# Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia

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## National Human Rights Commissions in Indonesia and Malaysia

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# Glossary

Where relevant, the glossary includes a reference to the country or NHRC to which the term applies.

| | |
|---|---|
| ABRI | Indonesian Armed Forces |
| *Aliansi Tolak PERDA Tibum* | Alliance Rejecting the Regional Regulation on Public Order (Indonesia) |
| APF | Asia Pacific Forum of NHRIs |
| BALITBANG | Office of Human Rights Research and Development (Indonesia) |
| *Barisan Alternatif* (BA) | Alternative Front, coalition of Malaysian opposition parties |
| *Barisan Nasional* (BN) | National Front, coalition of Malaysian government parties |
| *Bersih* | Coalition for Clean and Fair Elections (Malaysia) |
| BOP | Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment |
| *Bulubulu* | Fijian customary practice |
| *Bumiputera* | Malay and indigenous population (Malaysia) |
| *Bupati* | District Head (Indonesia) |
| CAT | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CDC | Community Development Centre (Malaysia) |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD | Convention on the Elimination of Racial Discrimination |
| CHU | Complaint Handling Unit (CHU) |
| CMW | Convention on the Rights of Migrant Workers and their Families |
| CPM | Communist Party of Malaya (Malaysia) |
| CRC | Convention on the Rights of the Child |
| DAP | Democratic Action Party (Malaysia) |
| *Defensor del Pueblo* | Type of NHRI, commonly found in Latin America |
| *Demokratisasi* | Democratisation |
| *Direktorat Jenderal Hak Asasi Manusia* | Directorate General for Human Rights (Indonesia) |
| DP3KK | Directorate for the Managing of the Development of the Kemayoran Complex |
| *Dwifungsi* | Dual role of the military (Indonesia) |
| ECHR | European Court of Human Rights |

| | |
|---|---|
| ERA Consumer | Education and Research Association for Consumers (Malaysia) |
| FAKTA | Jakarta City Residents Forum |
| *Fatwa* | Religious opinion given by Islamic authorities |
| GANDI | Movement for the Struggle Against Discrimination (Indonesia) |
| *Garis Panduan Perancangan dan Pembangunan Sejagat* | Universal Guidelines on Planning and Development (Malaysia) |
| GHR | Regulation on Mixed Marriages (Indonesia) |
| GMI | Abolish ISA Movement (Malaysia) |
| HAKAM | National Human Rights Society of Malaysia |
| *Hak asasi manusia* | Human rights |
| HINDRAF | Hindu Rights Action Front (Malaysia) |
| HRCL | Human Rights Courts Law (Indonesia) |
| HRCMA | Human Rights Commission of Malaysia Act |
| HRL | Human Rights Law (Indonesia) |
| ICC | International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICRMW | International Convention on the Rights of Migrant Workers and Members of their Families |
| ICRP | Indonesian Conference on Religion and Peace |
| ICRPD | International Convention on the Rights of Persons with Disabilities |
| IFC | Interfaith Commission (Malaysia) |
| IMF | International Monetary Fund |
| ISA | Internal Security Act (Malaysia) |
| ISJ | Jakarta Social Institute |
| *Isbat nikah* | Authority of courts to rule a marriage valid (Indonesia) |
| JAC | Judicial Appointments Commission (Malaysia) |
| JERIT | Oppressed People Network (Malaysia) |
| *Kampung* | Village, urban settlement |
| *Kantor Perwakilan* | Representative Office of KOMNAS HAM |
| KCS | Civil Registry Office (Indonesia) |
| *Kejaksaan Agung* | Attorney General's Office (Indonesia) |
| *Kepercayaan* | Mystic religion (Indonesia) |
| *Keputusan Presiden* or *Keppres* | Presidential Decree (Indonesia) |
| *Keterbukaan* | Openness (Indonesia) |
| *Ketertiban Umum* | Public Order |
| KHI | Compilation of Islamic Law (Indonesia) |
| KOMDA HAM Maluku | Regional Human Rights Commission of the Moluccas |
| *Komisi III DPR* | Third Parliamentary Commission (Indonesia) |

| | |
|---|---|
| KOMNAS Anak | National Commission for the Protection of Children (Indonesia) |
| KOMNAS HAM | National Commission on Human Rights (Indonesia) |
| KOMNAS Perempuan | National Commission on Violence Against Women (Indonesia) |
| *Konsortium Catatan Sipil Nasional* | Consortium on the National Civil Registry (Indonesia) |
| KORPRI | Indonesian Civil Servants Corps |
| KK | Family Card (Indonesia) |
| KLCC | Kuala Lumpur Convention Centre |
| KTP | Identity Card (Indonesia) |
| KUA | Office of Religious Affairs (Indonesia) |
| KUHAP | Criminal Procedure Code (Indonesia) |
| *Kumpul kebo* | Cohabitation |
| KY | Judicial Commission (Indonesia) |
| LAA | Land Acquisition Act (Malaysia) |
| LBH | Legal Aid Institute (Indonesia) |
| LINMAS | Community Protectors (Indonesia) |
| MCA | Malaysian Chinese Association |
| MIC | Malaysian Indian Congress |
| MK | Constitutional Court (Indonesia) |
| MP | Member of Parliament |
| MUI | Indonesian Council of Ulama |
| *Musyawarah mufakat* | Consultation and consensus-making (Indonesia) |
| NAM | Non-aligned Movement |
| NEP | New Economic Policy (Malaysia) |
| NGO | Non-governmental Organisation |
| NHRC | National Human Rights Commission |
| NHRI | National Human Rights Institution |
| NJOP | Sales Value of Tax Object (Indonesia) |
| NLC | National Land Code (Malaysia) |
| NRD | National Registration Department (Malaysia) |
| OHCHR | Office of the High Commissioner on Human Rights |
| OPM | Free Papua Movement (Indonesia) |
| *Operasi Lalang* | Mass arrest of dissidents (1987, Malaysia) |
| OSA | Official Secrets Act (Malaysia) |
| *Orang Asal* | Indigenous peoples of Sabah and Sarawak |
| *Orang Asli* | Indigenous peoples of the Malaysian Peninsula |
| *Pancasila* | Indonesian state ideology |
| PAS | Islamic Party of Malaysia |
| PAWANG | Alliance of Residents Against Evictions (Indonesia) |
| *Partai Hati Nurani Rakyat* | People's Conscience Party (Indonesia) |
| PDI | Indonesian Democratic Party |
| *Pegawai Negeri Sipil* | Civil servant (Indonesia) |
| *Pembangunan* | Development |
| *Pelatihan Hak Asasi Manusia Dasar* | Basic human rights training (KOMNAS HAM) |

| | |
|---|---|
| *Pelecehan terhadap agama* | Insult to religion |
| *Penduduk Kekal* | Permanent residents (Malaysia) |
| *Pengadilan Negeri* | District Court (Indonesia) |
| *Penggusuran* | Eviction (Indonesia) |
| *Penghayat* | Followers of animistic religions (Indonesia) |
| *Peraturan Tata Tertib* | Rules of Procedure (KOMNAS HAM) |
| PERDA | Regional Regulation (Indonesia) |
| *Perkawinan campuran* | Mixed marriages |
| *Pernikahan beda agama* | Interreligious marriage |
| *Perwakilan* | Representation (form of regional office of KOMNAS HAM) |
| PKI | Indonesian Communist Party |
| PKN | National Justice Party (Malaysia) |
| PKR | People's Justice Party (Malaysia) |
| PPP | Unity and Development Party (Indonesia) |
| PPPA | Printing Presses and Publication Act (Malaysia) |
| PR | Pakatan Rakyat (Malaysia) |
| *Preman* | Hoodlums (Indonesia) |
| PRM | Malaysian People's Party |
| PROLEGNAS | National Legislation Program (Indonesia) |
| *Provedor* | Type of NHRI, commonly found in Latin America |
| PSM | Socialist Party of Malaysia |
| PTUN | Administrative Court (Indonesia) |
| PUSHAM | Human Rights Study Centre (Indonesia) |
| *Rancangan Undang-Undang Catatan Sipil Nasional* | Draft Law on the National Civil Registry (Indonesia) |
| RANHAM | National Action Plan on Human Rights (Indonesia) |
| *Reformasi* | 'Reform', motto of domestic opposition in Indonesia and Malaysia, particularly in 1998 |
| RELA | Association of Volunteers of the Malaysian People |
| RPJMN | Medium Term National Development Plan (Indonesia) |
| RPJPN | Long Term National Development Plan (Indonesia) |
| RSS | Very Simple House (Indonesia) |
| SATPOL PP | Municipal Police Unit (Indonesia) |
| SMR | Standard Minimum Rules for the Treatment of Prisoners |
| SNAP | Sarawak National Party (Malaysia) |
| *Staf Fungsional* | Functional staff (KOMNAS HAM) |
| *Staf Struktural* | Structural staff (KOMNAS HAM) |
| SUARAM | Voice of the Malaysian People |
| SUHAKAM | Human Rights Commission of Malaysia |
| *Surat Edaran Menteri Dalam Negeri* | Circular Letter of the Minister of Home Affairs |
| *Surat Tugas* | Task Letter, official document required to commence a task (KOMNAS HAM) |
| TRAMTIB | Police Unit for Peace and Order (Indonesia) |
| UDHR | Universal Declaration on Human Rights |

| | |
|---|---|
| UMNO | United Malays National Organisation (Malaysia) |
| UN | United Nations |
| UNCHR | United Nations Commission on Human Rights |
| UNHRC | United Nations Human Rights Council |
| UPC | Urban Poor Consortium (Indonesia) |
| *Warung* | Shop on the side of the street (Indonesia) |
| *Wawasan 2020* | Vision 2020, Malaysian development policy |

# 1 The National Human Rights Commissions of Indonesia and Malaysia

## Introduction, Theoretical Framework and Research Approach

### 1.1 INTRODUCTION

#### 1.1.1 National Human Rights Institutions: Popularity and Potential

This book is about the National Human Rights Commissions (NHRCs) of Indonesia (KOMNAS HAM[1]) and Malaysia (SUHAKAM[2]). These organisations belong to the broader category of National Human Rights Institutions (NHRIs).[3] NHRIs are defined by the United Nations (UN) as bodies 'established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights' (Centre for Human Rights 1995: 6, para 39).

Since the 1990s, the number of NHRIs has grown rapidly, increasing from nineteen in 1990 to 120[4] in 2013. A key role in this expansion has been played by the UN, which has strongly supported the establishment and strengthening of NHRIs. The UN believes that 'strong and effective national institutions can contribute substantially to the realisation of human rights and fundamental freedoms' (Centre for Human Rights 1995: 1, ad. 1), by embedding international norms in domestic structures (Lindsnaes & Lindholt 2001: 44; Mertus 2009: 3). In 2002 UN Secretary General Kofi Annan argued that NHRIs are a crucial element for the domestic implementation of international human rights norms:[5]

> 'Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should therefore be a principal objective of the Organisation' (UN General Assembly, A/57/387, 9 September 2002, para 50).

It is believed that NHRIs can play a role in the promotion and protection of human rights at the national level because of their mandate and position. The

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1 *Komisi Nasional Hak Asasi Manusia*, National Human Rights Commission.
2 *Suruhanjaya Hak Asasi Manusia Malaysia*, Human Rights Commission of Malaysia.
3 For a further discussion of the definition of National Human Rights Institutions, see 1.1.3.
4 See http://www.nhri.net/nationaldatalist.asp, accessed 12 January 2013.
5 See also Cardenas 2003, who argues that NHRIs are 'intended to be the permanent, local "infrastructure" upon which international human rights norms are built' (p. 24-5).

mandate of NHRIs combines conducting human rights law research, propagating human rights (education), investigating violations, and in some instances attempting reconciliation after such violations have occurred (ICHRP 2004: 1). The position of NHRIs is a distinctive aspect of these institutions, in that they operate in the space between state and society (ICHRP 2004: 63, 97; Smith 2006: 904; Mertus 2009: 3). While they are part of the state structure, they do not belong to one of its traditional branches; and this should enable them to 'cut across the traditional distinction between state and civil society' (Kjaerum 2001: np).

Potentially this position has several advantages. In comparison to courts, NHRIs are easier to access, more cost-effective, and have a lower threshold of proof before they can hear a case (Kerrigan and Lindholt 2001: 94-5). NHRIs are also likely to command more authority within the state than NGOs. The latter are moreover often associated with a specific issue or part of the population, whereas – at least on paper – NHRIs belong to a country as a whole (ICHRP 2004: 58). Their origins and ties to the international human rights community suggest that they have the potential to bridge the gap between the international community, states and individual citizens (Lindsnaes & Lindholt 2001: 44; Cardenas 2003: 26). It is this particular combination of NHRIs' mandate and position that confers to them the unique potential to create support for human rights at the levels of both state and society. This is intended to enable NHRIs to mediate between conflicting views on human rights, which should, in turn, foster broader support for human rights and eventually their protection. Such a task is of significant legal, political and social relevance, particularly in countries where human rights norms have been considered alien or in contradiction to dominant values and norms.

### 1.1.2 Research Questions

The question then is whether NHRIs fulfil all these promises. The present research will address this issue by a comparative analysis of two NHRIs, one in Indonesia and one in Malaysia, looking at the development of these organisations over time. Indonesia and Malaysia are countries with a history of contesting international human rights, alongside authoritarian rule and systematic human rights violations. Such challenging environments evoke questions related to how NHRIs promote human rights, and which factors influence their functioning and the extent of their success. These considerations are explored through the following research questions:

1. *To what extent have the performances of KOMNAS HAM and SUHAKAM contributed to the realisation of human rights, in particular in the areas of non-discrimination (freedom of religion), protection against the state (fair trial) and welfare (adequate housing),*[6] *and why or why not?*

2. *How do the performances of KOMNAS HAM and SUHAKAM compare to each other, and what insights can be drawn from these performances about the role and potential of such organisations in mediating human rights discourses in countries with a high degree of social, cultural and religious pluralism?*

3. *What lessons can we learn from the experiences of KOMNAS HAM and SUHAKAM, and what recommendations can we make on this basis for a more effective performance of the NHRIs concerned, and possibly for NHRIs in general?*

The conceptual and theoretical issues raised by these questions will be addressed in section 1.2, which combines and draws on insights from various fields of research, such as human rights studies (including anthropological approaches and existing work on NHRIs) and organisational studies. First, however, we will look in some detail at the phenomenon of NHRIs, and introduce relevant background information about Indonesia and Malaysia.

### 1.1.3 Historical background of NHRIs

The idea to establish NHRIs dates back to a UN decision in 1946 (ECOSOC resolution 2/9, 21 June 1946, sect. 5), followed by additional resolutions in 1960 (ECOSOC resolution 772B, 25 July 1960) and 1978 (Centre for Human Rights 1995: 4). However, NHRIs remained a low priority before the 1990s, due to the UN's initial focus on entrenching human rights in international law in the years after World War II; followed by challenges to the enforcement of these rights during the Cold War in the 1960s and 1970s (Mertus 2009: 5).

The UN reiterated its support for the establishment of NHRIs at the 1993 Vienna World Conference on Human Rights. The Vienna Declaration reaffirmed 'the important and constructive role played by national institutions for the promotion and protection of human rights'; encouraged 'the establishment and strengthening of national institutions'; and recognised that 'it is the right of each State to choose the framework which is best suited to its particular needs at the national level' (Vienna Declaration, para 36).

The Vienna Declaration reflected the increased focus on human rights protection following the end of the Cold War (Cardenas 2003: 27), manifest in the attentions of a growing number of governmental and non-governmental

6 These rights were chosen for reasons of feasibility and relevance in Indonesia and Malaysia; and will be further explained in 1.3 (Research Approach).

human rights organisations (Mertus 2009: 5). The fall of communism caused a global wave of democratisation, and in many parts of the world human rights came to constitute the core of development cooperation (Kleinfeld 2006: 44-5). This coincided with a growing recognition that the protection of human rights intersected with other development objectives, such as democracy, economic progress and conflict resolution (Sen 1999: 11; Horowitz and Schnabel 2004: 3; Alston and Robinson 2005: 1-2).

The popularity of NHRIs also resulted from an increasing awareness within the UN, as well as in other international organisations, that the existing system of human rights treaties, bodies and courts was inadequate to guarantee human rights protection at local levels.[7] Consequently, these organisations started to focus on new strategies to improve human rights protection (Cardenas 2003: 28; Gomez 1995: 158; Mertus 2009: 7; Reif 2000: 4). At the international level, there was widespread consensus on the form that NHRIs should take. Moreover, many developed and developing countries preferred the establishment of NHRIs to the further development of international mechanisms, in a bid to curtail the ongoing international institutionalisation of human rights (Cardenas 2003: 29).

The UN came to distinguish two types of NHRIs: human rights commissions and ombudsmen (Centre for Human Rights 1995: 7, para 41). Human rights commissions have specific tasks in promoting and guaranteeing human rights, and are multi-member organisations. By contrast, classic ombudsmen organisations are single-member institutions whose task it is to address complaints concerning public administration (Reif 2000: 8-10). However, in practice the UN extends the term NHRI to other organisations as well, such as parliamentary commissions and 'hybrid' organisations[8] such as *defensor del pueblo* and *provedor* offices,[9] which are found mainly in Latin America.[10] Other organisations also use a broad definition of the term NHRI. The World Bank, for example, includes parliamentary bodies devoted to human rights issues in its concept of NHRIs (Cardenas 2004: 12). Specialised organisations that focus on particular

7 Keynote speech by Brian Burdekin, former UN Special Adviser on NHRIs, at the FORUM-ASIA workshop on NHRIs in the Asia Pacific region, Bangkok, 30 November 2006.

8 Hybrid organisations are those which combine elements traditionally associated with either human rights commissions or ombudsmen.

9 As classified by the National Human Rights Institution Forum, which was developed by the Danish Institute for Human Rights and the Office of the High Commissioner for Human Rights. See http://www.nhri.net/nationaldatalist.asp, accessed 12 January 2013.

10 Reif argues that the model of NHRI chosen for a particular country depends largely on historical, political and legal factors. This explains why *defensor del pueblo* can be found in countries with a Hispanic background, whereas the ombudsman model is more prevalent in European countries (Reif 2000: 13). Many countries have more than one NHRI; Indonesia, for instance, has a human rights commission, as well as commissions dedicated to special groups (women, children), and an ombudsman. Similarly, Sweden has four ombudsmen, which address, respectively, children's rights, ethnic discrimination, the rights of the disabled, and equal opportunity.

groups (i.e. indigenous peoples), as well as national bodies concerned with implementing international humanitarian law, commissions dealing with truth and reconciliation, and commissions set up as part of a peace agreement[11] have all been included in definitions of NHRIs (Reif 2000: 14-5; Cardenas 2004: 11; Mertus 2009: 3-4). The feature which these organisations have in common is that they are each a state body with a human rights mandate, rather than a Non-Governmental Organisation (NGO) dealing with similar issues.

In order to set minimum requirements for the establishment and mandate of NHRIs, the UN has drafted guidelines on NHRIs, which are commonly known as the Paris Principles.[12] The Paris Principles consist of four parts. The first, concerning competence and responsibilities, states that NHRIs should be given as broad a mandate as possible, in a constitutional or legislative text. The tasks of NHRIs are primarily of an advisory nature, and they may give advice to the government, parliament and any other competent body regarding legislation (including bills and proposals), cases of human rights violations, and the national human rights situation in general. In addition, they should promote and ensure the harmonisation of national legislation and practices with the international instruments to which the state is a party. NHRIs are also expected to assist in developing human rights education and to cooperate with each other in the UN framework. The second part of the Paris Principles concerns the composition and funding of NHRIs. It states that the appointment of members should ensure pluralist representation of all societal groups, including academics and NGO representatives. In addition, NHRIs should be provided with adequate funding, in order to secure their independence. The third part, methods of operation, calls for NHRIs to be able to consider freely any questions within their competence, hear any person, and address public opinion directly. The fourth part concerns those commissions which have quasi-judicial competence, meaning that they consider complaints and petitions of individual cases of human rights violations. These particular NHRIs should be able to issue recommendations to the competent authorities, and may seek amicable settlement.

Compliance with the Paris Principles plays an important role in both the regional and international standing of NHRIs. At the regional level, two levels of membership within the Asia Pacific Forum of NHRIs (APF)[13] can be dis-

11 Examples are Guatemala, Northern Ireland, Sierra Leone and East Timor.

12 The Principles relating to the Status of National Institutions were drafted in 1991 during the first International Workshop on National Institutions. In 1992 the Principles were endorsed by the Commission on Human Rights and in the following year by the UN General Assembly.

13 The APF was established in 1996 as an informal regional forum for NHRIs. The APF's primary roles are to further the establishment of NHRIs in the Asia Pacific region and strengthen existing institutions. Amongst others, it has provided legal drafting assistance to countries establishing NHRIs, and has developed a technical assistance programme to enhance the skills of NHRI staff. For a comprehensive discussion, see Durbach et al 2009.

tinguished: full membership is only accorded to those NHRIs that fully comply with the Paris Principles.[14] At the international level, NHRIs' compliance with the Paris Principles is monitored by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), a global representative body of NHRIs. The ICC is in charge of giving all NHRIs a status which reflects their compliance with the Principles. Only those NHRIs which have been accorded the highest status (A) may participate in the meetings of the UN Human Rights Council (UNHRC).[15] To ensure consistency between regional and international standards, the APF follows the ICC decisions. This means that full membership of the APF is equivalent to 'A' accreditation by the ICC.

### 1.1.4 Research on NHRIs

Since the 1990s, NHRIs have increasingly become a subject of research by academics[16] and NGOs.[17] Most often, these studies use the Paris Principles as a benchmark for NHRI effectiveness (Hossain et al. 2000; Burdekin 2007; Stokke 2007). Most studies have also concentrated on particular elements of the Paris Principles; such as the manner in which NHRIs were established, or their organisational structures and mandates (Lindsnaes et al. 2001). While this research has produced useful information, the focus on formal arrangements leaves little room for a more critical appraisal of the Principles themselves, which, it has been argued, are moreover insufficient to ensure 'an active and serious human rights commission' (HRW 2001: 11).[18] Nor will such an

14 Full members of the APF are the NHRIs of Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestine, The Philippines, Qatar, Korea, Thailand and Timor Leste. Associate members are the NHRIs of Myanmar, Maldives, Sri Lanka and Bangladesh. See http://www.asiapacificforum.net/members, last accessed 15 September 2013.

15 Of the 120 NHRIs worldwide, 65 have "A" status (including KOMNAS HAM and SUHAKAM); three "A status with reserve"; 14 "B" status; seven "C" status; while 31 others have not been accredited. See http://www.nhri.net/nationaldatalist.asp, accessed 12 January 2013.

16 See for instance Gomez 1995, 1998; Hossain et al. 2000; O'Sullivan 2000; Reif 2000; Hucker 2001; Lindsnaes et al. 2001; Eldridge 2002; Okafor and Agbakwa 2002; Cardenas 2003, 2004, 2007; Tomuschat 2001; Whiting 2003, 2006; Harding 2006; Kumar 2006; Smith 2006; Burdekin 2007; Murray 2007a; Thio 2009; Mertus 2009; Carver 2010; Renshaw 2012.

17 See for instance Amnesty International 2001; HRW 2001; ICHRP 2000, 2004; ICHRP 2005; Stokke 2007.

18 An exception is the Amnesty International (2001) report on NHRIs, which has argued that the Paris Principles should be more specific, for instance including precise requirements for the selection procedure of members. More recently, Murray (2007b) has called for 'an examination of the utility of the Paris Principles and the appropriateness of more detailed guidance on NHRIs' (p. 90).

evaluation contribute to understanding which factors enable the creation and development of an effective NHRI.

Despite increasing attention to NHRIs in general, research focusing on specific institutions has been surprisingly scarce.[19] The literature on the two NHRIs considered in this research, SUHAKAM and KOMNAS HAM, is also limited. In the case of SUHAKAM, there are several NGO reports and a few articles by Whiting (2003; 2006) and Thio (2009). Slightly more has been written about KOMNAS HAM; for instance in international NGO reports (ICHRP 2004) and brief discussions in academic work (Eldrigde 2002; Herbert 2008). The most detailed work to date is that of Lay and Pratikno (2002a; 2002b), who have looked at KOMNAS HAM in Indonesia's changing political context between 1998 and 2001.

Particularly studies conducted by international NGOs[20] are usually rapid appraisals of NHRIs, rather than in-depth studies on how these organisations function. More comprehensive inquiries combining an analysis of mandate and actual functioning are rare.[21] Such research provides more knowledge about the circumstances in which these organisations operate; and this information is crucial to understand the potential and limitations of NHRIs (cf. HRW 2001: 7). The present research builds on these findings, and intends to increase knowledge about the day-to-day operations of NHRIs, what they achieve on the ground, and how their actions can be explained (cf. ICHRP 2004; Murray 2007a; Murray 2007b; Mertus 2009).

External factors that influence NHRI performance and which have been singled out in the available research are public legitimacy, or the extent to which an NHRI has become a trusted part of the human rights machinery; as well as NHRI accessibility and linkages, i.e. relationships with civil society, government and the judiciary (ICHRP 2004: 5). Including such 'context' in research on NHRIs is crucial for understanding them. In the present study, context refers to both the political (state) and societal spheres (cf. Faundez 1997: 5), and focuses on how state and society, and NHRIs, react to and interact with each other. Such an approach builds on the detailed analysis of NHRI independence and accountability by Smith (2006), who has argued that these elements are crucial to legitimacy.

Smith defines independence as freedom from the control or influence of another actor, in particular from the state. At the same time, she argues that independence should be understood broadly, including as NHRI relationships with other state and non-state organisations (Smith 2006: 913-35). The notion that NHRIs may deal with and be influenced by a wide range of organisations is particularly relevant in places such as Indonesia and Malaysia which have

19 Exceptions are Pompe 1994; Gomez 1998; Whiting 2003, 2006; Flibbert 2005; Harding 2006; De Beco 2007; Wetzel 2007; Durbach et al. 2009; Petersen 2011.

20 HRW 2001; ICHRP 2004.

21 See Flibbert 2005; De Beco 2007; Wetzel 2007; Durbach et al. 2009; Mertus 2009.

high degrees of social pluralism, and where those actors may oppose international human rights norms.

In Smith's approach, accountability not only refers to formal accountability, as promoted by the publication of annual reports and other information regarding NHRIs' activities, but also looks at NHRIs' direct interactions with victims of human rights violations, and their ability to approach victims. Accountability may also refer to the specific relations between an NHRI and civil society or other human rights groups; while government accountability concerns the degree to which the government ensures an NHRI can work effectively. Accountability thus has both upward elements – directed at funding bodies, parliament and government – as well as downward elements, referring to the beneficiaries, partners, supporters and staff of an NHRI. Moreover, NHRI accountability is also a matter for the government, which, having established the organisation, should ensure that it can operate freely and has access to sufficient resources (Smith 2006: 937-41).

The more an NHRI is able to operate freely, the more likely it is to be accountable to both state and non-state actors. Conversely, the more accountable a government is to an NHRI, refraining from interference and providing it with resources, the more independent the organisation will be; which in turn contributes to greater accountability to its stakeholders. Together, independence and accountability increase legitimacy, which fosters NHRI credibility and effectiveness (Smith 2006: 906).

Context is also relevant in assessing the effectiveness of NHRIs: how do their activities relate to concerns within state and society, and to what extent can they influence dominant human rights attitudes? Looking at context may, moreover, show which perceptions about human rights receive support, and why. One of the starting points of this research is that the specific nature of NHRIs enables them to contribute to the realisation of rights, by mediating human rights discourses. This requires negotiation with stakeholders, whose position on a certain issue must be analysed in order to understand how new meanings of human rights are produced during interactions with an NHRI.

In addition to context, factors internal to the NHRI are also crucial. Smith refers to some internal dynamics (specifically, staff-commissioner relationships), but other internal elements remain to be considered, including leadership, internal structure, and the extent to which the personal beliefs of people within an NHRI influence its functioning.[22] These issues can best be examined by looking at NHRIs as organisations. The study of organisational aspects of NHRIs has so far been overlooked, although it is likely to be central to understanding their behaviour and evaluating their success.[23]

22 This will be discussed comprehensively in the theoretical framework.

23 This study also fits within a research tradition focusing on legal institutions, notably in Indonesia, and which combines law and public administration studies. See Lev 1972; Bedner 2001; Pompe 2005; Simarmata 2012.

### 1.1.5 Indonesia and Malaysia

This research focuses on the National Human Rights Commissions of Indonesia and Malaysia. As will be discussed in more detail below, both countries have challenging human rights environments. It is this context which renders a comparative study of their respective NHRIs particularly attractive. In addition, a comparive study is aided by key similarities between the two countries, including common cultural backgrounds; official languages which are both variations of Malay; and a shared experience of authoritarian rule. Both countries were strong proponents of the Asian Values discourse in the 1990s, and both have received international criticism for their human rights records. Following the Asian economic crisis in the late 1990s, *Reformasi* (reform) became the rallying slogan of domestic opposition in both countries. Both have Muslim majorities (90 percent of the population in Indonesia and 60 percent in Malaysia) and in recent years both have experienced the rise of political Islam (Abdullah 2003: 181-2; Abuza 2007: 13-4; Effendy 2003: 200; Liow 2009: 113-4).

Of course, there are also many differences. These are inherent in the geography and demography: The Indonesian archipelago covers almost two million square kilometres and houses more than 245 million people, whereas Malaysia is much smaller, with 330,000 square kilometres and slightly over 28 million inhabitants (in 2011). Malaysia is much more advanced economically; in 2011 its GDP per capita was around US$ 15,600, whereas Indonesia's was US$ 4,700. Poverty is much more prevalent in Indonesia, where in 2011 13.3 percent of the population lived below the poverty line, compared to 3.6 percent (2007) in Malaysia.[24]

Ethnic and cultural differences also exist between the countries. In Malaysia three ethnic groups are dominant: the Malays, Chinese and Indians. Next to these we find a relatively small number of indigenous peoples, both in Sabah and Sarawak (*Orang Asal*) and in peninsular Malaysia (*Orang Asli*). Politically, the Malays are dominant. Indonesia has far more ethnic groups, but its political life has been less divided along ethnic lines than Malaysia's. Further, Muslim communities in Indonesia are more diverse and divided than those in Malaysia, as a result of the local development of Islam (Heryanto and Mandal 2003: 3, 5).

In addition, there are differences between the countries' legal systems. Malaysia, colonised by the British, still applies common law in many fields; whereas Indonesia, colonised by the Dutch, predominantly follows a civil law tradition. These differences between the two relate primarily to the source of law: enacted law in civil law systems, as opposed to case law in common law systems. Over time, this has changed: in civil law traditions judges have

24 The World Factbook; https://www.cia.gov/library/publications/the-world-factbook/geos/id.html (Indonesia) and https://www.cia.gov/library/publications/the-world-factbook/geos/my.html (Malaysia), accessed January 2012.

increasingly been shaping law through their decisions, and in common law countries legislation has replaced large parts of the judge-made common law. Nevertheless, differences remain between the two systems, particularly with regard to law-finding (legal reasoning) and procedure (Zweigert and Kötz 1998: 263-4). One may add that the judiciary in Indonesia has been subject to tremendous political pressure for more than 40 years, which has caused great damage to the functioning of the whole legal system (Lev 2000; Pompe 2005).

Indonesia and Malaysia also have different human rights histories, which find their origins in their respective political pasts. Indonesia, now generally considered a democracy[25] (Aspinall 2010: 20), was an authoritarian state both under Sukarno's (1959-1965) and Suharto's rule (1966-1998) (Aspinall 2005: 2). Malaysia, on the other hand, has been described as a 'relatively democratic regime' (Alatas 1997: 1), 'semi-democratic' (Case 2002: 99), and as a country with a 'constitutional structure […] democratic in form but […] combined with repressive controls' (Crouch 1996: 240).[26] Whatever the exact proportions, it is evident that Indonesia and Malaysia have witnessed different degrees of political repression (Heryanto and Mandal 2003).

In one of the few comparative studies on Indonesia and Malaysia, Heryanto and Mandal (2003) attribute differences between the two countries to their respective independence struggles and experiences with communism. Malaysia never experienced an independence war. Between 1948 and 1960, during a period called 'the Emergency', the British shattered all oppositional politics. When Malaysia was granted independence in 1957, it automatically adopted most of the colonial government's repressive laws, and in subsequent years retained such authoritarian features through the existence and use of them (Heryanto and Mandal 2003: 3-4).

By contrast, Indonesia fought for its independence for four years (1945-1949). After the transfer of sovereignty, the Indonesian Communist Party gradually became an important actor in Indonesian politics; in 1955 becoming one of the leading contestants in the general election. When the military took control of government in 1965, they instigated a violent campaign against communists and their alleged sympathisers, resulting in 'one of the worst bloodbaths of the twentieth century, [during which] hundreds of thousands of individuals were massacred by the army and army-affiliated militias' (Roosa 2006: 4). Following the 1965 coup, political and military power became highly

25 Aspinall (2010) argues that Indonesia's democracy can be regarded in various ways; it is a democratisation success-story, as well as an example of low-quality democracy (Aspinall 2010: 32).

26 These differences can be attributed to definitions of 'democracy'. Alatas defines a democratic state as one in which citizens can change the government through the electoral system (Alatas 1997: 2). This contrasts with the approach taken by Crouch (1996), who considers democracy (and authoritarianism) in a wider context, for instance by taking into account the roles of opposition politics and political controls.

centralised in the hands of General Suharto, who succeeded Sukarno as President in 1967 and whose rule had little respect for human rights. Fear and violence were constant elements of the New Order state (Heryanto and Mandal 2003: 4-5).

These distinct paths of political history may explain the emergence of different forms of state repression in Malaysia and Indonesia. The Indonesian New Order state emerged from bloodshed, continued to be violent in its dealings with political opposition, and often used unlawful tools to further its objectives. In contrast, the Malaysian state has conducted its repression through laws inherited from the British (Heryanto and Mandal 2003: 6) and has at least upheld a system reminiscent of the rule of law. These different trajectories are reflected in the Indonesian and Malaysian human rights movements, with the former's focus mainly on indicting state violence, and the latter's on abolishing repressive laws.

During Suharto's New Order, Indonesia witnessed many and severe human rights violations; part of systematic state policy (Heryanto and Mandal 2003: 6; Schwarz 2004: 245, 247-49; Uhlin 1999: 18), and particularly prevalent in provinces with separatist tendencies such as East Timor, Irian Jaya[27] and Aceh. During the Cold War, the New Order Government's strong anti-communist ideology shielded it to some extent from international criticism of its human rights record, but after 1990 Indonesia drew increasing criticism, particularly regarding its military conduct in East Timor. The establishment of KOMNAS HAM[28] was partly a response to this increasing international criticism.

Since May 1998, when President Suharto resigned under domestic and international pressure, Indonesia has implemented many political and legal changes, including four amendments to its Constitution. The second amendment (2000) included the insertion of a completely new chapter on human rights. This addition, Chapter Xa, surpasses the guarantees in many developed states, and is generally considered to be a significant step forward (Indrayana 2007: 242; Lindsey 2008: 29). In addition, Indonesia has passed legislation on human rights, such as the 1999 Human Rights Law (HRL) and the 2000 Human Rights Courts Law (HRCL). Since 1999, the Ministry of Justice has included a special Directorate for Human Rights; and in 2001 the ministry was renamed the Ministry of Justice and Human Rights. Several new 'guardian institutions' have been established; most notably the Constitutional Court (2003), but also quasi-governmental bodies such as the National Commission on Violence Against Women (1998), the National Ombudsman Commission (2000), and the National Commission for the Protection of Children (2002). Indonesia has also now ratified all major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR, 2006) and the

27 Irian Jaya was renamed Papua in 2003.
28 See 2.2.1.

International Covenant on Economic, Social and Cultural Rights (ICESCR, 2006).[29] The country has thus made strong progress in both the recognition and adoption of international human rights norms in national legislation and state institutions – even if their implementation in practice still requires a much greater effort.

Malaysia has been relatively stable since its independence in 1957, with regular elections,[30] changes of heads of government, and a reasonably independent judiciary (Alatas 1997: 3-4). Nevertheless, it has experienced serious ethnic conflict, most notably following the 1969 elections, when Kuala Lumpur became the site of two months of ethnic rioting (Case 2004: 31).[31] These riots have profoundly influenced political, economic and social politics in Malaysia.

Executive interference in the judiciary has also occurred. In 1988 the Government suspended and eventually dismissed Chief Justice Salleh Abas, after the Supreme Court had ruled on several occasions against the Government, for instance by cancelling a detention order against opposition politician Karpal Singh (Crouch 1996: 139-41). Although this 'Crisis of the Judiciary'[32] did not lead to a halt of critical judgements (Crouch 1996: 142), it has generally been regarded as a turning point for judicial independence in Malaysia (Harding 1996: 142-8).[33] Similarly, Malaysia has experienced serious human

29 Indonesia also ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1984); the Convention on the Rights of the Child (CRC, 1990); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1998); and the Convention on the Elimination of Racial Discrimination (CERD, 1999). In 2000, Indonesia signed the Optional Protocol to CEDAW; in 2001 both Optional Protocols to the CRC; in 2004 the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW); and in 2007 the Convention on the Rights of Persons with Disabilities (ICRPD). Indonesia has not taken any action yet regarding the Optional Protocols of the ICCPR; the Optional Protocol of the ICRPD; or the International Convention for the Protection of All Persons from Enforced Disappearance, which was adopted by the UN in 2006 but has yet to obtain the necessary ratifications to enter into force.

30 In recent years, the Malaysian electoral system has come under increasing criticism, particularly through the work of the Coalition for Clean and Fair Elections (*Bersih*). The Coalition concluded that the 2013 general election 'was marred with violations of the election laws, code of conduct and endless political violence' (http://www.bersih.org/?p=6122, last accessed 9 September 2013).

31 See also 5.2.3.

32 Amongst others, see Hickling 1989; Harding 1990; Lee 1990; Trindade 1990.

33 While the issue of the quality of the bench is beyond the scope of this research, it should be noted that since the dismissal of Abas, there have been many concerns regarding judicial independence in Malaysia, including corruption and favouritism in the courts (see Wu 1999; Khoo 1999). Those concerns were confirmed in the 2007 Lingam Tape Crisis – in which a senior lawyer (V.K. Lingam) was videotaped in 2002 talking to the former Chief Justice of Malaya (Ahmad Fairuz Abdul Halim) regarding the appointment of the latter to the office of the Chief Justice of the Federal Court. To achieve the appointment, Lingam referred to the involvement of a business tycoon and a leading politician both close to then Prime Minister Mahathir. This signalled the direct influence of the executive in the appointment of judges. In response to the findings of the Royal Commission of Inquiry into the video-

rights violations; amongst them *Operasi Lalang* in 1987 when 119 dissidents were arrested at the order of Prime Minister Mahathir. Mahathir also prohibited assemblies and rallies of opposition parties, and suspended the printing permits of three newspapers (Crouch 1996: 109). However, it was not until 1998 that the Malaysian government was confronted with significant domestic resistance and international criticism. The trigger for these protests was the arrest and trial of former Deputy Prime Minister Anwar Ibrahim. Anwar had fallen out with Mahathir, who dismissed and removed him from the political party UMNO (United Malays National Organisation). Several weeks later Anwar, who by then had managed to gain interethnic support for reforms, was arrested on charges of sodomy. After a trial widely condemned for its unfairness, he was sentenced to 15 years in jail (Hooker 2003: 269)[34] and Mahathir managed to stay in power.

While in both Indonesia and Malaysia human rights violations have been a systematic part of state behaviour, these violations have differed in form and scale between the two countries. As mentioned, in Indonesia, human rights violations occurred mainly in the form of extra-legal state-violence. In Malaysia they were primarily based on repressive laws; and Malaysia has never experienced human rights violations on a scale like Indonesia.

Since 1998, legal safeguards for the protection of human rights have increased in Indonesia, while in Malaysia such safeguards have remained minimal. The Malaysian Constitution includes a section on 'Fundamental Liberties' (Part II), but many of the rights enshrined are circumscribed. Article 10 (1), for instance, guarantees freedom of speech, but Article 10 (2) determines that this right may be limited 'in the interest of the security of the Federation'. Malaysia has also been reluctant to accept international human rights norms. Presently, it has only ratified two treaties (both in 1995): the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Malaysia has not ratified the Optional Protocols to both conventions, and has submitted significant reservations, referring to provisions in Islamic law. The protection of human rights has also been limited because of the presence and use of repressive laws. Most notorious, until its abolishment in 2012, was the Internal Security Act (ISA, 1960),[35] which allowed detention without trial for a period up to two years,

recording, the Prime Minister (Badawi) announced ex-gratia payments to Abas and other judges affected by the 1988 Judicial Crisis and the creation of the Judicial Appointments Commission (JAC). However, concerns regarding judicial independence remain. See for instance the annual SUARAM reports on civil and political rights.

34 In 2004, the Federal Court overturned the sentence and Anwar was released. He returned to politics in 2008 as leader of the People's Justice Party (*Parti Keadilan Rakyat*, or PKR), currently the largest opposition party in Malaysia.

35 Other laws are the Restricted Residence Act 1933, the Sedition Act 1948, the Emergency Ordinance 1969, and the Dangerous Drugs Act 1985.

with the option for detention to be prolonged indefinitely by the Home Minister.

The circumstances in which KOMNAS HAM and SUHAKAM have operated have thus been challenging during different periods and in different ways. This research intends to shed light on the relevance of these two organisations, in environments where human rights have been systematically abused, and where the guarantees for those rights have been limited (Malaysia) or relatively new (Indonesia). This study thus provides information about important actors in Indonesia's and Malaysia's socio-legal landscapes, which until the present have received scant scholarly attention. In addition, this research will provide insights into the role and potential of NHRIs in socialising human rights discourses under different conditions, and examine how the same international human rights norms develop in different settings. This will further contribute to theories of human rights realisation.

## 1.2 Theoretical Framework

### 1.2.1 Human Rights: a Contested Concept

When considering human rights from a normative point of view, most authors agree that such rights are 'rights one has simply because one is a human being' (Donnelly 1989: 9). Similarly, Ignatieff states that human rights express 'our species is one, and each of the individuals who compose of it is entitled to equal moral consideration' (Ignatieff 2001: 3-4). The main human rights body of the United Nations (UN), the Office of the High Commissioner on Human Rights (OHCHR), defines human rights as: '[…] rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status'.[36] Definitions like these express universality, meaning that people share a common humanness and therefore everyone is equal and entitled to the same treatment (Goodale 2009: 15). Despite criticism,[37] the idea of human rights universality has become hegemonic, certainly at the level of international organisations (cf. Cowan et

36 OHCHR, http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx, last accessed January 2012.

37 Particularly cultural relativism has been identified as a threat to universal human rights (see for instance Cowan et al. 2001; Goodale 2009). Proponents of cultural relativism argue that beliefs and practices should be evaluated within the context of the culture concerned. As such, there are no trans-cultural ideas of what is right or wrong (Steiner and Alston 2000: 367), a position which contradicts a basic premise of the human rights movement. Traditionally, anthropology is regarded as a discipline supportive of cultural relativism (see for instance Goodale 2009), although anthropologists have not only critically examined human rights universality but also cultural relativism (see amongst others Cowan et al. 2001; Dembour 2001; Goodale 2009; Merry 2001; Wilson 1997).

al. 2001: 1). The notion of universality lies at the foundation of the international human rights regime, which comprises of treaties, treaty bodies, monitoring mechanisms and courts (Tomuschat 2003: 140-92). While international consensus on what human rights entail is often difficult to achieve,[38] all UN member states have ratified at least one major human rights treaty,[39] with 80 percent of member states having ratified four or more.[40] Moreover, the Universal Declaration of Human Rights (UDHR) is generally regarded as international customary law, which means that human rights norms are supposed to be valid everywhere and relevant for all.

The ratification of the core international human rights treaties is generally considered the best foundation for promoting respect for human rights (Smith 2003: 154). In this view, human rights find their way from the international to regional[41] and national levels. However, despite the entrenchment of human rights in law, many problems remain. Human rights are contested both in terms of what the norm should be, and which particular cases fall within or beyond its ambit. At the international level, states may submit declarations or reservations to a treaty when they ratify it, effectively avoiding the application of the norms enshrined in a particular article or the whole treaty (Smith 2003: 155). Moreover, what international and national law envisage is often not reflected in human rights practices. Particularly in developing countries with a high degree of cultural and religious pluralism, local implementation of human rights is often hindered by alternative value systems and skewed distribution of power and resources (Riggs 1964). National and local actors often justify actions infringing upon particular rights by appealing to overriding national interests, or by pointing at traditional or religious values. This illustrates that human rights are further defined and contested by interest groups, and that national and local interpretations of human rights are not necessarily the same as those common at the international level (Wilson 1997: 12; Goodale 2009: 126).

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38 See for instance Brems 2001.

39 There are nine major human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT); the Convention on the Rights of the Child (CRC); the Convention on the Protection of Rights of All Migrant Workers and Members of Their Families (CMW); the International Convention on the Rights of Persons with Disabilities (CRPD); and the International Convention for the Protection of All Persons from Enforced Disappearance, which has not yet come into force.

40 OHCHR, http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx, last accessed January 2012.

41 Regional human rights systems can be found in Africa, the Americas and Europe. For an overview, see for instance Steiner and Alston 2000 and Smith 2003. The European system is the most judicially developed of all human rights systems and has extensive case law (Steiner and Alston 2000: 786).

The contestation of human rights illustrates that these norms are a site of political struggle (cf. Ghai 2000: 11). This struggle is about determining what falls within the scope of human rights, and is waged in discursive terms, incorporated in stories, arguments and practices.[42] The contestation of human rights means that, for these norms to have the desired effect, they need to be socialised.[43] This process is influenced by contesting views, with organisations (whether at the state or non-state level) adjusting their discourses in such ways that their arguments become more acceptable. The process of socialisation of human rights norms is thus one which is intimately linked with negotiation.

The contestation of human rights (and thereby negotiation and socialisation) does not only take place in national or local, but also in international spaces. Merry (2006) describes how individual states and coalitions argue for or against the inclusion of a norm into the international human rights regime, which wording should be selected, and to what extent consideration ought to be given to national or even local circumstances. Through negotiations a compromise is achieved, which is then reflected in how a human right is defined internationally (Merry 2006: 38-44).

However, even when agreement is reached about the definition of a human rights norm, inevitably discussions will arise on whether or not certain practices constitute a human rights violation.[44] These processes are played out at national and local levels with different actors. The present research focuses on NHRIs, the government, courts, NGOs, and individuals who have a particular interest in the discussion, either because they are (potential) victims or perpetrators of human rights abuses. The international community assumes that NHRIs will combine their support for international human rights norms with an understanding of local and cultural differences (Cardenas 2003: 23; Mertus 2009: 3, 129). This then enables NHRIs to promote international perceptions of human rights at the national level.

An implication of considering human rights as a site of political struggle is that the rights are regarded as dynamic, and constantly evolving in time and space (Merry 2001: 38; Goodale 2009: 126). This means that human rights

42 Stories are a description of reality, which tell us what happened and why, which then lead to arguments in which actors position themselves in a certain way in order to persuade an audience. Finally, practices are the acts or what happens and thus of which arguments have become dominant (cf. Arnscheidt 2009: 14-7).

43 The socialisation of human rights is discussed in more detail in 1.2.2.

44 Merry gives the example of *bulubulu*, a Fijian customary practice in which a person apologises for an offense and offers a whale's tooth and a gift and asks for forgiveness. The practice has also been used in rape cases: courts do not impose legal penalties if *bulubulu* has been performed. This earned Fiji the anger of the CEDAW Committee, that argued that *bulubulu* contributed to the inability of Fiji's legal system to effectively deal with rape cases and therefore the practice contributes to human rights violations. For the Fijian government, however, it was more difficult to condemn the practice as *bulubulu* is central to Fijian village life. Therefore, the government cannot reject the practice altogether, even if it has opposed the use of the practice in court proceedings (Merry 2006: 113-5).

norms develop in reaction to, and as a consequence of, political and social developments (Dembour 2001: 59). The abolition of slavery, the introduction of universal suffrage, and criminalising domestic violence are all examples of how changes in societal attitudes and political concerns are expressed in human rights norms. Similarly, specific groups are given human rights protection, with the inclusion of women's and children's rights in the international human rights regime by way of the adoption of CEDAW and the Convention on the Rights of the Child (CRC, 1989) (Brems 2001: 21). This means that as more people and groups start expressing their concerns in terms of rights, their discourses may develop into new international human rights, as illustrated for instance by the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007) and the Convention of the Rights of Persons with Disabilities (2008). When eventually grounded in legal rules, human rights' contestation does not stop (Cowan et al. 2001: 6),[45] which is not surprising given that a legal rule is a result of various intentions and goals of legislators, and reflects particular worldviews and ideologies (Smith 2009: 220). NHRIs will be required to navigate these dynamics carefully in order to make a contribution to human rights realisation.

### 1.2.2 Human Rights Realisation

In this research the realisation of human rights is thought of as a process which starts with the guarantee of human rights in the Constitution or another legislative text. When rights are entrenched in law, this places obligations on the state to respect and actively protect them. Human rights are 'realised' when people have the means and capacities to have infringements on them redressed by the state. This implies that citizens are aware of what their rights are and have access to redress mechanisms. The realisation of human rights is thus a progressive concept, which aims for a situation where people agree on what human rights are, where the state refrains from infringing on them, and where the state is actively involved in providing redress for infringements if these occur. There is an important role to play for NHRIs in this process, as their mandate includes researching and advising on legislation, investigating human rights violations (and thereby holding violators to account), and education – serving to create human rights awareness. The realisation of human rights is relevant both as a development objective and as a major element of the rule

45 Similarly Arnscheidt argues that even when discourses become institutionalised (in policy, law and/or practice), struggles over definitions of problems and solutions remain (Arnscheidt 2009: 24).

of law (Faundez 1997: 13; Bedner 2010: 63-5).[46] The protection of human rights is in turn crucial to other development objectives, such as democracy, economic development and conflict resolution (Antons 2003: 6; Faundez 1997: 6; Ghai 2000: 47; Sen 1999: 3).

Although human rights are often treated as a unity, each human right has specific characteristics which pose particular challenges for its realisation. First human rights differ in terms of the relationships they address. Some concern a vertical relationship, between state and society (or individual); others address the horizontal relations among citizens. Second, different human rights require different forms of state behaviour to achieve the desired state of affairs. Some demand non-interference (negative action), while others ask for action from the duty bearer (usually the state), by providing certain goods or facilities. Third, human rights differ in that some rights are more readily accepted. Those that attract most societal opposition are usually the ones that affect inter-personal relationships or challenge dominant cultural patterns. For instance, rights pertaining to gender equality tend to receive far more opposition than rights related to a fair trial, which enjoy a large degree of public legitimacy.

This research gives attention to all three characteristics of human rights. It focuses on three rights: the right to a fair trial; freedom of religion; and the right to adequate housing.[47] The right to a fair trial (in criminal proceedings) is a vertical right. It imposes an obligation on the state to ensure that people are subject to fair proceedings in a criminal lawsuit. While the right to freedom of religion has a vertical aspect, it is also of a horizontal nature because its fulfilment requires citizens to respect the beliefs and worshipping practices of their fellow citizens. The right to adequate housing is of a vertical nature, primarily addressing the duty of the government to guarantee its citizens access to housing.

These three rights differ in terms of the action required from the state. The right to a fair trial demands non-interference of the executive in the judicial process and thus requires negative action, although positive action may be necessary to ensure that the judiciary can function independently. In the case of freedom of religion, the state must guarantee that individuals can worship freely, but at the same time the realisation of the right is also dependent on the behaviour of other citizens. The right to adequate housing on the one hand requires positive action from the state, for instance to provide for low-cost (public) housing or subsidy schemes. On the other hand, it also places demands on the state to refrain from forced evictions.

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46 Similarly, Sen (1999) argues that the expansion of human freedoms is both the primary end and the principal means of development (Sen 1999: 36). Sen distinguishes between political freedoms, economic facilities, social opportunities, transparency guarantees and protective security (Sen 1999: 38-40), all of which can also be found in human rights norms.

47 For why these categories were selected, see 1.3 (Research Approach).

Of the three rights selected, freedom of religion is usually the most contested, and societal resistance is likely to be high when for instance the protection of religious minorities means that adherents of the religious majority feel their position to be undermined. The discursive struggle over the inclusion of human rights that are contested (whether by state or non-state actors) will be much more complex, and their socialisation requires different strategies.

The realisation of human rights is dependent on the presence of an effective domestic legal system (Faundez 1997: 6, 24). The process starts with the enactment of laws that seek to change the repetitive patterns of social behaviours (Seidman and Seidman 1994: 11). For this purpose, they need to be well-drafted (Faundez 1997: 9; Seidman and Seidman 1994: 17, 38, 128) and 'socialised'. The latter refers to the process where people become aware about the meaning and consequences of law in such a way that they consider the law just and/or in accordance with their values and beliefs. Particularly that last element can be difficult to achieve in the case of human rights at odds with dominant values and norms.

Socialisation of human rights laws has been theorised in different ways. Political scientists Risse and Sikkink (1999) have emphasised the role of transnational networks of government and non-government bodies, which help expose human rights violations and stimulate change in societies. In their 'Spiral Model', Risse and Sikkink argue that international pressure forces norm-violating states to improve human rights conditions. The pressure will lead to initial changes, such as for instance the release of political prisoners, and eventually to the situation where the norm-violating state starts accepting human rights norms, for instance by ratifying international treaties. Finally, as a result of sustained international pressure, the state will move to rule-consistent behaviour or to the situation where norm compliance is a habitual practice (Risse and Sikkink 1999: 22-33).

Anthropological studies have yielded valuable empirical and theoretical insights into national and local perceptions of human rights which nuance the linear Spiral Model (Wilson 1997; Merry 2006). On the basis of two decades of studying gender violence, Merry has argued that the successful implementation -or realisation- of human rights requires them to become embedded in society, or in her terminology, to be 'remade in the vernacular'.[48] Vernacularisation consists of two processes: appropriation and translation. Merry defines appropriation as the replication of norms, as well as programmes and interventions, in other settings. It is often a transnational process, as many of the norms and programmes are transferred from one country to another. NHRIs are examples of appropriated institutions; as they are an international concept which has then been applied in different countries. Translation refers to the process of adjusting the language and structure of appropriated norms, pro-

48 Vernacularisation refers to the process where human rights are 'translated into local terms and situated within local contexts of power and meaning' (Merry 2006: 1).

grammes or interventions to local circumstances. The purpose of translation is to increase people's understanding of programmes and norms, and also allows for their adjustment to local circumstances. In doing so, translation increases the chances of acceptance of human rights norms (Merry 2006: 135-8).

While Risse and Sikkink's work provides an adequate point of departure for research on the socialisation of human rights norms, their emphasis on the role of transnational networks and international pressure leaves little room to consider possible contestation of human rights norms in domestic settings and how this influences processes of socialisation. In contrast, Merry's work gives ample attention to the contestation of human rights norms. Her research not only looks at socialisation of human rights norms at local levels but also includes an analysis of international standard-setting, which reveals its complexity as coalitions of states and NGOs sometimes work together but sometimes oppose each other. Her work thus underlines the struggle over human rights both in political and social spheres, as opposed to the Spiral Model's straightforward linearity.

The two processes of human rights vernacularisation identified by Merry, appropriation and translation, resonate with both the nature of NHRIs -being appropriated organisations themselves- and their role in translating international human rights norms to fit national and local contexts. Merry distinguishes three dimensions of translation. The first is the presentation of norms in a framework of local images, symbols and stories. Such frameworks make it easier for people to understand the norms, and increases the latter's acceptance and ultimately success. For example, domestic violence programmes in India use stories of Hindu deities to promote assertiveness among women, whereas in China domestic violence is labelled 'feudal'. The second dimension is the adjustment of a programme to the conditions in which it has to operate: strategies to combat domestic violence in Hong Kong have focused on getting women higher up the list for public housing, whereas in India establishing special police stations has been the preferred action. Thirdly, target populations of programmes are redefined. Domestic violence in China is more common among family members, whereas in Western countries it occurs primarily between partners. Programmes addressing domestic violence in China need to take such differences into account (Merry 2006: 136-7). Translation processes thus require a sound knowledge of local circumstances; with which NHRIs, as national organisations, should be familiar.

The processes Merry distinguishes are helpful in analysing the work of NHRIs, establishing in what ways they translate international norms, why they make these decisions, and to what extent they are successful.[49] The relevance of Merry's work for this research is also evident in the two methods of translation she distinguishes. The so-called 'advocacy approach' aims to change

49 These questions relate directly to research question 1, regarding the contributions of KOMNAS HAM and SUHAKAM to the realisation of human rights.

national laws, encourage ratification of international human rights treaties, and create new institutions. The second method, called the 'social service approach', aims to create human rights consciousness. NHRIs combine both approaches; their research aims to further the inclusion of human rights norms into legislation and structures, while their tasks in the field of education must create more human rights consciousness.

Finally, Merry's approach gives equal consideration to international human rights norms *and* appreciation for local circumstances. While this is a recurrent element in most anthropological work on human rights, it contrasts with human rights studies in other disciplines, particularly law or political sciences, which limit themselves to the spreading of international norms.[50] Merry's approach also differs from Brems' (2001), who argues for flexibility in the application of human rights standards and distinguishes between the core of the right and its periphery, in which restrictions are allowed (Brems 2001: 360-4, 410). By contrast, Merry warns against adaptation of international human rights norms. In that sense, Merry's theories build on the work of An-Na'im (1992), who has argued for a reinterpretation of cultural concepts by way of internal cultural discourse and cross-cultural dialogue, while emphasising that this approach 'does not seek to repudiate the existing international standards of human rights' (An-Na'im 1992: 2-5). Similarly, Merry argues that when human rights norms are adapted, they lose part of their power, as their appeal is that they challenge existing hierarchies (Merry 2006: 222). Thus in order to retain that power, human rights norms must not be adapted; yet for them to become more accepted it is important that they are presented in a way that resonates with people's beliefs -which can be done by referring to dominant values and practices. Those ideas, however, are sometimes in conflict with human rights norms, which poses a challenge in processes of translation. It is a position, as we will see throughout this study, in which NHRIs often find themselves. It resembles balancing on a tightrope: reproducing human rights into a framework that people understand, yet at the same time challenging that framework.

### 1.2.3 Organisational Performance and Effectiveness

Current studies have paid little attention to how NHRIs function as organisations and what organisational factors contribute to their success. This research

50 Risse et al. (1999) is a good example. Other authors (Dembour 2001; Goodale 2009) have noted that human rights studies have long been dominated by the discussion on cultural relativism (as opposed to universalism), and that this has caused both scholars and practitioners to make a choice between the two, meaning that supporters of cultural relativism have paid more attention to local circumstances, whereas supporters of universalism have emphasised international norms.

argues that insights about organisational performance and effectiveness are essential, in order to explain NHRIs' success or failure to promote human rights realisation. The inclusion of an organisational analysis is innovative in the research on NHRIs, which has generally used the Paris Principles as a benchmark of NHRIs' performance[51] and effectiveness. As NHRIs are public agencies, if not part of the executive, we will now first examine how concepts of performance and effectiveness are regarded in relation to the category of public agencies.

Although the term 'performance' is widely used in organisational studies, it is rarely defined. The reason for this seems to be a lack of agreement about what public agencies' objectives are (Boyne et al. 2002: 693; Braadbaart et al. 2007: 111).[52] The intended meaning of 'performance' can generally be derived from the context in which authors use the term. Two key elements in defining this concept are inputs and outputs. Inputs are an organisation's supplies, such as human and financial resources (Talbot 1999: 16), and equipment (Otto 1999: 46). Inputs are used in an organisation's activities (Poister 2003: 37; Talbot 1999: 17) and lead to outputs, which are thus the immediate products of input (Poister 2003: 3-4, 36; Sosmeña et al. 2004: 13; Talbot 1999: 23; Wilson 1989: 158). Performance then is presented as a process which concerns the relationship between inputs and outputs.

The activities of an organisation are in principle derived from its tasks, which in turn are based on the organisation's goals. Goals are defined as 'an image of a desired future state of affairs' (Wilson 1989: 34). While the goals of private enterprises are usually straightforward (i.e. to make profit; to achieve a certain market share), this is different in the case of public agencies. Their goals are often normative: the goal of NHRIs is 'to contribute substantially to the realisation of human rights and fundamental freedoms' (Centre for Human Rights 1995: 1). It is likely that people will disagree on what constitutes a 'substantial contribution' or 'realisation of human rights and fundamental freedoms'; and even on what constitutes a 'human right' or 'fundamental freedom'.

The main tasks of NHRIs are education, research and investigation,[53] which relate to the various dimensions of human rights realisation. These tasks are further defined into sub-tasks, which typically include organising training

51 'Performance' and 'functioning' are used interchangeably in this study.

52 Boyne et al. argue that the lack of definition is because stakeholders may disagree over the objectives of services in the public sector (Boyne et al. 2002: 693). Braadbaart et al. argue that 'there is a lack of consensus regarding acceptable proxy indicators of organisational performance' (Braadbaart et al. 2007: 111).

53 These are the tasks of NHRIs as stipulated in the Paris Principles, which most countries have adopted when establishing their NHRIs. Some NHRIs will have fewer tasks (investigation, for instance, is only optional according to the Paris Principles), and others will have more. The Indonesian Commission, for instance, has four main tasks: education, research, investigation and mediation; and the latter is not included in the Paris Principles.

(education), the studying of draft legislation (research), and inquiries into allegations of human rights violations (investigation). When these sub-tasks are carried out, an NHRI generates outputs. Performance, in this research, is then defined as the process in which an organisation transforms inputs into outputs.

Performance is often accorded a positive normative connotation: when an organisation is 'performing' this refers to a situation where it is doing well (Wilson 1989: xiv; Pfeffer 1997: 156). Similarly, Guillermo (2008), in defining performance measurement, refers to 'a process assessing progress' (Guillermo 2008: 6). In this research, however, performance is a neutral concept, meaning that it does not inherently have a positive or negative connotation. This allows for the further specification of organisational performance: it may be excellent, terrible, or anything in between.

Good performance is a condition but no guarantee of effectiveness. Effectiveness as defined in this research is related to outcomes, which are themselves defined as the substantive changes, improvements and benefits in a society that result from a programme (Poister 2003: 36; Talbot 1999: 24; Wilson 1989: 158). Outcomes thus refer to the extent to which an organisation has achieved its goals, and are therefore always positive.[54] In the case of NHRIs, outputs include human rights training and investigations, whereas outcomes refer to increased awareness of human rights and redress for victims of human rights violations. Outputs thus 'consist of the work the agency does, [and] outcomes can be thought of as the results of agency work' (Wilson 1989: 158).

Effectiveness has a temporal aspect, as it takes time before the outputs of an organisation have an impact on a society or community. One may distinguish between initial, intermediate and longer-term outcomes (Poister 2003: 36), which can also be thought of as three different levels of effectiveness. The initial outcome is the expected direct result of an activity. The initial outcome for human rights education is that participants learn something relevant. For both investigation and research, initial outcomes are that their reports are received and taken note of by the relevant bodies. Intermediate outcomes refer to a situation where the outputs generated by an organisation start to trigger structural changes. In the case of education, for instance, such a change would be when people start applying what they have learnt in their day-to-day activities. For investigations and research, intermediate outcomes are achieved when the recommendations of the NHRI are followed by the relevant groups, i.e. when they lead to the prosecution of violators, the ratification of international treaties, or the amendment of national laws contravening human rights principles. Finally, longer-term outcomes refer to a situation where the organisation has contributed to a substantive change; in the case of NHRIs this

54 Because outcomes are linked to effectiveness, they are inherently positive. This means that if outputs have negative consequences (i.e. a NHRI report leads to hostilities against the group it is supposed to protect), these are not considered outcomes.

would refer to the situation where, as a consequence of NHRIs' activities, the violation of human rights norms no longer occurs.

In summary, performance relates to tasks and outputs, whereas effectiveness relates to goals and outcomes, and good performance is no guarantee for effectiveness.[55] This is because effectiveness is more dependent than performance on external factors. The effectiveness of NHRIs is highly dependent on external parties, including how they respond to the NHRI and to what extent they are able and willing to ensure implementation of human rights norms. However, due to its nature as an advisory body the NHRI has relatively little influence on such decisions.

Organisational processes, performance and effectiveness are all influenced by both internal and external factors, albeit to different degrees. Internal factors refer to human, financial and material resources (Otto 1999: 93), and how the behaviour of people within the organisation influences its functioning (Wilson 1989: 27-8; Boyne et al. 2002: 699). Here, the crucial factor is that of leadership, which refers to the ability of a leader to direct the functioning of the organisation in such a way so as to impact positively on work processes, including performance as well as the attainment of goals (Otto 1999: 99).

Another internal factor influencing performance and effectiveness is internal structure, which refers to the design and construction of an organisation, such as the different jobs distinguished, work conditions (including pay), the qualifications of personnel, and prescribed and actual work processes. The differentiation between prescribed and actual work processes is particularly relevant for developing countries, where people's personal ties and obligations often conflict with the impersonal roles and duties they are supposed to fulfil (Otto 1999: 99). This ultimately influences organisational performance and effectiveness. Internal structure also includes people's commitment to the organisation. Commitment is fostered by rewards such as pay (Pfeffer 1997: 115-6), but even more by strong leadership, communication, team spirit and shared norms (Otto 1999: 102). This leads to a situation where there is a 'sense of mission' (Wilson 1989: 26-7), i.e. widespread agreement on how tasks should be executed. Internal factors influencing performance and effectiveness thus refer no merely to the people of an organisation, but rather to the interplay between people, and their perception of each other and of an organisation's tasks. In the present research, an important focus is the relationship between NHRI commissioners and staff: how they relate to each other, how they perceive the organisation's tasks, and how these perceptions relate to their personal (and professional) backgrounds.

External actors influencing the performance and effectiveness of NHRIs include the groups or organisations in direct contact with the organisation, includng the government, judiciary, civil society (in particular NGOs and the

55 Note that in some approaches performance and effectiveness are merged. See for instance Poister 2003: 3-4; Braadbaart et al. 2007: 111; Yamamoto 2006: 37.

media), victims of human rights abuses and those vulnerable to them, and the international community. These actors have different functions for NHRIs, which depend on civil society and/or individuals for obtaining information about alleged human rights violations; on the government for funding; and on the judiciary and government for implementation. Finally, the international community plays a role, as NHRIs find their roots in international government regimes and are supposed to further international interpretations of human rights norms. Most NHRIs also engage in regional networks of NHRIs, regularly attend UN meetings, and often cooperate with and receive funding from international human rights organisations.

The performance and effectiveness of NHRIs is also influenced by the organisation's socio-political context, which refers to a wide range of factors and actors that are largely beyond its control. These include social, cultural, economic, political and legal relationships, as well as history and geographical context, and the technological possibilities available. These influence both the organisation and its individual members, and therefore are often decisive in determining the operation of an organisation (Otto 1999: 47). Many NHRIs will find themselves in a situation where the notion of human rights is contested and powerful groups are hostile to the organisation's goals, which will make it difficult for NHRIs to achieve them.

Like most organisations, to some extent NHRIs can help create an environment that is supportive of their goals. This can be done by minimising the number of rivals, and by avoiding behaviour that will create problems and tasks that produce divided or hostile stakeholders (Wilson 1989: 191).[56] NHRIs need to avoid conflict to increase their chances of success, but the nature of NHRIs' tasks and their ultimate goal makes this difficult. When NHRIs conduct investigations into cases of human rights violations, they need to identify the responsible parties; and this can be the government, on which the NHRI is dependent for its funding and the implementation of its recommendations. This means that NHRIs, as with many other public agencies, must constantly balance the needs of doing their work adequately and maintaining sufficient stakeholder support to survive as an organisation.

The performance and effectiveness of NHRIs can be assessed by establishing correlating indicators. The first indicator is whether the way in which inputs are transformed into outputs has been efficient (Talbot 1999: 16). Efficiency is 'a ratio of valued resources used to valued outputs produced' (Wilson 1989: 19). The smaller this ratio, the more efficient the organisation. Efficiency also means that an organisation looks for ways to reduce inputs or the costs of inputs, while achieving similar, more and/or better outputs (Talbot 1999: 16).

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56 Stakeholders are those individuals, groups and organisations that are or can be affected by an organisation's actions. I distinguish stakeholders from interest groups, which are those organisations, groups or individuals that seek to influence an organisation.

For instance, for NHRIs efficiency means that in the case of research, the financial and human resources allocated are in proportion to the direct result.

Performance assessment also takes into account the number of 'physical outputs' (quantity), as well as the nature of the outputs (quality) (Talbot 1999: 16). Indicators of performance can be established when standards of quality and quantity of tasks have been identified. Quantity indicators refer to the number of activities conducted by the NHRI, i.e. the number of workshops held, investigations conducted, or research reports published. In the case of workshops, the qualitative indicator is whether the materials used are suitable for the participants, for example did they enable the workshop's target group to increase their relevant knowledge. In the case of investigations, the qualitative indicator is the extent to which the NHRI has been able to publish a comprehensive report, i.e. whether it conducted research at the actual site of the violation, and whether both victims and suspected perpetrators were questioned. With regard to research, the qualitative indicator is the extent to which the bills, laws and treaties under research cover various areas of human rights.

Another indicator of performance is the opinions of those the organisation has to serve -the target group or beneficiaries of an organisation's actions- which for the purposes of this research can be called clients. The relationship between an organisation and individuals is often driven by interest, accessibility, scope and/or coercion.[57] The relationship between clients and an organisation is considered strong when people's interests are being served by the organisation, such as when they have access to it, when the organisation reaches out to the people, and when the organisation is able to coerce other agencies into behaving in accordance to its policies. A strong relationship will increase the chances of achieving optimum results for clients (Otto 1999: 114).

Performance assessment thus requires considering the relationship between inputs and outputs (organisational efficiency), the extent to which an organisation meets quantitative and/or qualitative indicators of performance, and the relationship between clients and an organisation. Nuance in performance assessment can be achieved by including the organisation's environment in the discussion, and by taking into account those factors that facilitate or hinder the organisation's performance.

Where the assessment of performance is tied to the tasks of an organisation, assessment of effectiveness has to do with goals. The goal of NHRIs is to make a contribution to the realisation of human rights, which earlier in this Chapter has been described as a process which leads to a situation where human rights

57 Interest refers to the needs of people and to what extent the organisation answers those needs: people will use an organisation if what the organisation offers meets their interests. Accessibility refers to the extent to which people are able to access an organisation, which may be hindered by financial and social hurdles. Scope refers to the extent to which the organisation is able to initiate contact with, or reach out to individuals. Coercion refers to the extent to which an organisation influences people's behaviour, or the behaviour of other agencies, by issuing negative sanctions (Otto 1999: 114).

are legally guaranteed, where the state is actively involved in protecting those rights, and where people have the means and capacity to seek redress if violations occur. In assessing the effectiveness of NHRIs, it will be of concern whether the performance of the organisation has led to, for instance, increased human rights awareness or the inclusion of human rights norms in law. Effectiveness is highly dependent on external factors and as such also has a temporal dimension, which means that it takes time before strong performance of an NHRI translates into effectiveness.

## 1.3 Research Approach

In order to establish how NHRIs promote international human rights norms, and how they deal with competing discourses on human rights, the present research starts with legal analysis. This will tell us whether, and if so, how, international norms have been embedded in national legislative texts. In each case study selected, the analysis starts with international human rights law, as NHRIs' first (and foremost) reference point. The international discourse on a particular human right is then compared with national (and where applicable, local) legislation and legal doctrine. Next, a comparison of norm and practice will indicate divergences between international human rights law, national legislation, and national and local perceptions and practices.

Several choices were made to render this research feasible. Earlier in this Chapter, I have outlined the reasons for examining the NHRIs of Indonesia and Malaysia. I further chose to focus on three rights: freedom of religion, fair trial, and adequate housing, which will be referred to as case studies.

The right to freedom of religion is derived from the wider category of the right to non-discrimination, a civil-political human right which is especially relevant in countries with a high degree of pluralism. It extends to various sub-categories, such as race, sex, language, religion, political and other opinions, national and social origin, property and birth.[58] While the right to non-discrimination on the basis of religion is included in both the UDHR and ICCPR,[59] as yet the freedom of religion has not become the subject of a specific treaty.[60] Both Indonesia and Malaysia guarantee the freedom of religion in their Constitutions.[61] In addition, Indonesia included freedom of

58 UDHR, art 2; ICCPR, art 2 (1).

59 UDHR, art 18; ICCPR art 18 (1).

60 The best attempt to achieve this so far has been the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The lack of a specific legally binding treaty on the freedom of religion is because the controversial nature of the subject (See for instance Lerner 1996).

61 The 1945 Constitution (Indonesia); arts 28E (1), 29 (2). The Federal Constitution of Malaysia, Art 11. Islam is the state religion in Malaysia (Federal Constitution, Art 3).

religion in the 1999 Human Rights Law[62] (HRL) and has ratified the ICCPR. Despite these legal guarantees, both countries face challenges on issues of religious freedom. In recent years in Indonesia, mainstream Islamic groups have increasingly taken action against religious groups considered deviant, such as the Ahmadiyah,[63] while the provinces of Sulawesi and the Malukus in particular have experienced religious violence (Lindsey 2010; U.S. Department of State 2009a). In Malaysia, adherents of Islamic groups considered deviant may be detained (U.S. Department of State 2009b). In recent years there has been much public controversy regarding several court cases that have involved conversion to or out of Islam (Harding 2010: 511). Media reports have also regularly mentioned demolitions of Hindu temples, particularly in Kuala Lumpur.

The right to a fair trial is also a civil-political human right, and refers to an individual's entitlement to a fair judicial process. The right to a fair trial is related to other human rights, such as the presumption of innocence, the right to an adequate defence, the right to a public and expeditious trial, and the right to appeal and compensation in case of a mistrial (Smith 2003: 249). Elements of fair trial can also be found in other human rights, such as the freedom from torture, arbitrary arrest, detention without trial and enforced disappearance. The right to a fair trial is well-entrenched in international law,[64] as well as in the Constitutions of both Indonesia and Malaysia,[65] which share a history of authoritarian rule and human rights violations,[66] and whose judiciaries have been less than responsive towards human rights claims (Harding 1996, Pompe 2005).

The socio-economic right to adequate housing holds particular importance in developing countries. It is guaranteed in international human rights law, most notably in the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).[67] As set out in ICESCR General Comment no. 4 (1991), the core elements of the right to adequate housing include legal security of tenure, which means that people must have legal protection against forced eviction, harassment or other threats. It is also included in other international treaties, such as the ICCPR,[68] CEDAW[69] and CRC.[70] Forced and violent eviction of the urban poor communities in both Indonesia and Malaysia is a common

62 Art 22 (1) and (2).
63 See 2.4.1.
64 UDHR, art 7; ICCPR, arts 14, 15.
65 The Federal Constitution of Malaysia, art 8 (1); the 1945 Constitution of Indonesia, art 27 (1).
66 See 1.1.5.
67 Art 11.
68 Art 17.
69 Art 14(2) (h).
70 Art 27(3).

occurrence.[71] It is therefore perhaps not surprising that many of the individual complaints KOMNAS HAM and SUHAKAM receive concern residential evictions.

The three rights selected all relate to important social and political issues in Indonesia and Malaysia, and hence their relevance for NHRIs. Of particular interest for this research is the normative position taken by the NHRI concerned. What does the NHRI argue, and why, and *how* does it argue? Does it use other normative frameworks (i.e. cultural, religious), and why or why not? And to what extent do the arguments of the NHRI influence its stakeholders? In order to answer these questions, I have analysed reports issued by the NHRI and other organisations (predominantly NGOs), as well as media reports, and conducted more than 50 interviews. These were also essential in analysing the NHRIs' functioning as an organisation, providing information about organisational structures and work processes.

A significant part of the information in this research has been obtained through interviews. These were deployed to establish individuals' beliefs on certain issues, and to better understand the views of NHRIs. Interviews also helped to find out whether actual processes were in accordance with how they were prescribed or reported, while interviews with outsiders helped to develop an external perspective on the NHRIs and their work.

Interviews were conducted with NHRI members (commissioners) and staff, including former commissioners, as well as with other individuals in their environment, including representatives of NGOs and other independent state bodies, lawyers, politicians and policy makers. During my research, I often benefited from informants' personal networks: for example during an interview the informant would mention another person or organisation and put me in touch with them. Interviews were conducted in a semi-structured way, which means that I developed a set of questions for each group of interviewees but also let interviews take their own course. This often enabled informants to talk in detail about their personal experiences, which yielded valuable information. Interviews in Indonesia were conducted in Indonesian,[72] while those in Malaysia were conducted in English.[73] It was relatively easier to be granted interviews in Indonesia, than in Malaysia. Similarly, Indonesian informants were generally less reserved than their Malaysian counterparts, which I attributed to the countries' respective socio-political contexts: since 1998, Indonesia has witnessed a process of democratisation, whereas Malaysia is more semi-authoriarian. Interviews were recorded, whenever the informant gave me permission to do so. I always cross-checked the information obtained

71 For Indonesia, see 3.4.2; for Malaysia, see 5.4.1.

72 All translations from interviews in Indonesian are my own.

73 Although Indonesian and Malay are similar languages, my comprehension of Malay was insufficient to conduct interviews in the language. I also opted for using English because many of my informants in Malaysia were not ethnically Malay and for them Malay is their second (or third) language.

through interviews with other informants or sources. In addition to interviews, much information was obtained from informal conversations.

Many of the data used in this research also come from the reports published by the NHRIs themselves. Annual reports, for instance, provide overviews of NHRI activities and constitute an entry point for further research. For most of the case studies selected, a specific report from the NHRI was available. The advantages of such reports were that they were public,[74] and represented the official position of the NHRI on a particular topic. The reports also made it relatively easy to track down those involved; both within the NHRI and any external parties.[75] Whenever possible I interviewed all parties, in order to better understand the background and the working processes. In addition I identified the stakeholders of a particular issue, and interviewed them (when possible), in order to establish the effects of the report. Press reports were also useful for this purpose.

The fieldwork for this research was conducted in 2006, 2008, and in the case of Malaysia, also early 2009. The emphasis of this study is therefore on the functioning of SUHAKAM and KOMNAS HAM during that period. The reports I obtained for the case studies were published by the NHRIs between 2003 and 2008. All reports were still recent enough for me to locate those involved in writing them; and the older reports enabled me to investigate the influence of those reports over a longer period. To examine how the two NHRIs have developed since inception, I relied on interviews with current NHRI commissioners who had been in their positions for relatively long periods of time, as well as former commissioners, other staff,[76] and stakeholders (particularly NGO representatives) who had long-standing relationships with the NHRI. Developments after 2008 (KOMNAS HAM) and 2009 (SUHAKAM) were included to a certain extent; with relevant information being obtained through the Commissions' reports, media coverage, and personal communication with Commission staff and external stakeholders.

While conducting fieldwork, I observed the activities of the NHRI whenever this was possible. These included not only those activities open to the general public (i.e. press conferences), but also in-house activities including human rights training, lodging of individual complaints, and field visits. Sometimes these activities had a direct relationship with the case studies selected, but more often they had not. However, observing these activities provided me with valuable information about the ways in which the NHRI operated, and allowed me to engage with commissioners, staff and representatives of stakeholders – often paving the way for more formal interviews.

74 Archival research regarding particular cases was requested, but not always permitted by the NHRI.

75 KOMNAS HAM in particular engaged with NGO representatives in the writing of reports.

76 This depended on whether people were willing to talk about their experiences, which in practice was easier in Indonesia than Malaysia.

With respect to their involvement in this research, KOMNAS HAM and SUHAKAM were approached separately, as two individual, albeit related, institutions. Hence, the research is presented here as two separate studies, of two organisations that operate in distinct contexts. The differences between the two organisations can only be appreciated through conducting separate studies, which then allow for a meaningful analysis and comparison.

KOMNAS HAM is dealt with in Chapters 2 and 3, and SUHAKAM in Chapters 4 and 5. The first chapters about each of the NHRIs (Chapters 2 and 4) discuss their respective histories and development, in order to describe each organisation, and show how each has reacted to its specific environment and positioned itself in the changing socio-political context. Chapters 3 and 5 deal with the performances of KOMNAS HAM and SUHAKAM respectively, in promoting the rights to freedom of religion, fair trial and adequate housing. These chapters also explore the extent to which each organisation has been effective in its efforts. Chapter 6 provides a comparison of KOMNAS HAM and SUHAKAM, and includes conclusions and recommendations based on the findings from this research.

# 2 The 'Ironic' History of KOMNAS HAM

## The Development of the Indonesian Human Rights Commission, 1993-2008

### 2.1 INTRODUCTION

In 1993, the Indonesian government announced the establishment of the National Human Rights Commission; KOMNAS HAM. At the time, there were very few expectations of the Commission: its mandate was weak, Indonesia was an authoritarian state, and human rights violations were rampant. Surprisingly, within a short period KOMNAS HAM developed into a strong NHRI, which consistently challenged the state's human rights record. The actions of KOMNAS HAM contrasted with the low expectations held at its establishment, raising questions about the factors which contributed to its ascent during the New Order period. This success of KOMNAS HAM in a repressive context also meant that observers were optimistic about the Commission after 1998, when Indonesia moved towards more democratic governance. However, KOMNAS HAM was not able to meet those expectations; raising further questions about why KOMNAS HAM was not able to strengthen its position during this period.

This Chapter will discuss the development of KOMNAS HAM as an organisation, including a discussion of formal arrangements (legal foundation and mandate) and internal structure, with particular attention on actual working processes. In addition, the Chapter will address the most significant events and cases in the Commission's history, including its 1994 investigation into the murder of labour-rights activist Marsinah, and the 2004 reorganisation. This analysis of KOMNAS HAM is informed by a discussion of the socio-political context in which it operated. The combination of an organisational analysis and an appraisal of how KOMNAS HAM has positioned itself in this context helps us to identify which internal and external factors have influenced the Commission's performance, and what this has meant for its potential to socialise human rights successfully.

The analysis will show that between 1993 and 1998, positive internal factors dominated negative external ones; demonstrating that a weak mandate and unfavourable political conditions do not necessarily lead to poor performance. Conversely, challenging internal dynamics can mitigate the potential established by a stronger mandate and a more favourable environment. Together these findings indicate that the performance, and ultimately the effectiveness, of NHRIs are determined by a complex interplay between internal and external factors. Given these findings, studies of NHRIs should always consider the context in which they operate.

## 2.2 1993-1998: GENESIS OF KOMNAS HAM

### 2.2.1 Rationale for Establishing an NHRI in Indonesia

In the early 1990s Indonesia -together with other Asian countries such as Malaysia, Singapore, China and Burma- became an active participant in the so-called Asian Values debate (Pompe 1994: 86). The Asian Values discourse contended that universal human rights norms, as interpreted by the dominant international human rights regime, were inappropriate in the Asian context, where cultures emphasise communality and harmony. Perhaps unsurprisingly, these resonated with authoritarian forms of rule found in these countries. The Asian Values approach was also an assertion of national sovereignty or self-determination (Uhlin 1999: 14), as well as a criticism of the application of double standards in international relations (Brems 2003: 146). The approach was formulated in several regional Declarations, notably the 1992 Jakarta Declaration of the Non-Aligned Movement (NAM), and the 1993 Bangkok Declaration. The latter was formulated in anticipation of the UN World Conference on Human Rights later that year. According to prominent Indonesian human rights lawyer Todung Mulya Lubis, the Indonesian government had a 'persistent hesitation and suspicion towards liberalism, [an] obsession with harmony as a social concept, and [accorded] paramount importance [to] economic development in the context of human rights' (Lubis 1993: 11). Therefore the government's decision in 1993 to establish KOMNAS HAM seems to have arrived as a complete surprise.

Not all conditions were favourable, however. The establishment of KOMNAS HAM can be attributed to a number of factors, with international pressure on Indonesia playing a crucial role. Since the late 1980s, international relations had fundamentally changed following the end of the Cold War.[1] Free market ideology and political liberalism gained ground, putting pressure on authoritarian regimes such as Indonesia's. Indonesia responded initially by engaging in multilateral human rights forums,[2] and in 1991 became a member of the United Nations Commission on Human Rights (UNCHR). Indonesia's increasing commitment to the international human rights regime gave the impression that, at least in theory, it agreed with international norms. In practice, however, the Indonesian government barely responded to international criticism regarding persistent human rights violations. This changed in 1991 after a massacre committed by the Indonesian army in Dili, the capital of East Timor, which left more than 200 persons killed. Footage of the shooting recorded by foreign

1 See 1.1.5.

2 An important role was played by high-ranking officials within the Ministry of Foreign Affairs, and particularly Hasan Wirayuda, the then Director for International Organisations at the Ministry. Wirayuda also served as counsellor at the Permanent Mission of Indonesia to the United Nations in Geneva. For a detailed description, see Smith (1998).

correspondents immediately led to worldwide condemnation. Following the Dili massacre, Indonesia openly admitted it faced challenges in the field of human rights (Jetschke 1999: 160).

Indonesia's human rights record was a particular concern for the Ministry of Foreign Affairs, which had to respond to criticism and guard the country's international image. Directly concerned with this was Hasan Wirayuda, the Director of International Organisations, who according to Lay and Pratikno (2002a) played an important role in convincing the government to establish KOMNAS HAM. Wirayuda was one of the initiators of a 1990 seminar on human rights held within the Ministry of Foreign Affairs. The seminar recommended to explore the possibilities of establishing an organisation charged with human rights affairs. This idea was presented to members of the political elite and the army, including the then Commander-in-Chief, Tri Sutrisno. The responses were sufficiently positive for the Minister of Foreign Affairs, Ali Alatas, to put forward the idea of establishing an Indonesian NHRI (Lay and Praktikno 2002a: 76-78).

It is a commonly held view that international pressure plays a crucial role in forcing human rights-violating states into compliance with international human rights norms (Risse et al. 1999). Indeed, Jetschke (1999: 157) has claimed that KOMNAS HAM was a straightforward response to international criticism on Indonesia's human rights record. However, Glasius' (1999) research, on the influence of foreign human rights policy on Indonesia under Suharto, draws a different conclusion. Glasius argues that the response of a target state is influenced by the severity and credibility of foreign policy actions, as well as by the so-called desirability of a violation: when human rights abuses are considered necessary for the consolidation of a regime or of the state, then foreign influence attempts are unlikely to succeed. The same applies to weak sanctions: when the target state is criticised by less powerful countries, it is unlikely that the target state will change its human rights behaviour or policies. International pressure in general offers no guarantee of coercing norm-violating states towards improving their human rights record; and domestic developments play an important role (Glasius 1999: 314-323).

It is unlikely that the establishment of KOMNAS HAM would have been realised without particular domestic developments. By the end of the 1980s, there was increasing domestic pressure on the New Order regime, which together with international developments forced the government to respond to human rights concerns. The government's increasing engagement with human rights resonated with its policy of *Keterbukaan* (Openness). The policy has been announced in 1989 and was a period of political liberalisation, including a relaxation of censorship and increased public debate.[3] It is regarded as a response to societal developments:

3 *Keterbukaan* is generally considered to have stopped in 1994, when the Indonesian government banned the periodicals *Tempo*, *Editor* and *Detik* (Schwarz 2004: 319; Aspinall 2005: 47).

> '[...] society had changed. Indonesians were more educated, more healthy, more mobile and more prosperous than they had been in the late 1960s. A prolonged period of economic growth and stability had produced a substantial middle class and a rapidly expanding urban working class. These people read newspapers and watched television; they knew about human rights and gossiped about the corruption of the elite. […] In short, the New Order began to lose its coherence because its political architecture could no longer accommodate the tremendous social changes that had taken place over the past two decades' (Bourchier and Hadiz 2003: 16).

The policy has been described as 'a kinder, gentler approach to dissent', and an attempt by the Indonesian government to react to and deal with society's increasing dissatisfaction (Schwarz 2004: 231). The establishment of KOMNAS HAM resonated well with the policy's main themes, *demokratisasi* (democratisation) and *hak asasi manusia* (human rights), and has been called 'the most significant reform during the time' (Aspinall 2005: 43-5).

President Suharto also played an important role in the establishment of KOMNAS HAM.[4] Suharto was searching for ways to legitimise his rule. In this respect the formation of KOMNAS HAM bears striking similarities to the 1986 establishment of the Administrative Courts (*Pengadilan Tata Usaha Negara*, PTUN). The Administrative Courts were set up in the light of the New Order's increasing rhetoric of the rule of law and in a bid to increase the regime's legitimacy both at home and internationally (Bedner 2001: 31, 50). The establishment of KOMNAS HAM was intended to convince both international and domestic audiences that Indonesia attached importance to human rights and democratisation. Simultaneously, however, the Commission was to serve as an instrument for channelling and controlling domestic movements, and was thus part of the Indonesian government's entrenched policy of state corporatism (Lay & Pratikno 2002a: 34). Similarly, Aspinall has suggested that KOMNAS HAM was an attempt to create an alternative to the NGO *Lembaga Bantuan Hukum* (LBH, Legal Aid Institute), which had become very popular and was considered an opponent of the New Order regime (Aspinall 2005: 115).

In addition, the establishment of KOMNAS HAM reflected the subtle shifts in power relations at the government level that took place at the time. The drafting Committee for KOMNAS HAM's Presidential Decree was established by Suharto himself (Lay & Pratikno 2002a: 69). In addition to officials from the State Secretariat and the Ministries of Foreign Affairs and Justice, the Committee also included representatives of the Islamic party PPP (*Partai Persatuan Pembangunan*, Unity and Development Party). The PPP's presence reflected Suharto's attempts to gain legitimacy among the modernist Islamic

4 Interview with Satjipto Rahardjo, former commissioner, 9 May 2008.

community which had earlier been marginalised by his regime (Schwarz 2004: 171-5).

In December 1992 Ali Alatas announced the government's intention to establish a human rights commission (Smith 1998: 31). KOMNAS HAM was formally established in June 1993, a week after a meeting of foreign donors for Indonesia and a week before the UN World Conference on Human Rights in Vienna started (Forum Keadilan 8 July 1993). The Presidential Decree that established KOMNAS HAM made several references to an Indonesian interpretation of human rights. The Commission was based on *Pancasila*,[5] the state ideology, and its goals were to:

> 'a. help develop a conducive condition for the implementation of human rights, in accordance with *Pancasila*, the 1945 Constitution, and the UN Charter as well as the Universal Declaration on Human Rights;
> b. improve the protection of human rights in order to support the realisation of the goal of national development, which is the development of the true Indonesian People and the development of Indonesian society as a whole'.[6]

This Article gives precedence to national ideology and laws over international instruments, and makes no reference to international human rights instruments ratified by Indonesia – which at that time were very few anyway. Most conspicuous is the emphasis placed on the role of the Commission to contribute to national development, a communal goal, which was one of the key issues in the Asian Values discourse.

The reactions to the establishment of KOMNAS HAM, both inside Indonesia and abroad, were sceptical and suspicious. Todung Mulya Lubis commented that KOMNAS HAM was 'a good idea, but [had] some bad public relations' (Forum Keadilan 8 July 1993). When it became public that Airlangga University Professor Soetandyo Wignjosoebroto had agreed to join the Commission, his students asked him to reconsider.[7] Journalist Goenawan Mohamad and lawyer Adnan Buyung Nasution refused. Asmara Nababan, the only commissioner with an activist background between 1993 and 1998, agreed to join KOMNAS HAM after fellow activists had urged him to do so, in order to keep an eye on the Commission. Asmara had many reservations, and told his colleagues he would resign if he felt the Commission could not achieve anything.[8]

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5 Art 2.
6 Art 4.
7 Interview with Soetandyo Wignjosoebroto, former commissioner, 19 November 2003. Wignjosoebroto said he did not accept the offer immediately, and only did so after he had made sure he could resign if he wanted to. Former commissioner Satjipto Rahardjo had a similar experience, with people asking him 'are you mad?' after accepting a position (interview, 9 May 2008).
8 Interview with Asmara Nababan, former commissioner, 28 August 2006.

Human rights observers accused the Indonesian government of window-dressing in response to international pressure, which state officials vehemently denied. According to Moerdiono, the Minister directing the powerful State Secretariat, human rights were part of Indonesia's history and the establishment of a human rights commission was thus self-evident; Soesilo Soedarman, the Coordinating Minister for Politics, Law and Security, refuted any claims of international interference (Smith 1998: 33-34). These explanations were later opposed by Ali Said, KOMNAS HAM's first Chairperson, who stated that international criticism of Indonesia's human rights record did indeed play a role in the decision to establish the Commission.[9]

In the early 1990s, then, as the Indonesian government came under increasing pressure both from international organisations and within the country, the government felt the need to respond to these concerns in order to strengthen its position. The decision to establish KOMNAS HAM was a move to appease critics: Indonesia's ruling elite had no intention for the Commission to develop into an effective watchdog.

### 2.2.2 Presidential Decree 50/1993

KOMNAS HAM was established by Presidential Decree (*Keputusan Presiden*, abbreviated to *Keppres*) no. 50/1993. The Decree gave the Commission three main tasks: to promote human rights; to study international human rights instruments; and to investigate alleged abuses of human rights. This included providing recommendations to the government regarding ratification and human rights implementation.[10] These tasks were to be executed by corresponding sub-commissions, with administrative support from the office of a General Secretary.[11] KOMNAS HAM should have no more than 25 members, including one chairperson and two vice-chairpersons.[12] Commissioners were appointed fulltime[13] for a period of five years, and could be reappointed for one subsequent term.[14] The Commission's funding was to be provided by the State Secretariat.[15]

KOMNAS HAM's mandate was thus formulated quite broadly. It included human rights education and research; and with the addition of an investigative task, the Decree even surpassed the international recommendations laid down in the Paris Principles.[16] In other respects, however, the Presidential Decree

9 Interview with Satjipto Rahardjo, 9 May 2008.
10 Art 5(a), (b) and (c).
11 Art 11.
12 Art 8 (1).
13 Art 10 (3), art 12 (2).
14 Art 8 (5).
15 Art 13.
16 Investigation is an optional task for NHRIs in the Paris Principles.

was not exemplary. To begin with, KOMNAS HAM was established by Presidential Decree and not by 'a constitutional or legislative text',[17] as recommended by the Paris Principles. As LBH chairperson Abdul Hakim Garuda Nusantara explained:

> 'a Presidential Decree can be revoked at any time by the President. And because of the Decree, the Commission is only responsible to the President, and not to the people, as would have been the case were it established by law' (Forum Keadilan, 8 July 1993).

The Presidential Decree also symbolised Suharto's personal power. However, while a law or constitutional amendment would have been a better choice theoretically, it is doubtful whether this would have made much difference, with the Indonesian Parliament so heavily dominated by the executive. Further, speed and convenience also played a role in the choice for a Presidential Decree (Smith 1998: 34).

Another issue concerned the Commission's membership. While the Presidential Decree gave commissioners a reasonable and renewable term of five years, it was not specific regarding their qualifications. The only requirement read that commissioners should be 'well-known national figures'.[18] Further, there were no procedural provisions regarding appointment or dismissal, or pluralist representation, as required by the Paris Principles.[19]

The provisions regarding the Commission's funding and its financial independence also fell short of the Paris Principles. The Decree was silent about obtaining funding from other sources, such as foreign donors, and nor did it specify the extent of financial support to be provided by the state.[20] Moreover, the designation of the State Secretariat as the Commission's funder was problematic, because of its position directly under the President and Vice President. This placed the executive in clear control of the Commission's finances.

It is obvious that in general the Decree fell short of the Paris Principles' standards: it was ambiguous and not sufficiently comprehensive. Combined with the environment the Commission had to operate in – an authoritarian state with a weak human rights record – there were concerns about KOMNAS HAM's potential to function properly.

President Suharto asked Ali Said[21] to select the commissioners. Said's

17 Competence and Responsibilities, para 2.
18 Art 7.
19 Composition and guarantees of independence and pluralism, para 1.
20 Composition and guarantees of independence and pluralism, para 2.
21 Ali Said started his career in the army and eventually became a general. He also studied military law, and at the end of the 1950s became a military prosecutor in Denpasar. He became well-known when in the aftermath of the 1965 events he chaired the extraordinary court-martial (*Mahmillub*), and subsequently became Attorney General (1973-1981), Minister

list contained 24 people, mainly with backgrounds in the bureaucracy, but including academics, and one human rights activist.[22] Suharto approved the list, and added Said to it. In December 1993 the commissioners were formally appointed.[23] They then elected Said as chairperson, as well as two others as vice-chairpersons and a General Secretary. A handful of commissioners resigned or passed away before their five-year term ended, which necessitated replacements. In the absence of a formal appointment procedure, incumbent members suggested candidate members. According to former commissioner Asmara Nababan, candidates often had a similar background to the commissioner who recommended them.[24] New members were elected by voting in a plenary session. Indonesian human rights NGOs criticised this procedure for being oligarchic and lacking in transparency (Lay and Pratikno 2002a: 167).

Each commissioner sat on one of three sub-commissions: Education – responsible for furthering human rights awareness through public campaigning and organising training; research – responsible for recommending amendments or ratification of legislation; or Investigation – responsible for examining alleged human right abuses. They were assisted by staff members who, in the early years, were recruited by the commissioners themselves. While they were formally assigned to a specific sub-commission, in practice staff members would work on whatever was necessary.[25]

### 2.2.3 Challenges and Achievements: KOMNAS HAM during the New Order

Despite the shortcomings in its mandate and the repressive context it had to operate in, KOMNAS HAM managed to surprise in this period.

The Commission was particularly active in educational activities. Among its main feats were human rights training for members of the army and police. This was a novelty in Indonesia, and considering the repressive nature of the state and the role of the security forces in human rights violations, it was an important strategy to encourage these agencies to start respecting human rights. The Commission also organised workshops for NGO representatives, the media, and members of the security forces together. For many of these groups, this was their first opportunity to engage with each other in direct conversation. Further, KOMNAS HAM made agreements with the Ministry of Education to develop and implement a human rights curriculum at primary and secondary

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of Justice (1981-1984) and chairman of the Supreme Court (1984-1992). He chaired KOMNAS HAM until he passed away in 1996.

22 Ali Said was assisted by Baharuddin Lopa, who was Director General of Correctional Institutions (1988-1995). Later on he would become Minister of Justice (February-June 2001) and Attorney General (June 2001, until he passed away the following month).

23 By way of Presidential Decree no. 455/M/1993.

24 Interview, 28 August 2006.

25 Interview with Roichatul Aswidah, staff member, 18 May 2004.

school levels (KOMNAS HAM 1995: 9-10). In such activities the Commission emphasised the need for dialogue between groups commonly opposed to each other.[26] This was new in Indonesia, and is likely to have contributed to a positive perception of the Commission.

However, by far the most conspicuous achievements of KOMNAS HAM in its early years concerned investigations into human rights abuses which involved the security forces. The Commission's first high-profile investigation was the murder of Marsinah, a female labour activist. In 1993, she disappeared following a strike at the factory where she was employed. When, a few days later, her mutilated body was found, ten employees of the factory were arrested and tortured to confess to the murder. At the request of their lawyer, KOMNAS HAM opened an investigation, despite threats by the Minister of Justice that he would disband the Commission (Pompe 1994: 95). This investigation was extraordinary indeed, as hitherto the military had never been subjected to criticism from state bodies, let alone to an inquiry.

KOMNAS HAM's recommendations led to the release of the accused and gained the Commission widespread praise. Legal aid organisation LBH expressed its satisfaction at the efforts made by the Commission. Dutch Minister of Foreign Affairs, Pieter Kooijmans, said the report was 'an important step forward for human rights in Indonesia [...] the report was revelatory of the independence of the National Human Rights Commission' (Pompe 1994: 97). Sadly the true perpetrators of the killing – KOMNAS HAM identified the military unit involved in Marsinah's abduction – were not brought to trial.

The behaviour of security forces was also central to other widely reported KOMNAS HAM investigations, including the cases of Liquisa,[27] Timika[28] and the PDI Affair.[29] These were thorough investigations and the resulting reports

26 Interviews with Roichatul Aswidah, 18 May 2004; Saafroedin Bahar, commissioner, 28 August 2006; and former commissioners Soetandyo Wignjosoebroto, 19 November 2003; Saparinah Sadli, 27 May 2004; Satjipto Rahardjo, 9 May 2008.

27 In January 1995, six East Timorese civilians were killed during a military operation. The victims had been suspected of being agitators. In its investigation, KOMNAS HAM found evidence of torture and unlawful killing (KOMNAS HAM 1995: 41-3).

28 KOMNAS HAM's investigation in Timika (Irian Jaya, now Papua) was in fact an inquiry into six events that took place in Timika, Fak-Fak, and Desa Hoea. During military operations in these areas to curb the *Organisasi Papua Merdeka* (Free Papua Movement, OPM) as well as to ensure the safety of the mining company Freeport, 21 people were killed and four disappeared. KOMNAS HAM argued that between October 1994 and June 1995, people in these areas had become victim of indiscriminate killings, torture, unlawful arrest and arbitrary detention, disappearance, excessive surveillance and destruction of property. The Commission held the armed forces responsible for these violations (KOMNAS HAM 1995: 48-50).

29 During a party congress in 1996, dissidents within the PDI (*Partai Demokrasi Indonesia*, Indonesian Democratic Party), headed by Megawati Sukarnoputri, elected government-supported Suryadi as party chief. Megawati supporters responded by camping at the PDI headquarters in Jakarta, demanding her reinstalment. In July (the event is also referred to as the 27th of July Affair) military-backed hoodlums evicted the supporters with force (Schwarz 2004:

gave detailed accounts of the events, victims, and who or which organisations were responsible for the violations. While in none of these cases could KOMNAS HAM ensure that those responsible were held to account, their investigations were revolutionary in exposing the security forces as the main perpetrators of human rights violations.

Another outstanding feature of KOMNAS HAM's efforts was the addressing of cases in regions with separatist tendencies (East Timor and Papua), where the government defended human rights abuses as a necessity to preserve national stability and unity. Of similar sensitivity was the PDI Affair, which concerned the repression of political opposition to the New Order regime. In all of these cases, KOMNAS HAM was not afraid to name and shame those involved, and thus delivered a clear message to both state bodies and society that the behaviour of the state apparatus was not above the law. In general, this gained the Commission legitimacy, trust and moral force (Lay and Pratikno 2002a: 153).

The question is of course why KOMNAS HAM performed in such a way. Reasons can be found in a number of external factors. To some extent, the government cooperated with KOMNAS HAM. The government had a stake in good performance by the Commission, which could boost its national and international image.[30] The space given to KOMNAS HAM in its early years was also due to increasing divergences of opinion within the political elite regarding human rights issues, with some of them becoming more sympathetic towards reform. The cracks that had started to appear in the New Order façade meant that KOMNAS HAM was given relative freedom, and illustrated that the limited interpretation of human rights propagated internationally by the Indonesian government was by no means shared by all its members (Aspinall 2005: 51-85).

Internal factors also were important in enhancing KOMNAS HAM's performance. Ali Said played a crucial role in his capacity as the Commission's first chairperson. When it was first announced that Ali Said was in charge of selecting the members of KOMNAS HAM, there were critical remarks, with human rights activist Poncke Princen stating that Said was guilty of violating human rights (Forum Keadilan 8 July 1993).[31] Said was indeed a high-ranking

322). This was followed by two days of rioting, in which five persons were killed, 23 people disappeared, 149 were wounded and 136 others were arrested. In its investigation, KOMNAS HAM found that, amongst others, the rights violated included the right to freedom of assembly and association, the right to freedom from cruel and inhuman treatment, and the right to life. While the Commission stated that the event was 'related to an internal conflict of the PDI that became public', it argued that the violence following the eviction was 'a reflection of the political and security policies' (KOMNAS HAM 1996: 31-37).

30 Former commissioner Asmara Nababan added that often officials did not seem to be aware of KOMNAS HAM's tasks. He had the impression that KOMNAS HAM was often regarded as a personal order from Suharto, and therefore the Commission's requests were rarely questioned (interview, 28 August 2006).

31 Princen referred to Ali Said's role in the extraordinary court-martial (see note 21, above).

official, described as a 'government loyalist' who was of the opinion that 'the judiciary should be kept on a leash' and 'ensured from within [the Supreme Court] that government interests would be adequately protected' (Pompe 2005: 123-124). Taking these points of view into account, it was indeed no surprise Ali Said was given a position within KOMNAS HAM, to keep a close eye on the organisation's operations and to make sure it would not undermine government interests.

Former commissioners and staff members have described Ali Said as someone who was not afraid of Suharto.[32] According to Soetandyo Wignjosoebroto, Said was committed to KOMNAS HAM. Wignjosoebroto recalled how he once attended a meeting with the military and with Said, who was unexpectedly confronted by a young colonel describing KOMNAS HAM as an 'unnationalistic' institution influenced by foreign agents. According to Wignjosoebroto, 'Ali Said was furious. He smashed his fist on the table and gave him [the colonel] a piece of his mind'.[33] Similarly Baharuddin Lopa, who worked closely with Ali Said,[34] later recollected that Said had urged him to 'take care of the independence of KOMNAS HAM, because only by being independent it can take a step towards, and achieve, feelings of justice within society' (Lopa 1997: 229). Ali Said thus had a vision for KOMNAS HAM: he wanted the Commission to perform well, even in its restricted environment. In addition, Said's position in the bureaucracy, as well as his background in the military, opened doors to and commanded respect from those organisations.[35]

Ali Said's leadership, together with Baharuddin Lopa, also had a positive influence within the Commission, with Wignjosoebroto stating that 'they had the ability to unify the Commission, and could change inappropriate opinions [*suara kurang pas*].'[36] KOMNAS HAM's leadership thus developed a strong organisational culture.[37] The Commission also drew benefit from its informal and open attitude towards the press and the general public. Moreover, the commissioners and staff were guided by the strict -yet unwritten- rule that internal differences were not to be made public.[38] Material rewards were unimportant, as members and staff received only modest compensation for

32 Interviews with former commissioners Soetandyo Wignjosoebroto, 19 November 2003; Albert Hasibuan, 8 September 2006; Satjipto Rahardjo, 9 May 2008; and staff member Roichatul Aswidah, 18 May 2004.
33 Interview, 19 November 2003.
34 See note 22 above.
35 Interviews with Soetandyo Wignjosoebroto, 19 November 2003; Satjipto Rahardjo, 9 May 2008; and Saafroedin Bahar, 28 August 2006.
36 Interview, 19 November 2003.
37 See 2.2.3.
38 Interview with Soetandyo Wignjosoebroto, 19 November 2003.

their work.[39] Staff member Roichatul Aswidah, who joined the Commission in 1996, recalled: 'there were true ethics. Commissioners never accepted money or gifts from other people. Baharuddin Lopa did not even accept a single banana from parties involved'.[40] KOMNAS HAM surprised its critics. Even the highly critical New Order opponent and academic Arief Budiman conceded that 'the Commission was created to defend the government against international pressure. But over time it developed better than we expected' (Sen 1996: 7).

While KOMNAS HAM managed to present itself as a unity, internal disagreements were not uncommon. According to Wignjosoebroto the Commission could be divided into two groups. The first were the 'nationalists', former bureaucrats and military officers, who argued against the universal application of human rights norms. On the other side were the 'humanists': academics and activists, who supported universalism. The existence of this division was also confirmed by commissioner Saafroedin Bahar, who belonged to the group of nationalists. However, he labelled the groups as pro-state and anti-state.[41] The existence of these factions shows that the idea of human rights, as conceived at the international level, is not automatically shared within an NHRI. While at the time the differences were not insurmountable, a few years later these differences would have more serious consequences for the Commission's functioning.[42]

The favourable perception of KOMNAS HAM held by human rights organisations and the general public is the more remarkable because the Commission's activities did not lead to an improvement in human rights conditions in Indonesia. KOMNAS HAM's main achievement in its first years was simply that it promoted human rights in Indonesia: 'during the New Order, KOMNAS HAM was a centre of hope. It was a place where, at last, people could talk freely'.[43] What KOMNAS HAM managed to achieve was to legitimise the very notion of human rights, offering opportunities to discuss them and debate their importance for Indonesia. This creation of a 'space' for human rights should not be underestimated, especially in a repressive context where human rights were often construed as alien and dangerous for national stability and development. In fact, KOMNAS HAM's main achievement in its first years was to enable the development and strengthening of a domestic human rights

39 Both Asmara Nababan and Soetandyo Wignjosoebroto stated that they received around Rp. 2-3 million Rupiah a month (around US$ 200-300). It is unknown how much staff members received at that time, but the amount would have been less than that of the commissioners.

40 Interview, 18 May 2004.

41 Interview, 28 August 2006.

42 See 2.3.3.

43 Interview with Ratih Rosmayuani, staff member, 11 May 2004.

movement.[44] Such a movement is a crucial condition towards the realisation of human rights. That KOMNAS HAM remained unable to effect any substantial changes proved that Indonesia's powerholders were too strong, too repressive and too resistant to human rights norms. This suggests that KOMNAS HAM needed a more favourable environment to reach its full potential, and that emerged in 1998.

## 2.3 1998-2001: An Age of Reform

### 2.3.1 A Changed Landscape: *Reformasi* and the Acceptance of International Human Rights

In 1997 Asia was hit by a severe financial crisis. The Indonesian economy collapsed and thus the main pillar of the Suharto regime's legitimacy no longer existed. Public opinion turned against the government, and in May 1998 students took to the streets to demand the resignation of Suharto and an overhaul of Indonesia's political and economic structures. This was captured in the motto *Reformasi*. When, during a demonstration at the Trisakti University, security forces opened fire and killed at least four students, several days of rioting in Jakarta and other cities followed. Suharto's domestic support crumbled further, and international pressure on his regime increased. Finally, on 21 May 1998 Suharto resigned and the New Order drew to a close (Vickers 2005: 205).

Suharto was succeeded by his Vice President, Bacharuddin Jusuf Habibie, and many observers assumed that he would try to continue the ideology and policies of the New Order regime as much as possible. However, Habibie was under strong pressure to prove his democratic credentials and his support for the rule of law. He produced far more reforms than anyone had expected in a short time span, introducing press freedom, lifting the ban on the establishment of political parties, releasing political prisoners and decentralising the administration. Habibie also attempted to reform the military by separating the police from the armed forces, and by starting to phase out *dwifungsi*.[45] In addition, Habibie decided to hold a referendum in East Timor, which eventually led to its independence (Vickers 2005: 210; Schwarz 2004: 380-381, 404; Lindsey and Santosa 2008: 14-15).

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44 Aspinall (2005) gives a detailed description of the different actors opposing the New Order, including human rights organisations.

45 *Dwifungsi*, or dual function, refers to the two-fold purpose of the military in Indonesia: on one hand the role in defending the country against external threats, and on the other claiming an internal, socio-political, role. The latter allowed the military to keep a close eye on and intervene in social developments which may have posed a threat to the (authoritarian) state.

In 1999 Habibie was succeeded by Abdurrahman Wahid, who continued some of the earlier introduced changes and was a strong supporter of reform. Wahid announced seven unprecedented blueprints for judicial reform (Lindsey and Santosa 2008: 15) and was an active supporter of national reconciliation, particularly with regard to the victims and survivors of the 1965 massacres and its aftermath.[46] He challenged the role of the military and their influence in politics, calling them to account for the cruelties committed during the New Order (Vickers 2005: 211).

In addition to leaders sympathetic to reform (whether out of personal conviction or political necessity), international pressure, particularly from the International Monetary Fund (IMF) and other donors, led the Indonesian government to improve its human rights policy. In 1998, Indonesia issued its first National Action Plan on Human Rights (*Rencana Aksi Nasional Hak Asasi Manusia*, RANHAM) and started ratifying the major international human rights conventions. Before 1998, Indonesia had only been party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1984) and the Convention on the Rights of the Child (CRC, 1990). In 1998, Indonesia ratified the Convention Against Torture and All Forms of Inhumane and Degrading Treatment (CAT)[47] and the following year the Convention on the Elimination of Racial Discrimination (CERD). The Optional Protocols to CEDAW and CRC were ratified in 2000 and 2001 respectively, and in 2004 Indonesia signed the Convention on the Rights of Migrant Workers and their Families (CMW). In 2006 Indonesia also became a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, without submitting any significant reservations. These developments took place without much, if any, involvement by KOMNAS HAM. The Commission had not been very successful in developing programmes regarding the ratification of international instruments, as in its first years it emphasised its educational and investigative tasks. Only in 1997 did KOMNAS HAM issue reports regarding international human rights treaties. This was a deliberate decision, because the Commission realised that there was little chance that the Government would agree to ratification.[48]

During this period Indonesia also established several new state institutions charged with human rights protection, including the National Commission on Violence Against Women[49] (1998) (*Komisi Nasional Anti Kekerasan Terhadap Perempuan*, KOMNAS Perempuan) and the Directorate General on Human Rights (1999) (*Direktorat Jenderal Hak Asasi Manusia*) within the Ministry of Justice, which was renamed the Ministry of Justice and Human Rights. In addition,

46 See 1.1.5.
47 Signed by Indonesia in 1985.
48 Interview with Soelistyowati Soegondo, commissioner, 11 September 2006.
49 Established by the government, the creation of KOMNAS Perempuan was a response to the sexual abuse suffered by ethnic Chinese women during the May riots.

the Government established the Office on General Elections (1999) (*Kantor Pemilihan Umum*), the Ombudsman (2000) (*Ombudsman Republik Indonesia*), and the Commission on the Eradication of Corruption (2002) (*Komisi Pemberantasan Korupsi*).

Of utmost importance were amendments to the Constitution. Between 1999 and 2002, the Constitution was amended four times. The second amendment introduced a Chapter on human rights (Chapter XA). The provisions in this chapter were modelled on the Universal Declaration of Human Rights (UDHR) (Indrayana 2007: 233; Lindsey 2008: 29; Herbert 2008: 457). The provisions and protections included in the chapter, in both the civil-political field and in economic, social and cultural rights, are substantial – going beyond those in many developed countries (Lindsey 2008: 29).[50]

Through Indonesia's ratification of international treaties and the Constitutional amendments, human rights are now firmly entrenched in Indonesian national law. KOMNAS HAM can hence rely on a much more comprehensive legal framework, in which international norms have been explicitly accepted. Moreover, between 1999 and 2001 two laws were passed that directly affected KOMNAS HAM's mandate and powers: the 1999 Human Rights Law and the 2000 Human Rights Courts Law.

First, Chapter VII of the 1999 Human Rights Law (HRL)[51] replaced the 1993 Presidential Decree, to bring KOMNAS HAM's legal status into conformity with the Paris Principles. The HRL further expanded KOMNAS HAM's mandate, by adding mediation to the tasks of education, research and investigation; and granted the Commission the important power of summons.[52] This took KOMNAS HAM's tasks beyond those recommended in the Paris Principles. Other important changes were an explicit provision for the establishment of regional offices,[53] and the inclusion of the Commission's funding in the National

50 There has been controversy over the inclusion of the principle of non-retroactivity (art 28I (1)), which states that the right not to be prosecuted under retroactive laws may not be diminished under any circumstances. While the principle protects an important human right, it can also prevent the prosecution of those responsible for past human rights abuses (Indrayana 2007: 234), as criminal statutes from the New Order do not recognise crimes against humanity or human rights abuses as the Constitution does (Lindsey 2008: 30).

51 In Indonesian, *Undang-Undang Hak Asasi Manusia no. 39/1999*. While the law was enacted in 1999, KOMNAS HAM was given two years to implement the changes introduced by the Law. As of 2002, which coincided with the start of a new term of commissioners, Komnas HAM operated fully under the HRL.

52 Art 83 (3) (a), art 94, art 95.

53 Art 76 (4). A distinction is made between Representative Offices (*Kantor Perwakilan*), which are limited to conducting investigations based on the HRL, and the Representations (*Perwakilan*), which may perform all tasks provided for in the HRL. The *Kantor Perwakilan* are financed by Komnas HAM, whereas the *Perwakilan* are funded through their respective regional governments (Komnas HAM 2002: 84-5). As of 2008, there was one *Kantor Perwakilan*, located in Aceh, and four *Perwakilan*, located in West Sumatra, West Kalimantan, the Moluccas and Papua. It is beyond the scope of this research to include a study of the regional offices, however, a short visit to the office in Padang (2006) suggested that regional

Budget.[54] This allows for more transparency and public scrutiny, and therefore supposedly increases the Commission's guarantees for financial independence.

Another change which was introduced is that (candidate) members of KOMNAS HAM must have a track record in the promotion and protection of human rights. The HRL moreover explicitly calls for a plural composition of membership of the Commission, which should include NGO representatives and academics.[55] The selection procedure[56] allows for public participation, and final election is done by Parliament.[57] The maximum number of commissioners has been increased to 35.[58] The General Secretary is no longer chosen by the commissioners, and the position is reserved for a civil servant.[59]

These changes provided KOMNAS HAM with the necessary tools to become a strong human rights body. The inclusion of the power of summons enables the Commission to obtain evidence from parties who might otherwise be reluctant to answer requests for information – as had happened several times in the past. Similarly, the new appointment procedures brought an end to the non-transparent election of members[60] and reinforced public participation; increasing the Commission's legitimacy (ICHRP 2004: 60). These improvements have been acknowledged by the International Coordinating Commission (ICC) for NHRIs[61] in its 'A' Accreditation of KOMNAS HAM.

The second law affecting KOMNAS HAM's mandate is the 2000 Human Rights Courts Law (HRCL).[62] Enacted during the Wahid presidency, the law provides for the establishment of two types of courts dealing with gross violations of human rights:[63] the permanent courts, for human rights vi-

offices may have several advantages, such as facilitating access to Komnas HAM and alleviating the main office's workload. In addition, the staff of regional offices may have some advantages in dealing with complainants and violators, as they are considered to be locals, in contrast with 'the people from Jakarta'. Similarly, the office's ties to the region and its people may contribute to more support from the local government (personal conversation with Mahdianur, staff of the West Sumatra office, 6 September 2006).

54 Art 98.

55 Art 84(a), (b), (c), (d).

56 The HRL also provides for reasons for dismissal of commissioners. These are: illness that prevents a commissioner to conduct his/her tasks for a year; conviction of a crime; tarnishing the reputation of the Commission; and damaging the Commission's independence and credibility (art 85 (2)). To the present, Komnas HAM has never dismissed a commissioner, although some have resigned due to having insufficient time to conduct their tasks. Vacated positions remain unoccupied until the next election.

57 Art 83 (1).

58 Art 83 (1).

59 Art 83 (1). This means that the General Secretary is a member of the Indonesian civil service. Membership of the civil service carries a negative connotation in Indonesia, see 2.4.4

60 See 2.2.2.

61 See http://www.nhri.net/2007/List_Accredited_NIs_Dec_2007.pdf, accessed June 2010.

62 In Indonesian, *Undang-Undang Pengadilan Hak Asasi Manusia no. 26/2000*.

63 Art 4. The law defines gross human rights violations as genocide and crimes against humanity (art 7).

olations occurring after the introduction of the law,[64] and the ad hoc courts, specifically established for cases that occurred before 2000.[65]

The HRCL gives KOMNAS HAM a monopoly on conducting preliminary investigations into cases of alleged gross human rights violations.[66] When KOMNAS HAM concludes that such violations have indeed taken place, the Commission sends its findings to the Attorney General's office, which will start a formal investigation.[67] If the Attorney General's office supports KOMNAS HAM's conclusions, prosecution through a permanent or an ad hoc court should follow. Ad hoc courts need to be approved by Parliament, and they are formally established by way of a Presidential Decree.[68] When comparing the authority vested in KOMNAS HAM under the HRCL with the authority which it held under the 1999 HRL, a notable difference is that the 1999 HRL explicitly includes the power of summons, whereas the HRCL does not. This has caused KOMNAS HAM significant problems, which will be discussed below.[69]

The task to conduct preliminary investigations has placed the Commission in a strategic position. Investigations into severe human rights violations are a task of great political and social relevance in a country which has seen many brutal human rights abuses, most of which remain unresolved. In practice however, findings of gross human rights violations by KOMNAS HAM offer no guarantee of a follow-up by the Attorney General, as the process is subject to complex political struggles. As will be revealed later in this Chapter, the Attorney General's office is not immune to these influences, leading in some instances to the cancellation of further investigations into cases of evident human rights abuses; thereby preserving the impunity which the reforms introduced since 1998 have sought to end.

The political reforms that followed the end of the New Order went together with many societal changes, including the rapid growth of civil society organisations and the development of vibrant, independent and more diverse media. New NGOs were established, many of them in the field of human rights and well equipped in terms of human and financial[70] resources. Academic interest in human rights increased, with many Indonesian universities establishing human rights research centres (*Pusat Studi Hak Asasi Manusia* or PUSHAM, Human Rights Study Centre) (Herbert 2008: 480). These changes were clearly advantageous for KOMNAS HAM, and in combination with the strengthened legal position of the organisation, seemed to beckon a bright future. However, several new challenges emerged. The Indonesian state had become increasingly heterogeneous and fragmented. According to the analysis of Lay and Pratikno

64 Art 2.
65 Art 43 (1).
66 Art 18 (1).
67 Art 20 (1) and art 21 (1).
68 Art 43 (2).
69 See 2.3.3.
70 Often coming from western organisations.

(2002b), the Indonesian state could be divided generally into groups supporting reform processes and those that favoured, or had an interest in protecting, the concerns of the former leaders.[71]

Although this division did not usually lead to open, direct opposition to human rights reforms or KOMNAS HAM's investigations into human rights violations, opponents of these activities often used their ties with people within the Commission to influence the course of investigations. This aggravated existing divisions within KOMNAS HAM, and in several cases had a profound impact, as will be discussed in the next section. The Commission also needed to come to terms with the new environment in which it found itself. Never before had Indonesia possessed so many formal arrangements for human rights protection and implementation. Before 1998, KOMNAS HAM was a unique institution in addressing human rights. After 1998, it became one of many – even within the state structure. Therefore, the Commission had to reposition itself, which led to serious internal differences of opinion.

### 2.3.2 Challenges and Achievements: KOMNAS HAM Under Pressure

Due to the enactment of the 1999 HRL and 2000 HRCL, KOMNAS HAM became better mandated than ever before. Combined with the changed socio-political landscape, expectations of the Commissions rose. To some extent, KOMNAS HAM continued its work without major change, particularly in the field of education. In the field of research, KOMNAS HAM increased its activity.[72] However, the most significant change took place in the area of investigations into gross human rights violations, on which this section will focus.

The first and probably most volatile of these investigations concerned violations committed by the security forces in East Timor following the 1999 Referendum on independence. The investigation -which was conducted under the 1999 HRL, as the HRCL had not yet been enacted- was led by commissioner Albert Hasibuan, a prominent lawyer and former MP. The military proved willing to cooperate with the Commission during the investigation, probably because they were largely unaware of its potential consequences.[73] KOMNAS HAM could therefore interview General Wiranto, who had been Commander-in-Chief during the retreat of the Indonesian army from East Timor.

In 2000 the Commission caused significant commotion when it reported that systematic human rights violations had indeed taken place in East Timor, including mass murder, torture and ill-treatment, enforced disappearances,

71 This second group is labelled by Lay and Pratikno as pro-status quo. In practice however, the conflicts that emerge do not arise only between those two groups, but also between factions within them (Lay and Pratikno 2002b: 41).

72 Interview with Soelistyowati Soegondo, 11 September 2009.

73 Interview with Albert Hasibuan, 8 September 2006.

and violence against women and children. KOMNAS HAM was widely praised for the detail of the report (Lay and Pratikno 2002b: 122), which included a comprehensive list of those members of the armed forces and government who were held primarily responsible for the atrocities committed. Wiranto carried ultimate responsibility, as he had failed to guarantee the safety of the East Timorese following the referendum. As a result of these allegations Wiranto, who at the time was Coordinating Minister of Politics and Security, was removed from Wahid's Cabinet. KOMNAS HAM's recommendations were followed by an investigation by the Attorney General, which led to the establishment of an ad hoc court for East Timor.[74]

Although the report was well-received outside of KOMNAS HAM, it was controversial within the Commission itself. Several commissioners with a past in the armed forces and the administration thought that public naming of those involved went too far. They wanted the names to be forwarded only to the Attorney General's office and the President. However, during the final meeting of the investigation team with other KOMNAS HAM members, a vote decided in favour of publication. The opposing commissioners then openly criticised the investigation team (Lay and Pratikno 2002b: 123).

The investigation in East Timor amplified the existing differences within KOMNAS HAM, between members with a background in the armed forces and administration (the 'nationalists'), and those from NGOs and academia (the 'humanists'). After 1998, the nationalists and humanists increasingly disagreed on four issues. The first concerned the possible inclusion into KOMNAS HAM's mandate of the authority to prosecute organisations that did not implement the Commission's recommendations. According to the humanists, this would enhance KOMNAS HAM's performance,[75] but the nationalists argued that prosecuting powers were beyond the mandate of an NHRI.[76] Second, the nationalists were in favour of the General Secretary being a civil servant, whereas the humanists believed this would pose a threat to KOMNAS HAM's independence.[77] Third, the humanists opposed the increase the number of KOMNAS HAM's members to 35, fearing this would hamper decision-making processes, whereas the nationalists considered a large Commission necessary to deal with the vast territory of Indonesia and the complexity of human rights issues. Fourth, the nationalists argued that the regional offices should be accountable and subordinate to the Jakarta office, whereas the humanists wanted these offices to be developed as partners which could operate independently of the head office (Lay and Pratikno 2002b: 138-147). Of these issues, the matter of prosecution

74 Twenty people were tried in the Ad Hoc Court. Most of them were immediately acquitted, while five of them were sentenced to between 3 and 10 years in prison. They were all acquitted at various stages of their appeals. See http://www.kontras.org/data/Matrix%20Putusan%20Pengadilan%20HAM%20di%20Indonesia.htm (last accessed May 2012).

75 Interview with Asmara Nababan, 28 August 2006.

76 Interview with Soelistyowati Soegondo, 17 October 2006.

77 As noted above (see 2.3.1), this was settled by the HRL in favour of the nationalists.

was the most divisive. More seriously, however, these fissures reflected a deeper underlying disagreement about the course of human rights reform in Indonesia and the role of the Commission in the process.

This disagreement became apparent in subsequent KOMNAS HAM investigations. There were strong differences of opinion within the Commission regarding whether some investigations should proceed at all. In the case of the Moluccas,[78] where it was obvious that human rights violations had been committed, the disagreement between the two groups was so profound that eventually as a compromise the formal investigation was replaced by mediation. This angered many observers, who (rightfully) argued that the Commission ignored crimes committed in the Moluccas, and bypassed the recommendations of a regional investigation commission.[79] The mediation effort also contradicted the Commission's policy to mediate only in labour or land disputes.[80]

Similarly, during the Commission's investigation into the 1984 Tanjung Priok case in which security forces killed at least fifty people (Vickers 2005: 178),[81] the 'nationalists' strongly opposed the previously-employed practice of including external members, such as NGO representatives, in the investigation team – leading to the Commission ending this practice. According to Asmara Nababan, this had a negative impact on the quality of the investigation, because activists often have better access to victims and their families.[82] Indeed, the report on Tanjung Priok was generally considered unsatisfactory. Many criticised the Commission for its failure to address the roles played in the incident by former General Moerdani, at the time Commander of ABRI, and Regional Commander Try Sutrisno (Lay and Pratikno 2002b: 184-186).

The increasing contestation of the nature and processes of KOMNAS HAM's investigations were related directly to the broadening of its mandate. The changes to the Commission's mandates gave it much more authority, and unlike before 1998, the investigations could have serious consequences for those involved, including being held accountable by a court. In response, some commissioners started to protect the interests of their organisation of origin,

78 In early 1999, communal conflicts erupted in the Moluccas, involving Islamic and Christian groups. There was widespread reporting of the involvement of the security forces in the conflict, allegedly siding with militant Muslim groups. By 2000, an estimated 3,000 people had been killed in the conflict, and 500,000 people had lost their homes.

79 This investigation was conducted by the *Komisi Daerah Hak Asasi Manusia Maluku* (Regional Human Rights Commission of the Moluccas, KOMDA HAM Maluku), a regional office of KOMNAS HAM.

80 Interview with Ratih Rosmayuani, 11 May 2004.

81 KOMNAS HAM found evidence of gross human rights violations in its investigation, and the Attorney Generals' office continued the investigation. This led to the establishment of an ad hoc court for Tanjung Priok in 2003. Out of fifteen defendants, all lower-ranking military personnel, one was sentenced to ten years in prison, with the others receiving lesser sentences. All defendants were released between 2005 and 2006.

82 Interview, 28 August 2006.

and this became visible in individual cases. In one example, commissioner Koesparmono Irsan, a former police officer who had taken part in the Abepura investigation, distanced himself from the recommendations which blamed the police force for the human rights violations concerned. Similarly, Saafroedin Bahar, a retired army officer, never sat in investigation teams, as he found it difficult to criticise his former colleagues.[83]

While this split within KOMNAS HAM was neither new nor surprising, what had changed was the increasing use, by commissioners, of the press to voice their concerns. This contrasted with the previous (unofficial) policy that differences of opinion should not be aired in public. On several occasions these public differences had a clear negative impact on work processes within the Commission. This indicated that KOMNAS HAM was experiencing increasing internal disagreements about how it operated. The strong organisational culture which characterised the Commission in its early years had clearly weakened. Staff member Roichatul Aswidah stated that after 2000, the Commission's leadership commanded far less authority within the organisation than it did before.[84] Nor was the chairperson immune to the increasing fragmentation of KOMNAS HAM. Djoko Soegianto, KOMNAS HAM's chairperson between 2000 and 2002, was a retired army officer who had not been pleased with the Commission's investigation on East Timor. According to former commissioner Asmara Nababan, in subsequent investigations it took Soegianto longer than his predecessor[85] to issue the necessary Task Letter (*Surat Tugas*) to start proceedings. Similarly, the necessary funds were often only received once the investigation was already underway, leading to instances in which members of investigation teams had to pay for expenses themselves.[86]

The period between 1998 and 2001 was one of significant change for KOMNAS HAM. There was a strong societal demand to address human rights cases, and the Commission's mandate was strengthened to reflect those concerns. As we have seen, KOMNAS HAM's investigation into human rights abuses in East Timor was of exceptional quality. However, it showed to the security forces that the Commission was a force to be reckoned with, which pushed some of them to use their personal and professional ties to influence the direction and outcome of subsequent investigations. KOMNAS HAM had difficulty resisting these outside powers, and in combination with less authoritative leadership, it became increasingly divided. Ironically therefore, the introduction of a stronger mandate and the development of a more human rights-friendly

83 Interview, 29 September 2006.

84 Interview, 25 September 2006. Roichatul Aswidah worked for KOMNAS HAM between 1996 and 2008.

85 Marzuki Darusman, a lawyer and politician, was known as a supporter of human rights reforms.

86 Interviews with Asmara Nababan, 28 August 2006; and Ita F. Nadia, commissioner of KOMNAS Perempuan, 26 September 2006.

environment did not lead to KOMNAS HAM strengthening their performance in addressing gross human rights violations.

## 2.4 2002-2007: A STRONG HUMAN RIGHTS COMMISSION?

### 2.4.1 Organisational Developments

As outlined above, the 1999 HRL and the 2000 HRCL strengthened KOMNAS HAM's legal position considerably. Together with the changes in Indonesia's socio-political climate, it was believed that KOMNAS HAM's performance would improve and in turn contribute to the protection of human rights in Indonesia. However, the 2002-2007 period would be characterised by a number of internal challenges, which had a negative effect on KOMNAS HAM's performance.

As discussed in 2.3.1, the 1999 HRL introduced a new appointment procedure for commissioners. The new procedure[87] starts with the formation of a special selection committee, usually consisting of several NGO representatives, academics and retired judges. Candidates apply individually, and are required to submit references from people or institutions to support their candidacy. During the procedure, the general public is invited to submit opinions on the candidates, either via correspondence or during public interviews organised with the candidates. When the committee has compiled its shortlist, the names of the candidates are submitted to a Parliamentary commission, which conducts the so-called 'Fit and Proper Test'. This test is a final assessment, consisting of a presentation by the candidates followed by a question and answer session. Subsequently, the Parliamentary commission elects new members through a vote.

This appointment procedure is an improvement on the previous system, where the election of members was a matter for incumbent commissioners,[88] leaving those outside KOMNAS HAM uninformed about who had been proposed for membership and why they were (or were not) selected. In contrast, the new process calls explicitly for public participation, and the final election by Parliament reflects democratic decision-making (cf. Centre for Human Rights 1995: 11, para 79).

The new procedure was first applied in 2001. This application became a long process, stretching into 2002, and was problematic from the earliest stages. The initial selection committee was criticised by some members of KOMNAS HAM (from the 'nationalist' group) for being too liberal, as they claimed it included too many human rights activists. The 'nationalist' commissioners then demanded a second selection committee, which excluded representatives

87 The election procedure is described in detail in KOMNAS HAM's Rules of Procedure (*Peraturan Tata Tertib*).

88 See 2.2.2.

of NGOs or other external bodies. While there is no provision for a second selection committee in the Commission's Rules of Procedure, one was set up anyway – possibly to avoid further conflict within the organisation. This second selection committee added more names to the shortlist of the first committee, including candidates who had originally been considered unsuitable for the position. At the Parliamentary stage, it became evident that the new process had become subject to party politics. The candidates' political and personal allegiances, as well as the extent to which they secured the support of the main political parties, were more important than their human rights track record. This explains why, during the 2001/2002 selection, several candidates without clear credentials were favoured over well-respected human rights activists and lawyers. The existing divisions within KOMNAS HAM were reinforced and - even worse- the election led to the rise of a new group of commissioners: those supporting a more orthodox interpretation of Islam. Hence, the new procedure worsened the politicisation and fragmentation of the Commission, and increased its susceptibility to influence by outside groups hostile to (parts of) the human rights endeavour.[89]

This susceptibility and bias became most visible in the case of the Ahmadiyah, a religious group that was declared heretical in a *fatwa*[90] issued by the Indonesian Council of Ulama (*Majelis Ulama Indonesia*, MUI)[91] in 2005. As a result of the *fatwa*, the Ahmadiyah were subjected to severe discrimination and violence. In 2006, KOMNAS HAM member M.M. Billah proposed an investigation into the Ahmadiyah case under the HRCL. He submitted a 1000-page preliminary report to convince the Commission's plenary session. However, his proposal was turned down by the majority of commissioners, who were aligned with Ahmadiyah opponents.[92] The MUI was even represented directly within KOMNAS HAM, as one of the commissioners, Amidhan, served simultaneously as MUI's vice-chairman, and he strongly protected MUI's position.[93]

89 Interviews with Roichatul Aswidah, 25 September 2006; Zoemrotin K. Soesilo, KOMNAS HAM Vice-Chairperson, 13 October 2006; M.M. Billah, former commissioner, 26 April 2008; and NGO representatives Agung Putri, 29 August 2006; Ifdhal Kasim, 20 September 2006; and Usman Hamid, 9 October 2006.

90 Religious opinion issued by Islamic authorities.

91 The Ahmadiyah represent a global movement within Islam, which recognises Mirza Ghulam Ahmad as the last prophet instead of Muhammad. The MUI's 2005 *fatwa* on the Ahmadiyah was an affirmation from earlier *fatwas* (1980 and 1984) which recommended that the government ban the Ahmadiyah doctrine and disband its associated organisations. Although *fatwas* are not legally binding, by September 2011 at least 26 regencies and municipalities had passed by-laws on restricting or banning the Ahmadiyah (The Jakarta Post 10 December 2011).

92 Interview with M.M. Billah, 26 April 2008.

93 Interview with Soelistyowati Soegondo, 11 September 2006.

His actions, in fact, were in violation of KOMNAS HAM's Ethical Code,[94] which stipulates that where commissioners have a personal interest in an issue they are not allowed to participate in discussions or decision-making procedures. KOMNAS HAM eventually compromised: it did not open an investigation, but issued a statement in which it condemned the violence to which members of Ahmadiyah had been subjected. However, no reference was made to the source of the violence, or to the MUI's calls for the government to ban the Ahmadiyah.

Likewise, KOMNAS HAM's 2005 investigation into the 1997/1998 disappearance of 25 activists[95] was badly tainted by the politicisation of the Commission. During the investigation several military officials, including former Commander-in-Chief Wiranto, were summoned but refused to appear. However, during a private meeting with some commissioners, Wiranto stated that he was certain the missing activists had died, even if he did not disclose further information (Tempo Interaktif 1 July 2005). This information was not included in the report, however, because a majority of commissioners argued that this would be improper.[96] During the presentation of its findings, the investigation team stated specifically that it had no hypothesese about what had happened to the missing persons, even though the information from Wiranto had been published. This angered members of the victims' families, as well as NGO representatives, who were concerned that the omission of such information would contribute to impunity for the perpetrators.[97]

These two cases illustrate how political parties and interest groups which oppose or fear the consequences of the Commission's investigations have been able to rely on individuals inside KOMNAS HAM to influence its proceedings. As well, these cases show how human rights have remained a contentious field in Indonesia, as was also apparent in the Commission's relationship with other government bodies.[98]

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94 Art 9 (1): 'In the case where these is a conflict between the interests of a Commissioner in his position as a member and personal interests with regard to a matter that will be, is, or was addressed by KOMNAS HAM, the Commissioner in question must state the conflicts of interest in a meeting before he gives his opinion and he may not take part in discussions regarding that matter'. Several KOMNAS HAM commissioners and observers considered Amidhan, as vice-Chairperson of the MUI, to have a personal interest in the Ahmadiyah case or in preventing criticism on the MUI. Therefore, the common opinion is that Amidhan should not have been allowed to participate in the meeting on the Ahmadiyah.

95 Between 1997 and 1998, 25 activists were abducted and jailed. Thirteen persons were eventually released, but the fates of the twelve others remain unknown. In 2005 Komnas HAM opened an investigation into the case.

96 These commissioners opposing the inclusion of the information in the report were either former military officers themselves, or affiliated with Wiranto through the political party Golkar. Wiranto was a prominent member of Golkar until 2006, when he established his own political party, Partai Hanura (*Partai Hati Nurani Rakyat*, People's Conscience Party).

97 Interviews with NGO representatives Mugiyanto, 16 October 2006; and Usman Hamid, 9 October 2006.

98 See 2.4.2.

Another problem that KOMNAS HAM faced was an increasing backlog of individual cases. This backlog attracted significant criticism (Tempo Interaktif 30 January 2004). In response, KOMNAS HAM decided to completely overhaul its organisational structure. The sub-commissions which were based on a particular function (Education, Research, Investigation, and Mediation), were now classified according to rights category: one on Civil and Political rights, and the other on Economic, Social and Cultural rights. In addition, a sub-commission was established for the Protection of Special Groups. Within these new sub-commissions, individual commissioners became responsible for a particular right. In the Civil and Political Rights Sub-Commission, for instance, commissioners were charged with citizen's rights, the right to freedom of expression, and the right to justice (among others). There was no particular basis for selecting these rights; rather, commissioners were allowed to choose based on their personal interests and positions.[99]

While there are advantages to having commissioners charged with a particular issue or specialisation, in practice this caused significant overlap; as several commissioners chose to deal with similar issues. Thus, commissioners concerned themselves with indigenous people's rights in the Sub-Commission for Economic, Social and Cultural Rights, but also in the Sub-Commission for the Protection of Special Groups, which caused arguments over who was the actual expert on the matter. Such overlap was reinforced by a general lack of coordination between the sub-commissions.[100] As a result, the backlog which the restructuring intended to address continued to grow.

Another consequence of the restructuring was that a commissioner was now required to perform all tasks within KOMNAS HAM's mandate – education, research, investigation and mediation – whereas previously each sub-commission had focused on a single task. The restructuring reduced the effectiveness of the commissioners, as most tended to have extensive experience in one or two of the four areas, but lacked the skills and experience to contribute well in others.[101]

As part of KOMNAS HAM's restructure into two rights-based sub-commissions, the Sub-Commission for Investigation was disbanded and replaced by the Complaint Handling Unit (CHU). The task of the CHU was to receive complaints and forward them to the commissioner whose 'right' most closely correlated with the subject matter. However, because violations are often difficult to assign to a single category, commissioners (or their staff[102]) often disagreed with the CHU's classification, and would forward the case to another

99 Interview with Habib Chirzin, commissioner, 29 August 2006.

100 Interview with Saafroedin Bahar, 28 August 2006; and Heru W. Susanto, staff member, 19 September 2006.

101 Interview with Habib Chirzin, 29 August 2006.

102 The staff's rejection of a classification made by the CHU may also have been caused by a mutual dislike, CHU staff were functional personnel, whereas the staff employed in sub-commissions were structural staff (see 2.4.4).

commissioner. In this manner, cases would move from desk to desk for around a month. During my field research, I saw many files with notes saying "not ours – send to X". Such cases usually ended up at the plenary meeting of the commissioners, where a joint decision would be made as to who would investigate the matter. This fault in the system created new inefficiencies and delays in clearing backlogs, as well as a new lack of clarity for complainants around which commissioner or sub-commission was in charge of the case.[103] The new procedure was intended to relieve the sub-commissions from the administrative side of complaint handling (such as checking contact details), but this advantage did not compensate for the time lost due to moving cases around. In short, while the restructuring was well-intended, it did not achieve the desired results, and instead caused more internal problems for KOMNAS HAM.

The tensions that had developed between KOMNAS HAM members were taken a step further when conflicts emerged between the staff and the General Secretary. In 2007, KOMNAS HAM employed 177 staff (KOMNAS HAM 2007: 90), either working for a particular sub-commission (*staf struktural* or 'structural staff'), or in the general bureaus responsible for finances and administration (*staf fungsional* or 'functional staff'). This division was new. In the early years, staff had been recruited by the commissioners themselves, and did whatever had to be done – whether it was preparing a workshop, drafting a budget or cleaning a room. The appointment of staff to specific tasks, and therefore the emerging division between structural and administrative staff, was a direct result of the post-1998 organisational expansion.

The management of staff matters is the responsibility of the General Secretary. Until 2001, this position was held by one of the commissioners, but the 1999 HRL introduced a civil servant to this position, appointed by the President.[104] During the drafting of the HRL, there had been significant debate about this arrangement, with some commissioners fiercely opposed to the appointment of a civil servant.[105] The first civil servant to become General Secretary was Gembong Priyono, who was appointed in 2002. One of his first actions was to request that all KOMNAS HAM staff become civil servants, because all staff members were directly responsible to him. Many staff members were content to sign up for this new status, attracted by the possibility of retirement benefit schemes and other social security items. Other members refused, claiming that civil servant status would have a negative influence on their independence.[106] One staff member summarised their concerns: 'First they ask us to become civil servants. Then what next? They will probably make

103 Interview with Habib Chirzin, 29 August 2006.
104 Art 81 (3).
105 See 2.3.2.
106 Personal conversations with staff members Roichatul Aswidah, May 2004 and Ignas Triyono, September 2006.

us wear uniforms as in other [government] departments. Now how does that look in the eyes of victims who come to our office?'[107]

Subsequent General Secretaries have continued to actively promote the civil service, which some within the Commission referred to dismissively as *PNSisasi;* or the process of 'making civil servants' (PNS being the Indonesian acronym for *Pegawai Negeri Sipil* or civil servant). In 2006, General Secretary Sutoyo further 'bureaucratised' new staff, by removing a test from the application procedure in which participants had to demonstrate their familiarity with human rights. This particularly angered the staff working for the sub-commissions, who held that the removal of the test meant KOMNAS HAM was put on a par with 'an ordinary state body'. They argued that all staff members, without exception, needed at least a basic understanding of human rights.[108] Those appointed recently, who had not taken the test and mostly worked within the supporting bureaus, felt attacked by their colleagues. This led to another split, now between staff. However, the two groups united when Sutoyo announced in September 2006 that in order to bring KOMNAS HAM in line with government policies on the civil service, salaries would be reduced. For many employees, this meant a reduction of 1 million Rupiahs a month,[109] about US$ 100 – nearly a quarter of a month's salary. Staff members were outraged, and many went on strike for two weeks, although some chose not to strike because of concern for the needs of those seeking help from KOMNAS HAM during that period.[110] During the strike, the office was deserted and most complainants were not attended to.[111] Staff resumed their work when the General Secretary conceded that salaries would not be cut for at least another year.

The resistance to '*PNSisasi*' can be understood in light of the negative role played by the Indonesian Civil Servants Corps (*Korps Pegawai Republik Indonesia*, KORPRI) during the New Order, when they protected government interests. Despite these aversions to the label of 'civil servant', KOMNAS HAM staff members were not necessarily harmed by such a status, as in practice it tended not to influence their independence significantly. However, the problems between staff and the General Secretary distracted the Commission from other, more important, issues; such as how best to address the backlog

107 Personal conversation with staff member Kurniasari Novita Dewi, August 2006.

108 Interview with Heru W. Susanto, 19 September 2006; and personal conversation with Triyanto, October 2006. Since 2007, it is again a requirement for all new KOMNAS HAM staff to participate in training on basic human rights (*Pelatihan Hak Asasi Manusia Dasar*), organised by the Commission itself.

109 Interview with Heru W. Susanto, 19 September 2006.

110 Personal conversations with staff members Atikah Nuraini and Triyanto, September 2006.

111 The strike received some support from commissioners, who argued that adequate salaries were necessary to prevent corruption (interview with Chandra Setiawan, commissioner, 21 September 2006), but also feared it could tarnish the Commission's reputation (interview with Saafroedin Bahar, 25 September 2006).

of investigations, and how to improve the organisation's general performance. The problems also had a negative effect on staff morale. Interpersonal relationships within KOMNAS HAM were generally poor at that time, and this affected the functioning of the Commission far more than the status of its employees.

KOMNAS HAM's internal problems during this period raise questions about the role played by the Commission's leadership. Staff members, commissioners and NGO representatives have all strongly criticised KOMNAS HAM's leadership throughout this period.[112] While staff members and commissioners focused on the inability of the leadership to ensure coordination within KOMNAS HAM,[113] NGO representatives placed the blame on the political affiliations of members. During 2002-2007, KOMNAS HAM was led by prominent human rights activist Abdul Hakim Garuda Nusantara. Considering his background, on paper he was more than qualified to lead KOMNAS HAM and address the various problems that had emerged. In practice, however, Nusantara was unable to do so. While in some ways his activist background made him an ideal candidate to lead KOMNAS HAM, in other ways it proved an impediment. Nusantara lacked authority within the Commission, particularly among members with a background in the military or bureaucracy.[114] Similarly, Nusantara's background had a negative effect on how other state organisations saw KOMNAS HAM, and during his leadership it commanded far less respect than it had before.[115]

### 2.4.2 Challenges: KOMNAS HAM's Relationship with the Attorney General

The 2000 HRCL gave KOMNAS HAM the authority to open preliminary investigations into gross human rights violations.[116] The next step involves an additional investigation by the Attorney General's Office (*Kejaksaan Agung*). Only if the latter establishes that gross human rights violations have taken place can a prosecution commence; with the additional requirement that an ad hoc court must be established for all cases in which the alleged violation occurred before the enactment of the law.

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112 Interviews with commissioners Anshari Thayib, 26 September 2006; Enny Soeprapto, 26 September 2006; Soelistyowati Soegondo, 17 October 2006; M.M. Billah, 26 April 2008; staff members Heru W. Susanto, 19 September 2006; Roichatul Aswidah, 25 September 2006; NGO representatives Ifdhal Kasim, 20 September 2006; Ita F. Nadia, 26 September 2006; Mugiyanto, 16 October 2006.

113 An exception was former commissioner M.M. Billah, who identified commissioners' ties with political and military interest as the primary challenge to KOMNAS HAM in general and its leadership in particular.

114 Interviews with Saafroedin Bahar, 25 September 2006; and Soelistyowati Soegondo, 17 October 2006.

115 Interview with Soelistyowati Soegondo, 17 October 2006.

116 See 2.3.1.

In the 2006 report by KOMNAS HAM on the 1997/1998 disappearance of 25 human rights activists, the result of the preliminary investigation was that KOMNAS HAM identified 27 people who were either directly or indirectly responsible (KOMNAS HAM 2007: 88-90). The Commission then requested the Attorney General to undertake its own investigation (KOMNAS HAM 2007: 92). However, the Attorney General's Office replied that it only made sense to open an investigation after Parliament had approved the establishment of an ad hoc court (Koran Tempo 23 November 2006); an argument without any basis in the HRCL. As a result, those responsible for the disappearances and (presumed) deaths have not been held accountable, and probably never will be.

This case was not unique, even if the reasoning was a novelty. The Attorney General has rejected most of KOMNAS HAM's findings. In 2002 the Attorney General also refused to follow up on earlier KOMNAS HAM investigations[117] into the Trisakti, Semanggi I and Semanggi II cases, where the armed forces opened fire at demonstrators, killing 33 people and wounding nearly 1,000 others.[118] The Attorney General first argued that the documents submitted by KOMNAS HAM were incomplete (Tempo Interaktif 4 November 2002). When the requested documents were added, a new claim followed to deny the validity of KOMNAS HAM's investigation because the members of the investigation team had not been sworn in.[119] The Attorney General further ignored requests from KOMNAS HAM to discuss the matter, and eventually the Commission stopped pushing. Three years later, the Attorney General issued a statement that it would never open an investigation into the three cases because they were not an issue of gross violations of human rights. In its argument, the Attorney General's office referred to a similar decision made by Parliament in the case. The Attorney General used the same argument again, to justify its refusal to follow up the cases of May 1998[120] and Wamena and Wasior[121]

117 At political levels there also remains widespread resistance towards the finalisation of human rights cases, with a majority of political parties actively opposing the establishment of ad hoc human rights courts (Media Indonesia 10 March 2007; Suara Pembaruan 10 March 2007).

118 In the Trisakti case (12 May 1998), four students were killed and 681 other persons were wounded; in the Semanggi I case (8-14 November 1998), 18 demonstrators were killed and 109 were wounded; and in the Semanggi II case (24 September 1999), 11 demonstrators were killed and 217 persons were wounded. For a detailed chronology of events see http://www.kontras.org/data/kronik%20tss%20update.pdf, last accessed October 2011, on file with author.

119 Interview with Ruswiati Suryasaputra, commissioner and chairperson of the investigation into the disappearance of the activists in 1997/1998, 29 August 2006.

120 This investigation concerns the riots that took place in Jakarta between 13 and 15 May 1998, and the killings, disappearances and rapes that occurred in that period. The security forces, or hoodlums supported by them, are generally considered to be responsible for the violations. President Habibie ordered an initial investigation in May 1998, however the government did not respond to the findings of the investigation team. In 2003, KOMNAS HAM opened its own investigation and concluded that gross human rights violations had taken place (KOMNAS HAM 2006: 54-55).

(KOMNAS HAM 2006: 54-56); although what it would actually consider to be a 'gross violation' has not been clarified.

KOMNAS HAM's relationship with the judiciary has been difficult as well. According to the HRL, KOMNAS HAM may ask for the assistance of the District Court (*Pengadilan Negeri*) if people do not respond to the Commission's summons. The Commission has only rarely used this option.[122] In the case of the 1997-1998 disappearances, KOMNAS HAM sought help from the Central Jakarta District Court to summon six retired generals. The Court refused; and argued that as the HRCL -under which the investigation was carried out- does not include the power of summons, it had no authority to summon the persons in question (Suara Karya 4 August 2006).[123]

The reactions of the Attorney General's Office and the Central Jakarta District Court highlight several problems in adjudicating human rights cases in contemporary Indonesia. The HRCL appears to have several shortcomings, at least in the view of the Attorney General: it does not include the power of summons; there is no clear definition of the evidence that KOMNAS HAM should submit to the Attorney General; it is not clear what the status of the Commission's investigators should be and whether they need to be sworn in; and – for cases that occurred before 2000 – it is not clear whether the Attorney General can only open its investigation after Parliament has approved the establishment of an ad hoc court.

In response to these problems, KOMNAS HAM began to discuss amending the law as early as 2002. The following year, the Commission wrote a position paper on the law. In this document, the suggested amendments included an amemdment to designate the Commission as the sole investigator, and the Attorney General as prosecutor. In addition, the paper recommended that the establishment of ad hoc courts should only require the permission of the President. In 2004 and 2005, the paper was discussed in consultation with academics, lawyers, NGO representatives, judges, and members of the Army

121 The Wamena (2003) and Wasior (2001-2002) cases refer to violations that took place in the province of Papua. In the Wasior case, 140 persons were detained and subjected to torture or other forms of ill-treatment, one person died in custody and at least seven people were executed. Twenty-seven others were sentenced to imprisonment in trials which evidence indicates were unfair. The Commission held the Police Mobile Brigade (Brimob) responsible for the violations. In the Wamena case, at least 30 people were detained and tortured by the military, and at least one person died as a direct result. See http://www.amnesty.org/en/library/asset/ASA21/032/2002/en/29fcf820-d7f0-11dd-9df8-936c90684588/asa210322002en.html, last accessed October 2011.

122 This bears similarities to the experiences of the Administrative Courts, which also struggled with the refusal of officials to appear in court. In the case of the Administrative Courts, part of the problem is that it is not clear what powers judges have to make people appear, and whether the police can be called in for this purpose. Moreover, judges themselves were uncertain whether the police would want to assist in such cases, and an attempt to impel them to assist could therefore risk a loss of authority (Bedner 2001: 232).

123 See 2.3.1.

and Police; and there was agreement that the law needed to be amended.[124] KOMNAS HAM then prepared a draft bill; however, it is unclear what happened to this draft. At the time of writing (2013), there have still been no indications that the law will be amended, although there have been reports that the Government is preparing its own draft bill.[125] Any amendment to the HRCL would need to address the details of certain provisions: the lack thereof has been used to the advantage of those who champion impunity for human rights abuses.

## 2.5 Developments after 2007: A New Human Rights Commission?

### 2.5.1 New Commissioners and Directions

The internal conflicts within KOMNAS HAM, and the problems it experienced with other organisations, led to criticism and discontent from the outside world, especially from NGOs.[126] The latter took a keen interest in the 2007 KOMNAS HAM election process, and many NGO representatives announced their candidacy. NGOs also approached candidate members to sign a contract, committing themselves to work closely with NGOs and prioritise the concerns of victims of human rights violations. Most candidates did sign.[127]

In September 2007, 11 commissioners were elected to KOMNAS HAM by the Third Parliamentary Committee (*Komisi III DPR*). The process in several ways constituted a break with the past. No incumbent members were reappointed, bringing in new people and ideas. The number of commissioners was sharply reduced, to speed up decision-making (Media Indonesia 26 March 2007). No former members of the security forces or bureaucracy were elected, which was not as surprising as it may sound, as the selection committee had only selected two candidates out of 43 with such a background.[128] Six of the 11 new members had an NGO background; three were former lawyers -including a former Human Rights Court judge- and two were academics. This indicated that many MPs also felt that something needed to change.

The NGOs, which had monitored the proceedings closely, considered them an important step forward compared to the 2001/2002 election process, but they still found the Parliamentary Commission far from committed; with sometimes only 14 out of 47 members attending. The NGOs also criticised the nature of the questions asked during selection, which rarely concerned specific

124 Interview with Enny Soeprapto, 19 September 2006.
125 Personal communication with former staff member and deputy director of the NGO DEMOS, Roichatul Aswidah, January 2012.
126 Interviews with Agung Putri, 29 August 2006; Roichatul Aswidah, 25 September 2006; personal communication with Ita F. Nadia, September 2007.
127 Personal conversation with Indria Fernida, representative of the NGO KontraS, May 2008.
128 NGO report on the selection process, on file with author.

human rights problems or challenges faced by KOMNAS HAM. Instead, many questions focused on religious issues, including the candidate's opinions on polygamy, interreligious and same-sex marriages, as well as their own religion and their ideas about the Ahmadiyah.[129] This indicated to observers that the Parliamentary Commission was not so interested in a normative perspective on human rights, and was more concerned with the candidates' personal views and how well these fitted with the opinions of the status quo. Another shortcoming with the election process, in the view of NGOs, was that only a single female candidate was elected. The other three female candidates received considerable support from the NGO community, but were allegedly not elected because the Parliamentary Committee found them 'too radical'.[130]

Many of the newly appointed commissioners had applied because they were discontented with KOMNAS HAM, and were accordingly motivated to change the organisation. And indeed they did, starting with the dismissal of the unpopular General Secretary, Sutoyo (Kompas 22 October 2007), who was replaced by Bambang Priohadi; who nonetheless continued the policies of his predecessors.[131] The new commissioners also decided to return to sub-commissions based on function (KOMNAS HAM 2008: 12). Other changes concerned the reduction of the Chairperson's tenure to two-and-a-half years, or half a term (Suara Pembaruan 6 September 2007), and the assignment of the two vice-chairpersons to internal and external affairs. The Vice-Chairperson for external affairs also became the Commission's official spokesperson (KOMNAS HAM 2008: 12).

For the first time in KOMNAS HAM's history, the new commissioners announced which issues they would prioritise in the coming five years. Only days after his instalment as Chairman, Ifdhal Kasim, a prominent human rights activist, announced that the Commission would focus on cases of gross human rights violations and established investigation teams for the Talangsari[132]

129 Ibid.

130 Personal conversation with Indria Fernida, May 2008. One of them, Ita F. Nadia, suspected that her close association with survivors of the 1965 massacre and its aftermath negatively affected her candidacy (personal correspondence, September 2007).

131 In April 2008, Priohadi had managed to reduce the number of non-civil servant staff from 53 (KOMNAS HAM 2007: 90) to only two (interview with Roichatul Aswidah, 16 May 2008), who both found employment elsewhere in the course of the year.

132 In 1989, a military commando attacked the village Talangsari (Lampung, Sumatra), after allegations that its residents wanted to establish an Islamic state. During the attack, arbitrary detentions, torture, enforced disappearances and extrajudicial executions took place, costing the lives of at least 94 people. KOMNAS HAM initially opened an investigation in 2001, but this stagnated. The investigation was reopened in both 2004 and 2005, led by different commissioners. Neither investigation was finalised. In 2007, the new commissioners formed another investigation team that held the local military commander responsible for the violations, and forwarded the case to the Attorney General.

and Alas Tlogo[133] cases, as well as a team to investigate violations that occurred during the rule of Suharto in general (KOMNAS HAM 2008: 12). According to Ifdhal Kasim, the investigation of these cases was crucial for KOMNAS HAM to regain community trust (Koran Tempo 6 September 2007). Another announcement concerned the strengthening of KOMNAS HAM's regional offices and representations (Suara Pembaruan 6 September 2007). The Commission opened up some of its meetings to the public, and started convening monthly meetings with the press and general public to report on its activities (KOMNAS HAM 2008: 12).

The changes introduced by the new commissioners led to more transparency, the lack of which had been criticised by NGOs in the 2002-2007 period. However, KOMNAS HAM's environment had not changed significantly, and during its investigations the Commission continued to encounter the same problems as before, such as the refusal of military officials to respond to summons. The Commission's relationship with the Attorney General also remained problematic: in the Talangsari case KOMNAS HAM found evidence of gross human rights violations, but the Attorney General again refused to pursue the case until an ad hoc court had been established by Parliament.

### 2.5.2 Fall-out with the Indonesian Armed Forces

KOMNAS HAM thus continued to struggle in its relationships with external bodies. In 2008, the Commission found itself in a direct and widely publicised quarrel with the Armed Forces, regarding whether army officers were required to respond to KOMNAS HAM summons. At the core of the dispute was the point that although the right to summons is provided for in the 1999 HRL,[134] it is not included in the 2000 HRCL. This has led (former) armed forces personnel, most prominently Wiranto, to argue that they have no legal obligation to comply with KOMNAS HAM's summons in investigations carried out under the HRCL. In 2008, Wiranto received support from Defence Minister Juwono Sudarsono in this matter, and then went even further by stating that the Commission had no authority at all to summon military officials. The Armed Forces themselves stated that they would 'encourage' active military to give evidence, but could not ask this from retired officers (Kompas 6 March 2008). With regard to retired personnel, the Minister insisted a written statement would suffice (Kompas 17 March 2008).

133 The Alas Tlogo (East Java) case concerns a land dispute between the residents of Alas Tlogo and the company Rajawali Nusantara, owned by the Indonesian Navy. In May 2007, a clash erupted between the military and the villagers, leaving four people killed and eight others injured.

134 Art 94(1).

Sudarsono's statement thus legitimised the former officers' refusals. This has made it very difficult for KOMNAS HAM to obtain (incriminating) evidence during investigations. The Commission then threatened to take up the matter with the UN Human Rights Council (Kompas 10 April 2008), indicating that the Commission conducted investigations not for revenge but simply to comply with Indonesia's laws (Kompas 24 April 2008). This disagreement further damaged the Commission's already precarious relationship with the Armed Forces,[135] which felt insulted by KOMNAS HAM's public criticism. Repairing this relationship will be crucial for the Commission, as the Armed Forces are not only violators but also potential protectors of human rights. During this disagreement, the lack of former military officials among the Commission's ranks backfired on KOMNAS HAM, particularly in a country where – as in many developing countries – professional ties are often defined by personal relationships (Otto 1999: 68). Previously, communication with the Armed Forces was facilitated by commissioners who were retired military officers. These commissioners were not perceived as a threat by the Armed Forces, and often evoked a great deal of authority.[136]

The Commission's very public conflict with the Armed Forces demonstrated that resistance to KOMNAS HAM, and to human rights more generally, remains high. As with the non-cooperation of the Attorney General, the clash with the Armed Forces underlines how a loophole in a law – in this case, not including the power of summons in the HRCL- has been used by a powerful group to avoid accountability. Conflicts like these illustrate KOMNAS HAM's dependency on other organisations for its effectiveness, and the continuing difficulty of performing its task even if internal aspects are well-organised.

## 2.6 Conclusion

When KOMNAS HAM was established in 1993, few expected that the new organisation would turn out to be more than a paper tiger. The Commission's mandate was limited, its legal status weak, and most of all it was required to operate within an authoritarian state where human rights violations were an everyday fact of life. However, against all expectations and odds, KOMNAS HAM gained much public trust by opening investigations into human rights abuses, and by not shunning confrontations with those in power – not even with the security forces.

In KOMNAS HAM's first years, its commissioners – and in particular its leadership – were most influencial. While the Commission's efforts may not have led to a marked improvement in Indonesia's human rights record, the

135 Personal communication with Hesti Armiwulan, Vice Chairperson for External Affairs, 7 May 2008.

136 Interview with Saafroedin Bahar, 25 August 2006.

activities initiated by KOMNAS HAM were important in endorsing the very notion of human rights, which had long been contested by the Indonesian government. In promoting the concept of human rights, the Commission legitimised the claims of human rights NGOs, and thus created new space for such activism.

After 1998, expectations of KOMNAS HAM increased in line with demands for democratisation and human rights protection. In response to these concerns, and mandated by the enactment of the 1999 HRL and 2000 HRCL, the Commission started investigating gross human rights violations; finding itself under significant public pressure to bring these cases to court. However, many obstacles, both inside and outside the organisation, hindered KOMNAS HAM's performance. Increasing internal differences indicated that within the Commission, certain forces resisted the investigation of human rights cases, undermining KOMNAS HAM's ability to fulfil its mandate.

This influence which individuals can wield on organisational performance underscores the importance of the Commission's membership. NGOs in Indonesia had expressed strong criticism of the non-transparent way in which KOMNAS HAM elected its members in its first years. This issue was rectified though the new appointment procedure in the 1999 HRL. The new procedure made elections more transparent and allowed for public participation which, following international guidelines, increased guarantees of the Commission's independence and functioning. Paradoxically, however, this new appointment procedure, in combination with the composition of the Parliamentary Committee involved, led to politicisation and increased the fragmentation of KOMNAS HAM's membership. This exacerbated internal divisions, and in some cases led to a failure to act on blatant human rights abuses. The Commission did not respond adequately to these problems, as it was preoccupied with internal issues, such as the restructuring in 2004 and the conflict between the staff and the General Secretary.

KOMNAS HAM was thus not able to meet expectations that it would flourish in the new political environment which seemed more open to embracing international human rights discourse. The Commission's failure to meet these expectations can be attributed partly to the organisation itself. Particularly between 2002 and 2007, KOMNAS HAM was confronted with many internal challenges, exacerbated by the unsuccessful restructuring in 2004. However, external influences from interest groups also hindered the Commission, through the use of personal affiliations with commissioners to manipulate the course and outcomes of investigations. Particularly between 2002-2007, this external pressure had a profound impact on the Commission's processes. It is evident therefore that many of KOMNAS HAM's problems have been beyond its control, and continue to emerge irrespective of the Commission's organisational structure or membership. KOMNAS HAM has struggled continuously against remnants of the New Order regime, including both an assertive military and political parties that were dominant during Suharto's

rule. Many reforms, particularly those regarding human rights, are resisted from within the government (Aspinall 2005: 270-272), and this too has undermined KOMNAS HAM's effectiveness.

Many of the problems which arose during the period just discussed were addressed by the new commissioners appointed in 2007. In addition, interest groups -in particular NGOs- have successfully lobbied for a smaller but more dedicated commission. Of the commissioners appointed for the 2007-2012 period, there were none with a background in the armed forces. This ensured less fragmentation within the Commission, and was expected to have a positive influence on KOMNAS HAM's performance. In practice, however, the lack of commissioners with military backgrounds made access to and negotiation with the army far more difficult. This highlights the necessity, for the success of KOMNAS HAM and for human rights reform in Indonesia in general, of ensuring that the Commission includes representatives from all groups associated with human rights protection.

By looking at KOMNAS HAM's development as an organisation in Indonesia's socio-political context, this Chapter has demonstrated that the study of NHRIs should not be limited to a consideration of mandate and organisational structures alone. Rather, analysis of actual working processes is required to explain why an NHRI behaves as it does, and to identify the factors that contribute to that behaviour. KOMNAS HAM's first years have shown that a limited mandate and weak legal status do not necessarily lead to poor performance; just as the Commission's current larger mandate does not guarantee good performance, let alone effectiveness. The story of KOMNAS HAM is one of irony; of a state organisation that managed to become a trusted human rights body in an authoritarian regime, yet was not able to consolidate its position in far better circumstances. This Chapter has shown that at the root of this situation is a complex interplay of internal developments, relationships with other organisations, and the wider socio-political context. The functioning of NHRIs and the chances for their success can thus only be understood when an analysis of organisational elements is combined with a consideration of the socio-political context in which these organisations operate and of what the enabling and disabling factors of that environment might be. This will also be apparent in the following chapter, in which the performance and effectiveness of KOMNAS HAM in three categories of human rights will be discussed.

# 3 The Power of the Individual

## Performance and Effectiveness of KOMNAS HAM in Three Case Studies

### 3.1 INTRODUCTION

In the previous Chapter we have seen that since 1998, KOMNAS HAM, despite its stronger mandate, has faced serious difficulties. Not only has the Commission been confronted with mounting external pressure on its functioning, it has also experienced a number of major internal problems. Some of these were directly related to outside interference in KOMNAS HAM's affairs, while others were the result of poor management choices, with growing discontent and divergences within KOMNAS HAM especially apparent between 2002 and 2007. Inevitably, this had an impact on KOMNAS HAM's functioning. Where the previous Chapter discussed how the Commission's challenges affected its investigations into gross human rights violations, this Chapter will look at how KOMNAS HAM has performed in the areas of freedom of religion, the right to a fair trial, and the right to adequate housing.[1]

The primary concern of this Chapter is how KOMNAS HAM has addressed these rights: what activities has the Commission developed within those three areas, and what were the organisation's reasons for addressing them in that manner? As such, this Chapter focuses on the performance of KOMNAS HAM, and seeks to identify the factors influencing that process.[2] One of the conclusions in Chapter 2 was that individual members often had an important influence on the Commission's work, and this finding will be further explored in this Chapter. In addition, attention will be paid to the question of how the Commission has approached the international human rights framework, and thus to what extent and how it has socialised these norms in the Indonesian context.[3] Finally, attention will be paid to the nature of KOMNAS HAM's performance, and the extent to which the Commission has been effective or able to influence the process of human rights realisation.

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1 As outlined in 1.3, these rights were selected because of their relevance in both the Indonesian and Malaysian context, as well as to explore to what extent the performances of NHRIs may differ between different categories of human rights.

2 See 1.2.3.

3 See 1.2.2.

The first right considered in this Chapter, the freedom of religion, is enshrined in various international human rights treaties,[4] as well as in the Indonesian Constitution[5] and the 1999 Human Rights Law.[6] Nevertheless, in practice the freedom of religion has been subject to clear limitations,[7] with the state recognising certain religions while ignoring or even discriminating against others.[8] One of the areas in which issues of religious freedom arise is interreligious marriage (*pernikahan beda agama*). The situation is exacerbated because religion is at the core of the 1974 Marriage Law: the performance of a religious ceremony is a precondition for a marriage to be valid.[9] This provision is problematic for adherents of different religions who want to marry each other as well as for followers of religions or beliefs that are not recognised by the state, such as mysticism. Marriage law in general is an area where law and culture meet, and thus where conflict between the norms of the state and those of social groups is likely to emerge. In Indonesia, interreligious marriage is a very delicate matter that touches upon legal, theological and emotional sensitivities,[10] and it is very difficult to find clergy willing to conclude such interreligious unions (Bedner and Van Huis 2010: 182; Pompe 1988: 260; Pompe 1991: 262).[11] This situation thus impinges directly on the freedom of religion. Finally, I have selected interreligious marriages because KOMNAS HAM has addressed the issue in two reports.[12]

The second right to be examined is that to a fair trial. At the core of this right is equality before the law, but it is also related to other human rights such as the right to an adequate legal defence, freedom from arbitrary arrest, and freedom from torture and ill-treatment. In international human rights law,

4 UDHR, Art 18: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'; ICCPR, Art 18 (1) 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'; 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

5 During the New Order in Art 29, in the Constitution following the 2002 Amendment, in Art 29(2).

6 Art 22(1).

7 Particularly during the New Order the freedom of religion was restricted, to curb opposition to the regime and to prevent political and social unrest.

8 Recognised religions are Islam, Protestantism, Catholicism, Buddhism, Hinduism, and Confucianism.

9 Art 2(1) of the Marriage Law states that 'A Marriage is valid if it has been conducted according to the laws of the respective religions and beliefs of the parties involved'.

10 See for instance Cholil 2009; Connolly 2009; Elfira 2009; Mulia 2009.

11 For a more detailed description see below, 'Mixed Marriage Practices in Indonesia'.

12 See below.

the right to a fair trial is guaranteed in the UDHR[13] and in Article 14 (1) of the ICCPR: According to Art 14(1) of the ICCPR,

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law […]'.

Article 14 (2) concerns the right to be presumed innocent until proven guilty, Art 14 (5) the right to review by a higher court, and Art 14 (7) prohibits double jeopardy. Article 14 (3) includes the minimum fair trial rights in criminal proceedings, which include the right to be informed promptly and in detail about the nature and cause of a charge; adequate time to prepare one's defence and to communicate with a counsel of one's own choosing; and the right not to be compelled to testify against oneself or confess guilt. The ICCPR was ratified by Indonesia in 2005, and the right to a fair trial is also guaranteed in the Constitution,[14] the 1999 Human Rights Law,[15] and the Code of Criminal Procedure (*Kitab Undang-Undang Hukum Acara Pidana*, henceforth KUHAP).[16] These rights were systematically violated during the New Order when there was an 'endemic use of torture' (HRW 1994: 2) and physical abuse of detainees was likely, especially during interrogation. In addition, Indonesia's legal system was largely controlled by the executive branch of government that influenced outcomes of proceedings (HRW 1990: 1). Although since 1998 Indonesia has made significant progress in establishing a framework for human rights protection[17] (see, for instance, Herbert 2008), many challenges remain. The UN claims that torture and ill-treatment in detention, particularly in urban areas, is still a 'routine practice' and lacks an adequate definition, prohibition and punishment in law.[18] Even though there have been attempts to revise

13 Art 10; 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

14 Art 28D (1): 'Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law'.

15 Art 3(2): 'Everyone has the right to be recognized, guaranteed, protected, and treated fairly before the law and is entitled to equal legal certitude and treatment before the law'; Art 5(2): 'Everyone has the right to truly just support and protection from an objective, impartial judiciary'; Art 17: 'Everyone without discrimination, has the right to justice by submitting applications, grievances, and charges, of a criminal, civil, and administrative nature, and to a hearing by an independent and impartial tribunal, according to legal procedure that guarantees a hearing by a just and fair judge allowing an objective and impartial verdict to be reached'.

16 Chapter VI (The Rights of the Accused and Suspects) and Chapter VII (Legal Aid).

17 The Indonesian Constitution guarantees equality before the law (Art 28D (1)) and freedom from torture, inhuman and degrading treatment (Art 28G (1)). The 1999 Human Rights Law also guarantees these rights, in Articles 17 and 33(1) respectively.

18 UN document A/HRC/7/3/Add.7

the Code of Criminal Procedure, human rights observers note that its draft law still falls short of international standards. Thus, there is no provision that a person should be brought before a court promptly to determine the legality of the arrest, and there is no requirement for the authorities to inform a suspect or defendant of his rights (Amnesty International 2006). In sum, both laws and practices pertaining to the right to a fair trial leave much to be desired, which would warrant action from KOMNAS HAM, even more so because issues related to a fair trial have featured prominently in the Commission's investigations of past human rights violations.[19]

The right to adequate housing, the final right to be examined in this Chapter, is a socio-economic right of particular relevance in developing countries. In addition to international human rights provisions,[20] this right is also guaranteed in Indonesian national legislation, including the Constitution[21] and the 1999 Human Rights Law.[22] Each year, KOMNAS HAM classifies around 30 percent of the cases it has received as concerning land rights. These cases include claims of *adat* communities to land, but the vast majority relates to appropriation of land by either government or businesses, and the eviction of the people occupying that land. This Chapter pays particular attention to how KOMNAS HAM has addressed evictions and the right to housing in Jakarta. The assumption is that due to the Commission's geographical proximity to sites of evictions here, as well as the relatively uncontroversial nature of the right at the level of society,[23] adequate housing would be an issue with which KOMNAS HAM could achieve significant success.

The discussion about how KOMNAS HAM has addressed each of these three issues will start by providing a background to each, which touches on the Commission's core concerns. Attention will then be paid to the activities

19 For example, KOMNAS HAM has conducted an investigation into the 1997/1998 disappearances of 25 human rights activists.

20 UDHR, Art 25 (1): 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing […]'; ICESCR, Art 11 (1): '[…]the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing […]'; CEDAW, Art 14(2)(h): '[…] to enjoy adequate living conditions, particularly in relation to housing […]'; CRC, Art 27 (3): 'States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing'. Indonesia has ratified the ICESCR, CEDAW and CRC.

21 Art 28H (1): 'Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care'.

22 Art 36 (1): Everyone has the right to own property, both alone and in association with others, for the development of himself, his family, nation, and society through lawful means'; Art 40: 'Everyone has the right to a place to live and the right to an adequate standard of living'.

23 When compared to freedom of religion.

developed by KOMNAS HAM in response to each issue. Of particular concern is how the Commission has related international human rights norms to national laws and practices; in what ways the Commission has propagated the international human rights discourse; and how it has dealt with conflicting views on human rights norms. To determine the activities undertaken by the Commission, my first resources were KOMNAS HAM's annual reports. In the cases of interreligious marriage and adequate housing, specific reports issued by KOMNAS HAM were also available, which represent the official position of the Commission. These made it easy to establish who, both within and outside the Commission, were involved in a report; and who were the main target groups. I interviewed staff and commissioners involved with the three categories of rights, as well as stakeholders and members of target groups. In addition, media reports were helpful in establishing how KOMNAS HAM's efforts were received.[24] Together, these approaches provide considerable insight into the Commission's work processes, its performance, and ultimately its effectiveness.

## 3.2 KOMNAS HAM AND INTERRELIGIOUS MARRIAGE

### 3.2.1 Interreligious Marriage in Indonesia

Until 1974, interreligious marriages in Indonesia were regulated by the 1896 *Regeling op de Gemengde Huwelijken* (Regulation on Mixed Marriages, henceforth GHR).[25] The GHR stipulated that interreligious marriages should be conducted according to the religion of the husband. While the GHR did not require women to convert, for the purposes of the marriage they were required to follow their husband's religious laws (Butt 2008: 276). In 1973 the Indonesian Government proposed a new marriage law, in an attempt to create a uniform law for all Indonesians and to increase protection of women by placing restrictions on polygamy and unilateral divorce (Pompe 1988: 261-2). The draft law had a secular and general character (Bedner and Van Huis 2010: 179). It did not include specific provisions for interreligious marriage, but this was implicitly allowed. Article 2[26] determined that a marriage was valid when conducted

24 See also 1.3.

25 GHR is the commonly used abbreviation for the Regulation on Mixed Marriages, see Pompe 1998: 263.

26 'Perkawinan adalah sah apabila dilakukan di hadapan pegawai pencatat perkawinan, dicatatkan dalam daftar perkawinan oleh pegawai tersebut, dan dilangsungkan menurut ketentuan undang-undang ini, dan/atau ketentuan hukum perkawinan pihak-pihak yang melakukan perkawinan, sepanjang tidak bertentangan dengan undang-undang ini'. Translation: 'A marriage is valid when it is conducted before a marriage registry official, recorded in the marriage register by the mentioned official, and when it is carried out according

by an officer of the Civil Registry (*Kantor Catatan Sipil*, henceforth KCS) (Badan Pembinaan Hukum Nasional 1996:10). In addition, Article 11(2)[27] stipulated that differences between people, including religion, were not an impediment to marriage (Trisnaningsih 2007: 48-9). These articles raised such strong protests from conservative Islamic groups (Bedner and Van Huis 2010: 179) that the government chose to back down and make significant concessions. These included the removal of Article 11(2) (Pompe 1988: 263). A significant change was made to Article 2, which now stipulates that 'a Marriage is valid if it has been conducted according to the laws of the respective religions and beliefs of the parties involved'.[28] This placed religion at the core of marriage law in Indonesia (Bedner and Van Huis 2010: 179).

The 1974 Marriage Law thus made the performance of a religious ceremony a prerequisite for the registration of a marriage, which is arranged by the KCS (for non-Muslims) or the *Kantor Urusan Agama* (Office of Religious Affairs, henceforth KUA, for Muslims). The Marriage Law was unclear about the status of interreligious marriages. In 1975, the Supreme Court ruled that for such marriages the GHR still applied, and that they should be performed by the KCS rather than through a religious ceremony (Pompe 1988: 263, 271; Pompe 1991: 262). However, several developments in the 1980s made this practice increasingly difficult. In 1983, President Suharto instructed the KCS to refuse to perform marriages involving Muslims. These marriages were henceforth performed by the KUA, until the organisation was instructed by the Ministry of Religion to turn away Muslims who wished to marry non-Muslims (Butt 2008: 277-8). In addition, in 1987, during a joint meeting of the Ministers of Home Affairs, Justice and Religion, it was decided that marriages could no longer be performed by the KCS. The legal status of this decision was uncertain, as it was unclear whether a ministerial decree had a direct effect or whether it was a policy statement without legal force. In any case, civil servants have considered themselves bound to the Ministers' decision (Pompe 1988: 272). Then in 1989, the Supreme Court ruled that the GHR was no longer valid after all, as the Regulation was based on a civil marriage system which had since been abandoned (Pompe 1991: 265; Bedner and Van Huis 2010: 182). At this point, the KCS only registers marriages between non-Muslims (Butt 2008: 279). In addition, the *Kompilasi Hukum Islam* (1991, Compilation of Islamic Law, henceforth KHI), which is applied in Islamic courts, explicitly prohibits Muslims

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the stipulations of this law, and/or marriage law provisions of the parties who perform the marriage, insofar they do not contradict with this law'.

27 'Perbedaan karena kebangsaan, suku bangsa, negara asal, tempat asal, agama/kepercayaan dan keturunan tidak merupakan penghalang perkawinan'. Translation: 'Difference in nationality, ethnicity, country of origin, place of origin, religion/belief and descent are no impediment to marriage'.

28 'Perkawinan adalah sah bila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu'.

from marrying non-Muslims.[29] This is a very unusual interpretation[30] of Islamic marriage law, as at least marriages between Muslim males and non-Muslim females are generally allowed, providing that the woman belongs to a religion 'of the Book', meaning Christian or Jewish women (Pompe 1991: 263; Butt 2008: 277).[31]

Interreligious marriage in Indonesia has thus become plagued by religious, legal and administrative hurdles, and state institutions as well as many religious institutions are unwilling to marry couples with different religious backgrounds. The problem is most serious for those who want to marry followers of Islam, Buddhism and Hinduism, because these religions (as commonly interpreted in Indonesia) require non-adherents to convert before a marriage can take place (Butt 2008: 277). In those cases where couples manage to conclude an interreligious marriage, it remains to be seen whether the marriage can be registered (KOMNAS HAM and ICRP 2005: 3).[32]

Unregistered marriages create a number of problems for both the state and individuals. When marriages are not registered, the state loses important demographic data on its population. Unregistered marriages are also often disapproved of by families, and children born from the union only have a legal relationship with their mother, because their father's name does not appear on the birth certificate.

To overcome such problems, couples with different religious backgrounds use various strategies. The most common one is the conversion of the bride or the groom to his or her partner's religion. Subsequently, they may convert back to their original religion after the marriage registration (Trisnaningsih 2007: 39). Another possibility is to marry according to the religion of one party first, followed by a marriage ceremony according to the religion of the other party. This practice is frowned upon and many consider it 'an insult to religion' (*pelecehan terhadap agama*) (Badan Pembinaan Hukum Nasional 1996: 18). Some organisations, advocating pluralism, have facilitated interreligious marriages. Until 2005, the Paramadina Foundation in Jakarta concluded marriages between a Muslim and a non-Muslim party, which were then registered with the KCS.[33] The Foundation ceased the practice after strong opposition from radical Islamic groups. Another, but rather costly, strategy

29 Art 40(c) prohibits the marriage between a Muslim man and a non-Muslim woman, and Art 44 prohibits the marriage between a Muslim woman and a non-Muslim man.

30 The provisions in the KHI echo a 1980 *fatwa* of the Indonesian Council of Ulama (MUI), which explicitly forbade both male and female Muslims from marrying non-Muslims (Butt 2008: 281).

31 However, Butt notes that this provision is subject to further interpretation too, as some Muslim scholars argue that Muslim men may only marry non-Muslim women if there is a lack of available Muslim women (Butt 2008: 277).

32 Bedner notes that courts judge the validity of a marriage on a religious ceremony, rather than registration (Bedner 2001: 198).

33 Interview with Ilma Sovri Yanti, ICRP, 16 April 2008. The Paramadina Foundation had established a network of KCS officers who were willing to register the marriage.

is to marry overseas (Trisnaningsih 2007: 59). Upon return to Indonesia, the couple registers the marriage at a KCS, although this practice has reportedly become more difficult because of the KCS policy not to register marriages involving a Muslim party.[34] Marrying outside Indonesia has also attracted criticism; KOMNAS HAM member Soelistyowati Soegondo stated she found the practice disrespectful to Indonesian law.[35] NGO representative Ahmad Nurcholish, although sympathetic towards these couples, commented that 'Indonesian law should not bow to the laws of other countries'.[36]

From a human rights perspective, the Indonesian Marriage Law is problematic. As we have seen above, the provision that marriages are contracted based on religion poses problems for the freedom of religion of partners of different religions. In addition, by placing religion at the core of the Marriage Law, problems have also emerged for people who do not adhere to a religion. These realities are in contradiction with international interpretations of the right to freedom of religion, to which Indonesia has subscribed.[37] According to the UN Human Rights Committee, the freedom of religion extends to theistic, non-theistic and atheistic religions and beliefs, including the right not to profess a religion or belief.[38] In relation to marriage this means that the state should facilitate a civil or secular marriage for those who prefer that for whatever reason. The present lack of this option in Indonesia therefore constitutes a violation of the freedom of religion.

The practice regarding interreligious marriage in Indonesia raises other human rights concerns as well. If in order to marry, people are required to convert to the religion of their partner, this can be considered a case of forced conversion, and therefore in violation of the freedom to religion (Lerner 1996: 94-7).[39] The problems faced by couples of different religious beliefs also affect their freedom of marriage[40] and their right to establish a family.[41] Finally, the difficulties some encounter in obtaining a marriage certificate indicate that they are not receiving equal treatment to other citizens in this respect; which violates the right to equality.[42]

International norms on the freedom of religion clearly indicate that the state must treat people equally, irrespective of their convictions or beliefs. This principle has been accepted by Indonesia through its ratification of the ICCPR

34 Interview with Ahmad Nurcholish, ICRP, 22 April 2008.
35 Comments made during a discussion forum, 4 September 2006. Soegondo was one of the key informants for this Chapter, as she was involved both in the report on the National Civil Registry (3.2.3) as well as issues related to the right to a fair trial (3.3).
36 Interview, 22 April 2008.
37 In 2006, Indonesia ratified the ICCPR.
38 General Comment no. 22, CCPR/C/21/Rev.1/Add.4, 30 July 1993
39 ICCPR, Art 18; the Indonesian Constitution, Art 28E; HRL, Art 22 of the 1999 Human Rights Law (HRL).
40 UDHR, Art 16(1).
41 ICCPR, Art 23(2); the Indonesian Constitution, Art 28B; HRL, Art 10(1).
42 ICCPR, Art 16; the Indonesian Constitution, Art 28D (1); HRL, Art 5(1).

in 2005 and the inclusion of the freedom of religion in national law. However, the provisions of the Marriage Law, judicial readings, and the practices surrounding interreligious marriage illustrate that there is a disparity between international human rights norms and national law and practices.

### 3.2.2 KOMNAS HAM's Report on Interreligious Marriage

While, as we have seen, several human rights concerns relate to interreligious marriage in Indonesia, according to KOMNAS HAM representatives the Commission has received few complaints about the issue.[43] However, this has not prevented the Commission from addressing it, which is likely the result of the amount of public debate on the matter. Interreligious marriages have received considerable attention in the media, often through Indonesian celebrities who wish to marry foreigners from a different religious background. In 2005, the Indonesian Council of Ulama (MUI) issued a *fatwa* prohibiting interreligious marriage; and many conservative Muslim groups oppose interreligious marriage because of a belief that it will encourage conversions to Christianity (Trisnaningsih 2007: 39). Considering the sensitivities and controversies relating to mixed marriage, KOMNAS HAM's decision to address the issue in two reports was quite courageous.

In 2005, the first report, *Pernikahan Beda Agama: Kesaksian, Argumen Keagamaan & Analisis Kebijakan* (Interreligious Marriage: Testimonies, Theological Arguments and Policy Analysis) was published. The initiator of the research underlying the report was KOMNAS HAM Commissioner Chandra Setiawan, who became commissioner for the right to freedom of belief (*hak atas kebebasan kepercayaan*) following the 2004 restructuring,[44] and whose activities therefore included matters pertaining to the right to freedom of religion. Setiawan had become interested in interfaith marriage as a board member of the Indonesian Conference on Religion and Peace (ICRP).[45] In late 2004, he proposed that KOMNAS HAM should publish a report on interreligious marriage. A few commissioners immediately supported the idea, while many were less enthusiastic, as they found the issue too controversial and feared a backlash from conservative Islamic groups. Some commissioners were more personally opposed, because they held that interreligious marriages were a deviation of religion (*sesat*) and therefore should not be facilitated. Eventually however, Setiawan

43 Interviews with Chandra Setiawan, commissioner, 21 September 2006; and Ahmad Baso, commissioner, 7 May 2008. It was also difficult to establish how many cases KOMNAS HAM received pertaining to freedom of religion in general, as the Commission has not classified its complaints in that manner.

44 See 2.4.1.

45 The ICRP is a Jakarta-based NGO which concentrates on issues of religion, pluralism and non-discrimination.

was allowed to proceed, even though several commissioners refused to attend group discussions during the course of the research.[46]

The report on interreligious marriage was written in cooperation with ICRP, which greatly facilitated Setiawan's task. Not only did he know this organisation well, but the ICRP had already gathered most of the data needed for the report and had an extensive network of informants, including people who had contracted interreligious marriages, representatives from religious institutions, and KCS and KUA officials. In fact, the report was drafted primarily by the ICRP. The ICRP had strategic reasons for cooperating with KOMNAS HAM:

> 'We had political reasons [...]. KOMNAS HAM has much more power to break through [*daya dobrak*] than ICRP: KOMNAS HAM is a brand. Working with them made the report stronger, and we could also benefit from their network [in order to promote the report]. We are primarily a religious organisation, whereas KOMNAS HAM has a network within the bureaucracy'.[47]

The ICRP thus expected that, by using KOMNAS HAM's networks into higher levels of government, there was a greater chance that the report's recommendations to be accepted. In this case an NGO and an NHRI used each other: one as a resource base, and the other as a platform for human rights activism.

The report focuses particularly on perceptions of interreligious marriage within state institutions, such as the government, parliament and courts; but looks also at the views of religious organisations, NGOs and the general public (KOMNAS HAM and ICRP 2005: 10-12). The report starts by describing the personal experiences of ten couples who have contracted interreligious marriages. It then discusses the matter from the theological perspectives of Islam, Catholicism, Protestantism, Buddhism, Hinduism, Confucianism, and mystic beliefs respectively; arguing that most religions do allow interreligious marriages. The report contends that the approach of the Indonesian state towards interreligious marriage does not reflect or accommodate these religious perceptions (KOMNAS HAM and ICRP 2005: 221).

Thus, rather than directly promoting the right to freedom of religion, the report argues that the state should be more accommodating of theological perspectives. This illustrates the careful manner in which the report frames the legitimacy of interreligious marriage: rather than presenting it as a human right, it is argued that it is allowed from a religious perspective and therefore should be guaranteed by law. Here, the Commission's translation of the international human rights framework takes place by referring to religious perceptions and is used to support the legal analysis. This approach is not common in the work of KOMNAS HAM. Both commissioners and staff members have argued that using cultural and religious frameworks may be problematic,

46 Interview with Ahmad Nurcholish, 22 April 2008.
47 Ibid.

because a framework based on Javanese cultural norms may alienate non-Javanese and vice versa, and likewise framing human rights in a 'Christian discourse' may upset Islamic or other religious groups and vice versa. The use of religious frameworks in the report illustrates the sensitivities surrounding interreligious marriage, and therefore the necessity to gain social support for the issue.

According to the report, the core of the issue is the common interpretation of the Marriage Law, which is to reject interreligious marriages. The report notes that interreligious marriages in fact are not prohibited in the Marriage Law, but only in the KHI, which is applied by the KUA but not by the KCS. This means that different standards are applied to different Indonesian citizens, which violates the right to equality. The report criticises KCS, as some of them will register interreligious marriages, while others do not. Moreover, those KCS which do register these marraiges limit themselves to marriages concluded by a religious ceremony. They will not register marriages if one of the parties adheres to a religion not recognised by the Indonesian state. The report also questions the professionalism of KCS officials, many of whom seem to be unaware of the 1989 Supreme Court ruling that the KCS have the authority to conclude marriages. Another point of criticism concerns the provision in the Marriage Law that religious law determines whether a marriage is valid or not; as well as the stipulation that the husband is the head of the family (KOMNAS HAM and ICRP 228-239, 265).

In a discussion of Indonesia's human rights obligations, the report argues that while the freedom of religion is guaranteed, in practice it has not been protected adequately. Particularly problematic is the 1978 Circular Letter of the Minister of Home Affairs (*Surat Edaran Menteri Dalam Negeri*), which determines that Islam, Catholicism, Protestantism, Hinduism and Buddhism are Indonesia's official religions. Another major violation is the People's Consultative Assembly Decision no. II of 1998, which stated that followers of *Kepercayaan* (mystic religions) 'do not belong to a religion […] their followers are advised to adhere to a religion that is recognised by the state'[48] (KOMNAS HAM and ICRP 2005: 252). Concerning the 1974 Marriage Law, the report argues that the Law 'obviously contradicts Article 16(1) of the UDHR and Article 10(1) of the 1999 Human Rights Law, which both concern the right to marriage' (KOMNAS HAM and ICRP 2005: 258).

The report concludes with a number of recommendations for the Ministry of Home Affairs, the Ministry of Religion, the Ministry of Justice and Human Rights, Parliament, the courts, religious institutions and for KOMNAS HAM itself. Among the recommendations are the revision of the Marriage Law, and the

48 This Decision was passed by the MPR in March 1998. In November 1998, the MPR issued another Decision (TAP MPR no.IX/1998) in which TAP no.II/1998 was declared invalid, as its 'content is no longer in accordance with society's situations and conditions'.

enactment of a Draft Law on the Civil Registry.[49] The report advises that interreligious marriages should be registered by the KCS (KOMNAS HAM and ICRP 2005: 284-285). It also recommends a revision of the KHI, to accommodate interreligious marriages 'based on the principle of mutual respect and in striving for the right to follow religious teachings as well as to respect each other's beliefs'. The report goes beyond the issue of interreligious marriage alone, by calling for the immediate elimination of discriminatory practices, such as the refusal to register marriages of those who do not adhere to one of the officially recognised religions (KOMNAS HAM and ICRP 2005: 286-287). Religious institutions are called upon to respect the various interpretations regarding interreligious marriage. Religious institutions not accepting the practice 'will only psychologically hurt persons who contract an interreligious marriage and their families' (KOMNAS HAM and ICRP 2005: 288). While the report argues for recognition and facilitation of mixed marriages, it carefully avoids recommending these unions. Rather, the report urges couples to sensibly consider their plans and discuss them with clergy, psychologists, friends and families (KOMNAS HAM and ICRP 2005: 289).

The two human rights principles most often referred to in the report are the freedom of religion and the freedom of marriage, as guaranteed in the UDHR.[50] The report gives a word by word translation of the provisions in the UDHR, and does not use cultural or historic frameworks to underline their relevance in the Indonesian context. The need for this is perhaps limited, because the Indonesian Constitution and the 1999 Human Rights Law contain them as well. However, the relevance of the rights is also underlined by a theological analysis, to demonstrate how various religions call for religious freedom and consider the possibilities for interreligious marriage.

The report argues that interreligious marriage should be facilitated by the KCS. The difference between the report's advice and the 1989 Supreme Court ruling is that the latter authorised the KCS to conclude interreligious marriages, whereas the report argues that the KCS should simply register them. While the ruling of the Supreme Court allows a secular marriage, the report does not; a position based on the argument that Indonesia is a religious state and therefore marriages should have a religious character (KOMNAS HAM and ICRP 2005: 253). This is, as was noted above,[51] not consistent with how freedom of religion is understood on an international level. However, advocating secular marriage would likely be ineffective in the Indonesian context and would have attracted strong criticism from all sides, including from within KOMNAS HAM and ICRP itself. Therefore the report emphasizes that the state (specifically the KCS) should be a service provider to register marriages, and should not be

49 See 3.2.3.

50 Little reference is made to the ICCPR, which at the time of the report had not yet been ratified by Indonesia.

51 See 3.2.1.

involved in concluding or determining the religious validity of marriages. This should remain the prerogative of religious institutions, although the report urges them to reflect critically on their positions towards interreligious marriage, and argues that, in fact, most religions allow for such unions. Before examining how this report was received, we will consider another KOMNAS HAM report, which was also related to freedom of religion and interreligious marriage.

### 3.2.3 KOMNAS HAM's Report on the National Civil Registry

In the same year as the preceding report was published (2005), KOMNAS HAM published another report which dealt with interreligious marriage, albeit in an indirect way. The report *Catatan Sipil Nasional* (National Civil Registry) was an initiative from Commissioner Soelistyowati Soegondo,[52] who had started the research for the report in 2000, because she was 'personally interested in the matter'. Soegondo only reported her initiative to the Commission in 2002: 'before 2002, KOMNAS HAM's focus was very different. It concentrated on big cases, criminal cases. This is a civil issue'.[53] In contrast to Chandra Setiawan, Soegondo quickly gained approval from her fellow commissioners, as the topic was much less controversial. Soegondo's professional background may also have helped, as – unlike Setiawan, who was new to KOMNAS HAM and was an NGO representative – she had been with the Commission for several years; and as a former legal drafter and judge she was close with commissioners who had worked in government or served in the armed forces. Just as with the report on mixed marriages, this report on the Civil Registry was a joint effort by KOMNAS HAM and other organisations – this time including government ministries.[54] Together, they formed the Consortium on the National Civil Registry (*Konsortium Catatan Sipil Nasional*), with Soegondo as chair.

The report argues the need from a human rights perspective to register births, marriages, divorces and deaths through a single agency: the National Civil Registry, under the Ministry of Home Affairs. The report's recommendations translated into a draft law on the National Civil Registry (*Rancangan Undang-Undang Catatan Sipil Nasional*), which was eventually enacted as Law 23/2006 on the Administration of the Population.

The human rights that the report is concerned with primarily are the right to form a family (*hak berkeluarga dan melanjutkan keturunan*), and the right to justice (*hak memperoleh keadilan*). The report argues that the state must recognise

52 Soegondo was commissioner from 1998 until 2007. After the 2004 restructuring, Soegondo was commissioner for 'the right to obtain justice' (*hak memperoleh keadilan*).

53 Interview, 16 May 2008.

54 Members of the Consortium included representatives of the Ministry of Home Affairs, the Ministry of Justice and Human Rights, the Ministry of Religion, and various NGOs.

key life events through registration at the civil registry, which will result in the issuance of a certificate, which will constitute the means by which people can claim their rights (KOMNAS HAM 2005: 8). Similar to the report on interreligious marriage, this report also argues that the main task of the state is to serve its citizens (KOMNAS HAM 2005: 5-11, 28, 41-57).

The report argues that although there is a civil registry, in practice registering life events is often difficult for people who adhere to religions not acknowledged by the state. Not only is this a violation of freedom of religion as guaranteed in the Indonesian Constitution, it also means that data collected regarding marriages are incomplete (KOMNAS HAM 2005: 62-63). The report pays particular attention to children's and women's rights in the Constitution, the 2002 Law on Child Protection, the Convention on the Rights of the Child, and the 1993 Vienna Declaration (KOMNAS HAM 2005: 69-71).

The report identifies that the implementation and interpretation of the Marriage Law has left citizens 'confused' and has led to a lack of legal certainty. It refers explicitly to marriages that have been contracted according to religions not recognised by the state, as well as interreligious marriages. The report recommends that these discriminatory practices should be put to an end by establishing an organisation mandated to register all marriages, irrespective of religion or ethnic identity. In some cases (i.e. interreligious marriages, after permission of the court) the organisation should even be allowed to marry people officially (KOMNAS HAM 2005: 14-20). As well, the report argues that the principle of *isbat nikah*, mentioned in the KHI, should be adopted into national law. This procedure means that Islamic courts can legalise an unregistered marriage retroactively, in cases where a marriage certificate is missing, or for marriages that have been contracted before the enactment of the Marriage Law.[55] The report does not propose that this arrangement should extend to interreligious marriages (KOMNAS HAM 2005: 77-80). For interreligious marriages, the report argues that:

> '[The Civil Registry] is under the obligation to register and is not allowed to interpret on behalf of the religion which is adhered to, or the beliefs that are held, by a person. The refusal to the obligation to register is considered a violation [of the law] and attracts a penalty. (KOMNAS HAM 2005: 82)'.

55 Although *isbat nikah* was meant to be a transitional article providing for the retroactive recognition of marriages contracted before the enactment of the Marriage Law, the wording of the provision is ambiguous and has been interpreted by the Religious Courts to also apply to marriages contracted after 1974. *Isbat nikah* therefore does not only allow non-registration to be rectified, but also allows divorced women to obtain birth certificates for a child otherwise considered born out of wedlock. In addition, it has been successfully used by widows who seek recognition of their rights to the pension of their deceased husbands (Bedner and Van Huis 2010: 187-188).

In the draft law attached to the report, Article 26 (1) provides for the registration of marriages: 'every marriage has to be registered by an Officer of the Civil Registry'; while Article 27 states that 'the registry of a marriage as meant in Article 26 (1) includes marriages that have been determined by the Court' (KOMNAS HAM 2005: 102). The report's argument that the Civil Registry should have the mandate to marry people in certain cases has not been included in the draft law.

The draft law on the Civil Registry does not refer explicitly to interreligious marriages. In an interview, Soelistyowati Soegondo stated that many members of the Consortium were in favour of such a clause, but the Ministry of Home Affairs warned that such a provision would attract much opposition in Parliament.[56] As a compromise, Article 27 states that marriages determined by the courts will also be registered. Article 28 stipulates that a marriage certificate is also issued for *perkawinan campuran* (mixed marriages). Unlike the Marriage Law, the elucidation defines mixed marriages as those between an Indonesian citizen and a foreign national *and interreligious marriages* (emphasis added) (KOMNAS HAM 2005: 125). Thus the draft law includes an avenue for couples who seek recognition for an interreligious marriage. While not as straightforward as the provisions that apply to citizens who marry someone with the same religious background, it is quite an improvement.

The report on the National Civil Registry is strongly based on human rights arguments. It also frames its arguments in a discourse of development: the establishment of a civil registry is in conformity with principles of *Reformasi* and efforts of legal reform, as well as a break from the colonial and New Order past. In the argument for the inclusion of the concept of *isbat nikah,* the report seeks to build bridges with the Islamic community, in contrast to the report on interreligious marriages, which regards the KHI only as an obstacle for the recognition of interreligious marriage. Even if the report focuses on the registry of life events in general, the registration of marriages, and in particular interreligious marriages, is by far the most controversial issue. That it was not given prominent attention was certainly for strategic reasons: the members of the Consortium were well aware that leaving out a direct reference to interreligious marriage would give them an advantage when the draft law was discussed by parliament.

### 3.2.4 Performance and Effectiveness

The two reports studied both deal with interreligious marriage, but in different ways. One is dedicated to the issue, the other deals with it as part of a broader matter. Their aims are also dissimilar: the report on the National Civil Registry

56 Interview, 16 May 2008.

directly promotes a complete new law, whereas the report on interreligious marriage limits itself to changing perceptions of interreligious marriage and an amendment to the Marriage Law. Both reports are of high quality – they are detailed and include a thorough discussion of international and national law, as well as an analysis of relevant practices. The report on interreligious marriage even adds a theological analysis and personal experiences of couples who have contracted interreligious marriages. By publishing these reports KOMNAS HAM has given attention to a very relevant yet controversial issue in Indonesia.

The effectiveness of KOMNAS HAM with regard to the report on interreligious marriages has to be considered against the general goals of NHRIs. This includes the socialisation of human rights, which in this particular case means changing perceptions on interreligious marriage so that they are in compliance with international human rights standards. To change perceptions, the publication of a report alone is not enough; also required is socialisation of the report's findings. To date, such socialisation has been minimal. Both KOMNAS HAM and ICRP considered their job done after the report had been published, and its distribution remained limited to their respective networks.[57] No press conferences were held, and no general campaign followed. The main reason for this was continued resistance from within KOMNAS HAM. The report was not able to convince those commissioners who had opposed the project from the start. The rights to freedom of religion and freedom of marriage are contested within the Commission and in society. When one of the report's editors, Ahmad Baso,[58] was elected Commissioner in 2007, he did not use the opportunity to take the matter any further: 'we have finished the report, and we [KOMNAS HAM] never receive complaints on interreligious marriage. The matter is sufficiently dealt with by the ICRP'.[59] The ICRP, however, has a much smaller network, which concentrates on other NGOs. It does not have personal relationships facilitating direct access to decision-makers in the government. In sum, despite the strength of the report, and its provision of ample opportunities to develop a wide range of activities regarding interreligious marriages from a human rights perspective, the report's flow on effects for human rights appear to have been minimal.

Neither has the publication of the Report on Interreligious Marriage led KOMNAS HAM to recommend to the government the amendment of the 1974 Marriage Law, as the report suggested. While the report's research team initially wanted to recommend such amendments directly to government, such a recommendation would not have been supported by a majority of commissioners, and therefore the report only contained a recommendation to KOMNAS HAM. By making such a concession to the more conservative commissioners,

57 Interview with Ahmad Nurcholish, 22 April 2008.
58 Before his election to KOMNAS HAM, Baso was a member of ICRP.
59 Interview, 7 May 2008.

the research team together with Chandra Setiawan made sure that the report could at least be published. Ironically, while the negotiation between the research team and more conservative commissioners was necessary for the report to be produced, it also paved the way towards its failure.

KOMNAS HAM's effectiveness with regard to its report on the Civil Registry is an entirely different matter, which has to be seen in the light of the enactment of the 23/2006 Law on the Administration of the Population.[60] This Law was considered a priority by Parliament because it would replace colonial legislation and would 'provide protection and legal certainty to the Indonesian people in obtaining their civil rights' (Dewan Perwakilan Rakyat 13 November 2006). The bill received overwhelming support from the various political parties. In fact and despite the different title, many provisions of the Law on the Administration of the Population are similar to the draft law on the Civil Registry.[61] Wicipto Setiadi, Director of the Harmonisation of Legislation at the Ministry of Justice and Human Rights, confirmed that Parliament had merged elements of the draft law on the National Civil Registry into the Law on the Administration of the Population.[62] In this particular case KOMNAS HAM, as part of the Consortium, was able to successfully connect with ongoing legislative debates.

The registration of marriages is provided for in Article 34(1) of the Law on the Administration of the Population. This article states that: 'marriages that are valid based on the provisions in laws, must be reported by a person of the Implementing Organisation in the place where the marriage was concluded, no later than 60 days after the date of the marriage'. In addition, Article 35(a) of the Law determines: 'the registry of marriages as meant in Article 34 also applies to marriages that have been determined by the Court'. The elucidation of Article 35 states that court orders can be obtained for 'marriages that have been concluded between persons of different religions'. This is similar to the provisions regarding interreligious marriages in KOMNAS HAM's law on the Civil Registry.

While many provisions in the Law on the Administration of the Population are similar to those proposed by the Consortium in the draft law on the National Civil Registry, there is a difference in terms of their respective

60 *Undang-Undang Administrasi Kependudukan*, no. 23/2006.

61 According to Wahyu Effendi, chairman of the NGO GANDI (*Gerakan Perjuangan Anti Diskriminasi,* Movement for the Struggle Against Discrimination) and member of the Consortium on the Civil Registry, 'the Law on the Administration of the Population is for eighty percent concerned with the civil registry, it is [a copy of] the draft law on the National Civil Registry' (Kompas 19 December 2006, see also Effendi's op-ed in Sinar Harapan, 6 January 2006). This view was also shared by Soelistyowati Soegondo: 'I do not hesitate to say that the Law on the Administration of the Population came into effect because of KOMNAS HAM. It is in fact what we proposed through the draft law on the Civil Registry' (interview, 16 May 2008).

62 Interview, 27 May 2008.

approaches. The draft law on the National Civil Registry was rights-based, and explicitly refers to the right of every person to obtain a civil registry certificate,[63] which right is not included in Law 23/2006.[64] In a critique, Wahyu Effendi has argued that the Law focuses predominantly on obligations and sanctions, which disproportionally target individuals rather than officials (Kompas 19 December 2006).

However the reference to interreligious marriage in the elucidation means that finally the law in Indonesia refers to such unions, and allows the people involved to seek approval from the courts with the intention of having their marriage registered. This is an important step forward and means that KOMNAS HAM, as part of the Consortium on the Civil Registry, has been effective in this respect.

That KOMNAS HAM has addressed interreligious marriages in these two reports is due to the personal initiatives and interests of commissioners. Chandra Setiawan pursued the publication of the interreligious marriage report despite opposition from within the Commission, while Soelistyowati Soegondo was met by a general disinterest in the issue of a civil registry. This demonstrates that the performance of KOMNAS HAM depends strongly on individuals. Nevertheless, once the reports are published, any further action leading to positive change – a key index for evaluating the reports' effectiveness – depends on the Commission as a whole. The lack of socialisation of the Report on Interreligious Marriages illustrated the opposition to the issue within KOMNAS HAM. The report therefore also appeared to be a compromise: while Setiawan was allowed to publish the report, he was prevented from pursuing the matter further.

While the effects of the Report on Interreligious Marriage were minimal, the Report on the National Civil Registry did achieve legal change in the direction KOMNAS HAM advised. This difference can be explained largely by the nature of the two reports. By specifically dealing with interreligious marriage, the first report raised much resistance, whereas the second one was less confrontational and more palatable for political parties. Further, the former was written in cooperation with an NGO, whereas the latter was associated with a much larger group of organisations, including state bodies. Such broad support, as well as good political timing, contributed to its success. KOMNAS HAM was able to connect its human rights concerns with ongoing legislative processes, which proved an effective strategy.

63 Art 6(b).

64 Art 2(a) states that every inhabitant is entitled to a Population Document (*Dokumen Kependudukan*), which refers to identity cards (*Kartu Tanda Penduduk* or KTP) or family cards (*Kartu Keluarga* or KK).

## 3.3 KOMNAS HAM AND FAIR TRIAL

### 3.3.1 The Right to a Fair Trial

In international human rights law, the right to a fair trial is guaranteed in the UDHR[65] and the ICCPR. According to Article 14(1) of the ICCPR,

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law […]'.

Article 14 (2) concerns the right to be presumed innocent until proven guilty; Article 14 (5) the right to review by a higher court; and Article 14 (7) prohibits double jeopardy. Article 14 (3) includes the minimum fair trial rights in criminal proceedings, which include the right to be informed promptly and in detail about the nature and cause of a charge; adequate time to prepare one's defence and to communicate with a counsel of one's own choosing; and the right not to be compelled to testify against oneself or confess guilt.[66] The ICCPR was ratified by Indonesia in 2005, and the right to a fair trial is also guaranteed in the Constitution,[67] the 1999 Human Rights Law[68] and the Code of Criminal Procedure (*Kitab Undang-Undang Hukum Acara Pidana*, henceforth KUHAP).[69]

At the beginning of this Chapter it has been noted that the Indonesian law includes many guarantees, but Indonesia has serious problems in implementing these guarantees, both legally and in practice. As regards the legal problems, many of the KUHAP's provisions do not meet international human rights standards, and in practice police and public prosecutors often neglect the legal protections in place (Amnesty International 2006: 2; Fitzpatrick 2008: 504; HRW 2004: 33). It has been argued that particularly in conflict areas such as Aceh and Papua, and previously East Timor, where KOMNAS HAM has offices[70] and performed many investigations, the KUHAP has had 'little meaning or application' (Fitzpatrick 2008: 504). To make matters worse, Indonesia's judiciary has done little to improve this situation, a problem which can be attributed to a history of political interference by the regime in the judicial process. Particular-

65 Art 10; 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

66 In addition to the provisions in Article 14 discussed here, Art 16 stipulates that 'everyone shall have the right to recognition everywhere as a person before the law'.

67 Art 28D (1).

68 Arts 3(2), 5(2), 17.

69 Chapter VI (The Rights of the Accused and Suspects) and Chapter VII (Legal Aid).

70 The East Timor office was, of course, closed after East Timor's independence in 1999.

ly during the New Order, the Indonesian judiciary became notorious for being corrupt and under the control of the executive. According to Lev (2000) the legal process barely functioned: 'the courts were corrupt and politically submissive, the prosecution and police abusive, statutory law out of date but in any case often marginal and ineffectively enforced' (Lev 2000: 3). Since the demise of the New Order in 1998, significant institutional reforms have been initiated, including the establishment of a Constitutional Court (*Mahkamah Konstitusi*, or MK, established 2003) and a Judicial Commission (*Komisi Yudisial*, or KY, established 2004) which may open investigations into complaints regarding the performance of judges. Nonetheless, the court system has far from recovered from 40 years of authoritarian government.

### 3.3.2 KOMNAS HAM and Fair Trial

It is difficult to determine exactly how many complaints KOMNAS HAM receives on the right to a fair trial, as the Commission does not classify its complaints under this category. However, it seems there are many; since in 2002 half of all complaints concerned arbitrary arrest, detention and enforced disappearances (KOMNAS HAM 2002: 66-7). Similarly, in 2006 KOMNAS HAM received 557 complaints[71] associated with the right to a fair trial, around 40 percent of all complaints received that year (KOMNAS HAM 2007: 69-70).[72] One would therefore expect that KOMNAS HAM would continuously seek to improve the quality of the regular judicial process.

This is not the case, however: judicial process has not been a routine object of KOMNAS HAM's investigations.[73] In its first years the Commission occasionally sent observers to court cases,[74] and visited prisons or other places of detention to look at persons held without warrant.[75] In 2000, KOMNAS HAM organised a training programme for officials of the Attorney General's Office, the Supreme Court, the Military and Criminal Courts, as well as lawyers and academics. This programme focused on judicial independence, the rights of suspects, and equality before the law. Attention was also paid to topical subjects, such as the 1997/1998 case of the activists who disappeared (KOMNAS HAM 2000: 51-5). This training, however, was never repeated. In 2006, KOMNAS HAM visited several prisons and places of detention in Sumatra and Java. The

71 Of this number, 521 complaints related to the right to obtain justice, 12 related to the right to life, and 24 related to the right to personal freedom.

72 Local branches of KOMNAS HAM, particularly those in conflict areas, tend to receive an even larger number of complaints related to the right to a fair trial. At the Aceh office, for instance, around fifty percent of complaints received yearly relate to the right to a fair trial (KOMNAS HAM 2000: 151; KOMNAS HAM 2001: 202).

73 A notable exception was its 1994 investigation into the Marsinah case (see 2.2.3).

74 For instance in 1995 to the *Tempo* case.

75 Interview with Asmara Nababan, 28 August 2006.

Commission found that prisoners and detainees seldom received copies of their verdicts, which made it difficult for them to prepare an appeal. The Commission attributed this situation to a lack of coordination between detaining organisations and the courts (KOMNAS HAM 2007: 73-4).[76] This overview suggests that KOMNAS HAM has focused mainly on what happens to individuals after a trial, rather than on their rights before and during this process.

By contrast, in its investigations of cases of gross human rights violations, KOMNAS HAM has paid considerable attention to the rights associated with a fair trial. For instance, the investigation into violations in East Timor following the 1999 referendum found evidence of mass killings, torture and other forms of ill-treatment, as well as of enforced disappearance (KOMNAS HAM 2000: 110-111). Similarly, in the investigation into the 1984 Tanjung Priok case the Commission found that enforced disappearances and extrajudicial killings took place (KOMNAS HAM 2001: 124-125). Comparable conclusions were reached in the Commission's investigations into the 1998 cases of Trisakti, Semanggi I and Semanggi II (KOMNAS HAM 2003: 99-101). In 2005-2006, KOMNAS HAM also investigated the disappearances of 25 human rights activists in 1997 and 1998 (KOMNAS HAM 2007: 87-91).[77] In all these cases, KOMNAS HAM has consistently upheld international human rights norms, and related them to national human rights guarantees, but in its reports the Commission never refers to the right to a fair trial as such. Apparently the Commission instead considers torture and enforced disappearances as independent topics. However, rights such as the freedom from torture are an important precursor to guaranteeing the right to a fair trial. This has been recognised in international human rights law, and therefore it could be expected that KOMNAS HAM would relate those rights to the right of a fair trial.

KOMNAS HAM has also provided support in cases where human rights complaints have been brought to other organisations. In April 2007, for instance, the Jakarta Legal Aid Institute (LBH Jakarta) received a complaint from the family of Teguh Uripno, who had died in police custody.[78] He had allegedly been arrested without warrant and was subjected to beatings during custody. The family sought LBH Jakarta's help to bring charges against those involved in Teguh's arrest and detention. LBH Jakarta organised a press conference at KOMNAS HAM's premises, and the Commission sent a letter to the Chief of Police, in which it asked for information about the incident. Two weeks

76 Interview with Soelistyowati Soegondo, 11 September 2006. She also commented that delays in informing people (and detaining authorities) about a verdict can influence the status of a person, with respect to whether he or she is regarded as a detainee or prisoner. This is important, as prisoners may receive visitors more often, can apply for remission, and may be allowed to work outside their cells. The visits were an initiative of Soegondo herself, once again showing how important personal initiatives are in determining which issues are addressed by KOMNAS HAM.

77 See also 2.4.2.

78 The file of this case was accessed at LBH Jakarta, June 2008.

later, the Chief of Police admitted the victim had been beaten and kicked, and that the two policemen responsible for the ill-treatment had been arrested -two days after the Commission had sent the letter- and would be brought to trial. KOMNAS HAM clearly succeeded in exercising pressure on the agencies involved,[79] but to date, cases such as this one have been rare.[80]

It may also have been expected that KOMNAS HAM would participate actively in discussions regarding the revision of the Code of Criminal Procedure. These discussions commenced in 1998, following the fall of the New Order. While the Code guarantees several rights for suspects and defendants,[81] it falls short on the right to be informed promptly about the grounds for the arrest and the charges,[82] as well as on the right to be tried promptly by an independent and impartial court.[83] Further, it does not include an explicit prohibition on torture;[84] nor on the use of information in court which has been obtained through torture or ill-treatment.[85] On all these points, the Code of Criminal Procedure is not in accordance with international human rights standards, and therefore KOMNAS HAM would be expected to push for change here.

In 1999, KOMNAS HAM was approached by the Ministry of Justice and Legislation (later renamed the Ministry of Justice and Human Rights) to participate in the revision of the Code (Komnas HAM 1999: 55), but the Commission declined the invitation[86] for reasons that will be explained below.

### 3.3.3 Performance and Effectiveness

The limited attention KOMNAS HAM has given to fair trial in the judicial process indicates that the issue has little priority within the Commission. Indeed, former KOMNAS HAM Chairperson Abdul Hakim Garuda Nusantara stated that:

> 'KOMNAS HAM has not specifically conducted a programme related to the right to a fair trial as all our time has been used to conduct investigations into human rights violations of the past, as well as human rights violations that happened after *Reformasi*. Indirectly, we have dealt with fair trial in all of those investigations. So even while KOMNAS HAM did not deal with fair trial specifically, it has always been

79 LBH staff member, May 2007.
80 Personal communication with KOMNAS HAM and LBH Jakarta representatives, June 2008.
81 These include the right to an expeditious trial (Art 50), the right to legal assistance (Art 54 and Chapter VII on legal assistance), and the right to be free from duress during interrogation and trial (Art 52).
82 I.e. that this should occur at the time of the arrest or shortly thereafter, in any case before interrogation starts as provided for in the ICCPR, Art 14(3) (a).
83 ICCPR, Art 14(1).
84 ICCPR, Art 4 and 7; CAT, Art 2(2).
85 CAT, Art 15.
86 Interview with Roichatul Aswidah, 25 September 2006.

> a concern in the cases that we have addressed, and we have done this in the best way we could'.[87]

It is true that in general KOMNAS HAM's investigations into gross violations of human rights have been of good quality, with some of them even exceeding the expectations of the most critical human rights observers. The reports are detailed in their chronology of events, include the testimonies of both victims and perpetrators,[88] and refer extensively to national and international human rights provisions. However, the reports of these investigations were focused on bringing specific cases to court, rather than promoting broader reforms in the area of fair trial.

Considering the vast challenges Indonesia faces in bringing fair trial rules and practice into conformity with human rights standards, the question inevitably arises why the Commission has not paid more attention to this matter. Former director of LBH Jakarta, Uli Parulian Sihombing, has blamed the absence of a commissioner for this right. Yet, commissioners for 'the right to feel safe' (*hak atas rasa aman*) and 'the right to life' (*hak untuk hidup*), which also cover issues such as arbitrary arrest and enforced disappearances;[89] 'the right to obtain justice (*hak memperoleh keadilan*); 'the right to individual freedom' (*hak atas kebebasan pribadi*); as well as 'the protection of women' (*perlindungan perempuan*) and 'the protection of minorities' (*perlindungan minoritas*) could have put fair trial issues more centrally than they have done. Commissioner Soelistyowati Soegondo argued that the limited focus on fair trial was due to a lack of interest from commissioners: they simply chose other topics to focus on.[90]

However, besides the argument of lack of concern, it is likely that the nature of KOMNAS HAM's mandate has been important as well. The 1999 Human Rights Law stipulates that KOMNAS HAM cannot address cases that are pending in court or are being investigated by another body (e.g. the police). This limitation, which is common for NHRIs, serves to prevent overlapping jurisdictions, and is based on the presumption that the final decision in a case should always be made by a court (Centre for Human Rights 1995: 12-3). Indeed, with the exception of the Marsinah case,[91] KOMNAS HAM has never opened investigations into cases that were pending in court. Apparently, KOMNAS HAM's strict interpretation of this restriction has meant that the Commission does not address violations of human rights during the legal process

87 Interview with Abdul Hakim Garuda Nusantara, former Chairperson (2002-2007), 25 April 2008.

88 This is unless suspected perpetrators refuse to appear at the Commission, which led to major gaps in information, and was particularly common when those summoned were (former) military personnel, see 2.4.1

89 Interview with Enny Soeprapto, commissioner for 'the right to feel safe', 19 September 2006.

90 Interview, 16 May 2008.

91 See 2.2.3.

at all. However, this has never been the intention of the UN guidelines; and certainly there should be some flexibility for NHRIs to address human rights violations during any stage of the legal process.

Another reason for KOMNAS HAM's limited attention to the issue of fair trial is its opinion that the judicial process is a subject for other organisations. According to Abdul Hakim Garuda Nusantara, KOMNAS HAM's Chairman between 2002 and 2007:

> 'the task to monitor the judicial system lies with parliament and the Judicial Commission [*Komisi Yudisial* or KY]. The mandate of the KY is limited to the judges. KOMNAS HAM has not focused on fair trial to avoid overlap. […] Monitoring the judicial system is not the responsibility of KOMNAS HAM. Of course it could be useful if KOMNAS HAM, together with the KY and parliament, would address fair trial. Probably it would also be more effective that way too. If KOMNAS HAM would do it independently there is a risk of inaccuracy, and cooperation with other bodies probably means that resistance would be less'.[92]

However, neither the Judicial Commission nor parliament is well-positioned to deal with the right to a fair trial. As Abdul Hakim Garuda Nusantara himself admitted, the Judicial Commission only examines judicial behaviour,[93] and not the police or the prosecution. Similarly, while parliament may call the Attorney General and police to account, its main task is to legislate; it is not the body responsible for the enforcement of laws, nor for holding to account officials who have violated the law's principles. Therefore, parliament and the Judicial Commission are not capable of fully addressing the right to a fair trial, and this means that there are many opportunities for KOMNAS HAM to address the issue.

Considering the problems Indonesia faces in the area of the right to a fair trial,[94] it is surprising that KOMNAS HAM has not developed more activities focusing on the judicial process. In particular, the Commission's refusal to take part in the revision of the Code of Criminal Procedure was, on first consideration, unexpected. However, most commissioners were of the opinion that the chances for the Code to be revised were small, and therefore declined the invitation.[95] KOMNAS HAM's reasons not to participate were thus strategic. This decision also resonates with KOMNAS HAM's general approach to fair trial issues as we have seen in this Chapter. KOMNAS HAM does not consider itself as the organisation primarily responsible for issues pertaining to the judicial process. Rather, it considers (correctly or not) that these responsibilities lie with the Judicial Commission and parliament. Criticising the judicial process

92 Interview, 25 April 2008.
93 The Judicial Commission may open investigations into the functioning of judges. In addition, the Judicial Commission selects candidate Supreme Court judges.
94 See 3.3.1.
95 Personal communication with Roichatul Aswidah, April 2012.

could lead to further alienation, which will not help KOMNAS HAM's own position or performance. In this light, it is not surprising that the Commission refers to other bodies to press for meaningful changes within the judiciary.

In addition, KOMNAS HAM has made a deliberate decision to focus on issues associated with the right to a fair trial, such as enforced disappearance, torture and extrajudicial killings. This choice can be explained within the context of a country in transition from an authoritarian regime and Indonesia's human rights history.[96] In addition, the Commission's focus resembles those of Indonesian human rights organisations, which focus strongly on violations committed by the security forces.

## 3.4 KOMNAS HAM AND ADEQUATE HOUSING IN JAKARTA

### 3.4.1 The Right to Adequate Housing

The third right of concern in this Chapter is the right to adequate housing. In international human rights law, the right to adequate housing is guaranteed as part of the right to an adequate standard of living in Article 25(1) of the UDHR and Article 11(1) of the ICESCR, to which Indonesia became a state party in 2006:

> 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. […]'

The right to adequate housing is further clarified in General Comment no. 4 of the Commission on Economic, Social and Cultural Rights (1991), which is an authoritative interpretation of the right under international law. According to General Comment no. 4, the right to housing does not only refer to shelter, but also to the right to live somewhere in security, peace and dignity.[97] The Comment therefore considers forced evictions[98] '*prima facie* incompatible with the requirements of the Covenant'.[99] In the 1993 Resolution on Forced Evictions, the UN Commission on Human Rights has stated that forced

96 See 1.1.5.
97 Para 7.
98 Forced evictions are defined as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection' (General Comment no. 7 of the Commission on Economic, Social and Cultural Rights, para 3).
99 Para 18.

evictions constitute 'a gross violation of human rights',[100] unless the government appropriates land 'in the most exceptional circumstances, and in accordance with the relevant principles of international law'. These principles are outlined in General Comments no. 4 and no. 7 – the latter specifically concerns forced evictions – and include requirements for consultation with those affected; adequate and reasonable notice of the date of eviction; the availability of legal remedies for those affected; and access to legal aid. The UN Commission on Human Rights Resolution 1993/77 recommends that when people have been forcibly evicted, they are given 'immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs'.[101]

In national Indonesian law, the right to adequate housing is guaranteed in the Constitution:

> 'Every person has the right to a life of well-being, both in body and mind, [a right] to a place to reside, to be in a good and healthy environment, and is entitled to receive medical care'.[102]

The right is also provided for in the 1999 Human Rights Law, with similar wording.[103] In these laws, 'the right to adequate housing' has been translated as *hak untuk bertempat tinggal* (literally: the right to reside in a place to live), which is different from how both NGOs and KOMNAS HAM have referred to the right, namely *hak atas perumahan yang layak* (the right to adequate housing).[104] In practice however, this difference has not been a problem for NGOs or KOMNAS HAM, and this research will not differentiate between the two.

In this research, the choice was made to study KOMNAS HAM's activities with regard to the right to adequate housing in Indonesia's capital, Jakarta. Until 2007, the most frequently used legal basis for eviction was Jakarta's Regional Regulation (*Peraturan Daerah* or PERDA) 11/1988, which refers to 'public order'. This regulation was replaced by Regional Regulation 8/2007, which allows for evictions in the 'public interest'. Both regulations prohibit individuals from living in green zones, on riverbanks, and near railway tracks and bridges. People who build shelters in these areas are liable to face im-

100 Resolution 1993/77, para 1.

101 Para 4.

102 Art 28H (1).

103 Art 40. The right to property is guaranteed in Art 36(1), and Art 37(1) states that persons are entitled to fair compensation in instances where property is confiscated for the public interest.

104 The 1992 Law on Housing and Settlement comes closer to an explicit reference to housing: 'every citizen has the right to occupy, and/or enjoy, and/or own an adequate house (*rumah yang layak*) in a healthy, safe, harmonious and organised environment' (Art 5(1)). The provision is reminiscent of the New Order's emphasis on development (*Pembangunan*) and collective duties rather than individual rights, in the provision that citizens have the duty to help create housing and settlements (Art 5(2)).

prisonment and fines. Another regulation used for evictions in Jakarta is Regional Regulation 1/1996, which allows for the eviction of persons who do not hold a Jakarta Identity Card. Aimed at controlling migration to Jakarta, this regulation disproportionally affects poor communities in the city, as it is estimated that 30 percent of individuals in these communities do not hold a Jakarta Identity Card – even if many of them have been living and working in the city (often in the informal secor) for years (Sekolah Tinggi Filsafat Driyarkara 2003: 6). Finally, Regional Regulation 18/2002 allows for evictions to enhance the 'beauty' of Jakarta.

International human rights law allows governments to restrict people in choosing their place of residence, but this must be provided for in law and only when necessary to protect public order, health and security.[105] These restrictions must be in accordance with human rights obligations, and must conform to the principle of proportionality. This means that even if there is a basis in law for an eviction and the reason for an eviction is legitimate, the way in which it is implemented, the form and amount of compensation and the ultimate impact of the eviction may still render it unlawful under international law. The regional regulations concerned provide scope for an arbitrary application of notions of 'public order' and 'public interest', as they do not provide adequate protection for those affected by evictions, nor do they provide a provision for monetary or material compensation. National law does not adequately address these matters, but should in any case conform to international human rights standards, especially as Indonesia is now state party to the ICESCR and has explicitly acknowledged the right to adequate housing in its Constitution. In that regard, the provisions of the regional regulations and their implementation thus raise questions regarding the regulations' validity. Furthermore, the practice of residential evictions in Jakarta is often in violation of human rights guarantees.

### 3.4.2 Residential Evictions in Jakarta

Indonesia's capital, Jakarta, struggles with poverty, unemployment, poor transportation, environmental pollution and housing problems. The Jakarta government aims for the city to become similar to cities such as Seoul and Singapore (ISJ 2003: 70-1; Sutiyoso 2007: 26). As a result – particularly during Governor Sutiyoso's tenure (1997-2007) – the areas for low- and middle-income earners have declined in size (HRW 2006: 11), with the government rapidly building new business areas, luxury residences and shopping malls. These projects have often involved appropriation of land occupied by poor communities, usually without title, and have resulted in forced evictions, usually

105 ICCPR, Art 12(3).

involving the security forces[106] and intimidation and violence. Only rarely have the victims of these evictions been given compensation. For many occupants, eviction has not only meant the loss of their homes, but also of their livelihoods; as many of them had small businesses close to their homes that were also demolished. The loss of income makes moving to another place almost impossible, and has meant that many parents were no longer able to afford school fees, forcing their children to drop out of school.[107] A study conducted by the NGOs FAKTA (*Forum Warga Kota Jakarta*, Jakarta City Residents Forum) and ISJ (*Institut Sosial Jakarta,* Jakarta Social Institute) reported that between 2001 and 2003, 86 evictions took place in Jakarta, resulting in the destruction of more than 18.000 houses, thousands losing their jobs, and many children dropping out of school. The organisation of the evictions was reported to have cost 35 to 52 billion Rupiah for personnel and equipment, or around US$ 3.5 to 5.7 million (FAKTA 2006: 5-6).

There is consensus among the Jakarta government and NGOs that as a principle of good governance, notification of an eviction has to be provided in three separate letters, the last one arriving no later than seven days before the scheduled eviction (HRW 2006: 34). The policy of the Jakarta administration is to provide compensation in the form of money or by substitution of land (HRW 2006: 35).

According to Presidential Regulation 65/2006 on the Allocation of Land for the Public Interest, financial compensation is given either at market value or according to the NJOP, *Nilai Jual Obyek Pajak*, or Sales Value of Tax Object. As the NJOP is usually 40 to 50 percent lower than the market value, there is a considerable difference; and as the government generally uses the NJOP, it systematically under-compensates residents (HRW 2006: 80). Presidential Regulation 65/2006 requires no compensation for occupants who do not hold title over the land. In cases where squatters receive some financial assistance, this is considered charity. The Indonesian regulations and practices on compensation do not meet international human rights standards (HRW 2006: 33; Reerink 2011: 164), which stipulate that evictions may only take place in accordance with international law, adhering to principles of reasonableness and proportionality; and that all alternatives must be explored in order to avoid, or at least minimise, use of force during evictions. In addition, international

106 Evictions involve the military, police, or groups of other public order officials such as TRAMTIB (*Satuan Polisi Ketentraman Dan Ketertiban*, Police Unit for Peace and Order), SATPOL PP (*Satuan Polisi Pamong Praja*; Municipal Police Unit) and LINMAS (*Lindungan Masyarakat*, Community Protectors). These are local government security forces under the authority of the governor and mayors of Jakarta.

107 According to research conducted by the NGO PAWANG (*Paguyuban Warga Anti-Penggusuran*, Alliance of Residents Against Evictions) in four evicted communities, 16 percent of children dropped out of school, and unemployment increased by 20 percent (FAKTA 2006: 5-6). This illustrates that violations of the right to housing also have an impact on other human rights; see also HRW 2006: 33.

standards call for adequate compensation to be given to residents, irrespective whether they hold title or not.[108]

In practice the Jakarta government seldom negotiates with residents, and when the latter attempt to meet government officials their efforts are often rejected. Moreover, the government often 'forgets' to announce evictions, and if it does announce them, letters are not given to residents personally, but spread in the streets (HRW 2006: 62-64). But even then, written notifications mean little to people who are illiterate.[109] According to Presidential Regulation 65/2006, the city government has 120 days to negotiate settlement with residents,[110] and then the matter has to be decided by the civil courts. However, the uncertainty and duration of a court case helps public officials to force residents into accepting an inadequate settlement (HRW 2006: 71).

Providing compensation moreover leads to new problems. Often, the government claims part of it as taxes, and corruption leaves residents with a smaller amount than they are entitled to. Conversely, residents sometimes bribe government officials to receive better compensation (HRW 2006: 78, 81-82). Compensation in the form of alternative land or housing usually consists of the option to rent a flat or Very Simple House (*Rumah Sangat Sederhana*, RSS), or to migrate to another island. However, migration often leads to loss of livelihood and renting a flat or a RSS house requires the payment of three to four million Rupiah (US$ 330 to 440) deposit, which most of those evicted cannot afford. Their being employed in the informal sector also means that they seldom have a regular income, and may not be able to pay the rent (ISJ 2003: 66). A woman who was threatened with eviction from her home in North Jakarta, and was offered a flat, said: 'I can't live in a flat, because we would have to rent, but our income isn't stable. And we've got a *warung* [shop on the side of the street]; I can't run my shop from a flat'.[111]

In the lead-up to an eviction, residents are often subject to intimidation from the security forces and *preman* (hoodlums paid by the government or private companies) to ensure that they vacate the land as soon as possible. When residents decide to stay, the police, public order officials or *preman* commonly use violence towards them, including tear gas and water cannons. This sometimes leads to casualties. Also reports have been made of sexual assault and rape. Houses are demolished with bulldozers or burnt down, without giving residents enough time to secure their belongings. (ISJ 2003:

108 See General Comment no. 7 on forced evictions, as well as section 3.4.1.

109 Discussion with victims of evictions in Jakarta, 16 May 2008.

110 The Regulation offers no clarification about whether the negotiation period also applies to residents who do not hold title.

111 Interview with Siti Aminah, victim of forced eviction, 22 May 2008.

68-70; HRW 2006: 41-61). These practices are clearly in breach of international human rights standards.[112]

The Jakarta government has justified evictions citing reasons of 'development' (*pembangunan*), the 'public interest' (*kepentingan umum*) and 'the order, cleanliness, and beauty of the city' (*ketertiban, kebersihan dan keindahan kota*) (Sekolah Tinggi Filsafat Drikarya 2003: 1; FAKTA 2006: 7-12; HRW 2006: 35-36). Other arguments for eviction are the illegality of settlements, including the failure to comply with building codes, building without permits, and building without holding title over the land. The government's labelling of these settlements as 'illegal' puts the blame on the communities, and ignores that these settlements are often the product of poor policies and administration as well as corruption. The designation of many settlements as illegal is moreover questionable, as many have paid to get permission to live on the site, have lived there for decades without contestation from the government, or were even explicitly advised by the government to use idle land (see Governmental Regulation 36/1998). The government often provides utilities such as electricity and water. Nonetheless, the eviction of these settlements has been regarded by the Jakarta government as a punitive measure on the basis of illegality, in the words of former Governor Sutiyoso 'to teach the people a lesson to respect the law' – which is an outright violation of the ICESCR (HRW 2006: 24-26; 34-36).

The practice concerning evictions in Jakarta leaves much to be desired from a human rights perspective. The Jakarta government has failed to assess what the impact of a scheduled eviction would be on individuals, let alone considered an alternative. Forced evictions in Jakarta are, therefore, unlikely to be a proportionate action to the public order, public interest or the beauty of the city. Based on international human rights provisions which are recognised in Indonesian law, these evictions should therefore not be carried out. As we have seen earlier, the Regional Regulations underlying these evictions also contradict national and international human rights standards. The practices of evictions in Jakarta means that in addition to the right to adequate housing, other human rights issues are at stake, and this supposedly makes it an important issue for KOMNAS HAM.

112 Jakarta's eviction practices are for that matter not necessarily representative of other Indonesian cities. In his research on tenure security for the urban poor in Bandung, Reerink (2011) has noted that there people enjoy a high degree of administrative recognition, even when they do not own the land. Further, in several instance of land clearances people were able to negotiate higher compensation and even forced developers to (partly) cancel building projects. These differences between Jakarta and Bandung can be attributed to local balances of power, which to a large extent determine the success of people in negotiating proper compensation.

### 3.4.3 KOMNAS HAM and Residential Evictions

Around 30 percent of all complaints brought to KOMNAS HAM yearly, so roughly 500 cases, relate to land disputes. The majority of these cases concern the appropriation of land by either the government or business, and involve the eviction of those who were living on the land. 25 percent of all cases concerning residential evictions (*penggusuran*) received by KOMNAS HAM come from Jakarta. This is both because of their frequency and due to the geographical proximity of the Commission (KOMNAS HAM 2004: 48).

In its first years, KOMNAS HAM lacked a formal operating procedure for dealing with eviction cases. From the annual reports, however, several policies can be distilled. In some cases, commissioners would visit the eviction site to meet with the residents and to verify information. In most cases however, especially when it concerned a case outside of Java, KOMNAS HAM would send a letter to the local government, most often the District Head (*Bupati)*. If the latter was involved in the eviction himself, KOMNAS HAM would send a letter to a higher official, for instance the Governor. In these letters the Commission would encourage settlement of the disputes through *musyawarah mufakat* (negotiation) and *secara kekeluargaan* (as a family). Although in most cases the residents had no legal rights over the land they occupied, KOMNAS HAM supported compensation in the form of replacement of land, with some success (KOMNAS HAM 1995: 26-7; 1996: 13-6; 1997: 36-41; 1998: 38-43; 1999: 70). In addition, KOMNAS HAM has paid attention to the right to adequate housing as part of their workshops on economic, social and cultural rights for civil servants, as conducted by the Sub-Commission for Education between 2002 and 2004.[113]

Following the enactment of the 1999 Human Rights Law, KOMNAS HAM has increasingly mediated in land disputes, in which it continued to promote *musyawarah mufakat* (KOMNAS HAM 2000: 73; KOMNAS HAM 2001: 92). Some cases have been successful, a well-known example being the 2001 mediation concerning the case of the eviction of shopkeepers near Jakarta's Zoo. The Commission's helped in securing the postponement of the scheduled evictions, as well as giving the shopkeepers the opportunity to continue their businesses in another area (KOMNAS HAM 2001: 92). In the 2004 Kemayoran case (see below), mediation led to the peaceful clearing of the land conducted by the residents themselves. The residents were moreover able to negotiate adequate compensation (KOMNAS HAM 2004: 68-9).

However, the Commission has not always been successful. In 2003, mediation in the Teluk Gong case stagnated as the parties involved refused to compromise (KOMNAS HAM 2003: 123). In 2004, residents of Cengkareng Timur lodged a complaint with KOMNAS HAM as they were threatened by eviction.

113 In attended one of these workshops in May 2004. The workshops were discontinued after the restructurisation of KOMNAS HAM later that year (see 2.4.1).

Despite the Commission's request to delay the eviction, the land was cleared anyway. It was reported that during the eviction a girl was raped by a security official (HRW 2006: 87). KOMNAS HAM tried to secure compensation for the victims, but an agreement was not reached (KOMNAS HAM 2004: 70). Around 300 residents then relocated to the Commission's premises where, together with other victims of forced evictions, they stayed until mid-2004 in makeshift tents.[114]

Except for attempting mediation, KOMNAS HAM has no clear policy on how to deal with evictions. Notwithstanding the large number of eviction cases brought to the Commission, it deals with them on a case-by-case basis. Only in 2003 did KOMNAS HAM announce that, in cooperation with the Jakarta government, it would establish a team to develop 'a more humane method of carrying out evictions'. The Commission announced that attention would be paid to the manner in which security forces treated people during evictions, and that a training programme would be established for public order officials. In addition, the KOMNAS HAM team would engage with universities and NGOs to discuss options for low-cost housing (KOMNAS HAM 2003: 112; The Jakarta Post 5 November 2003). However, this team was never established because none of the commissioners made it a priority.

Later in 2003 KOMNAS HAM held a meeting with Governor Sutiyoso, but the latter only used the meeting to reiterate that all evictions were conducted according to the Regional Regulations in place and therefore legal. Unfortunately, the Commission failed to use the occasion to question Sutiyoso's argument of legality, or the validity of the regional regulations and the manner in which evictions were carried out in Jakarta. In its 2003 Annual Report KOMNAS HAM described evictions in Jakarta as 'arbitrary and repressive […]. Evictions have increased the suffering of poor people and the chances that they engage in resistance, anarchy and crime' and adds that the task of the government and the state is 'to increase the welfare of the people' (KOMNAS HAM 2003: 38-9). While the Commission directly refers to the arbitrary nature of evictions, its conclusion regarding the human rights at risk of violation is inadequate. KOMNAS HAM refers to the right to be free from ill-treatment and to social and economic rights in general, but a reference to the right to housing is missing.

In November 2003, the absence of a clear policy on eviction cases, as well as the violent eviction of the Cengkareng Timur residents, led a number of lawyers associated with the NGO FAKTA to initiate a lawsuit against KOMNAS

114 Initially, the residents relocated to KOMNAS HAM, as they had no other place to go to. Over time, however, many of them found other accommodation. Some residents stayed at the Commission, claiming KOMNAS HAM should provide them with homes as the government had failed to do so (The Jakarta Post 7 June 2004). In July 2004, 29 families remained, who wanted to put pressure on the Commission to act more proactively with regard to cases of forced eviction. Finally, they were asked to vacate the premises, and were assisted by KOMNAS HAM financially to do so (The Jakarta Post 29 July 2004).

HAM at the Central Jakarta District Court.[115] The lawyers held that KOMNAS HAM had failed to perform its duties (*telah lalai melaksanakan kewajiban*) and had let evictions happen (*membiarkan penggusuran*). According to the plaintiffs, this meant that KOMNAS HAM had violated the 1999 HRL and committed a tortuous act against the law (*perbuatan melawan hukum*) as defined in the Civil Code (FAKTA 2006: 346-347).[116] They demanded that the Commission offer its apologies to the evictees in six national newspapers, television channels and radio stations and that KOMNAS HAM would cover the costs of the lawsuit (FAKTA 2006: 335-55, 364-5; The Jakarta Post 7 November 2003).[117]

In June 2004 the Court ruled that KOMNAS HAM had not violated the Civil Code or the HRL, because the Commission had been willing to receive complaints on evictions. Unlike the plaintiffs, the Court held that there was no legal obligation for KOMNAS HAM to act upon the complaints in a *structural* manner. Nevertheless, the Court did hold that the Commission should increase its efforts in 'providing a fair and just solution for victims of forced evictions and in protecting residents from future evictions' and ordered KOMNAS HAM to apologise. The plaintiffs accepted the verdict and expressed their satisfaction: 'KOMNAS HAM is now legally bound to be more active against evictions. If it still doesn't do anything about it, then we will file another lawsuit'. This signalled that opening a civil case against an NHRI could be a way of holding such an organisation accountable.[118] Lawyer for KOMNAS HAM, Firman Wijaya, said the Commission would accept the ruling and stated that the lawsuit was 'an educational example to the public on how to exercise their legal rights' (The Jakarta Post 11 June 2004).

While the case against KOMNAS HAM was pending in Court, FAKTA brought an impending eviction at Kemayoran in Central Jakarta to the attention of the Commission. The authorities intended to develop Kemayoran into a business area with an international trade centre (FAKTA 2006: 89-93).

On 17 May 2004, Kemayoran residents received a letter that they had to vacate the land within seven days. On 24 May, a large group of Kemayoran residents (approximately 150 people) came to KOMNAS HAM to lodge a complaint, but were prevented from doing so by the police. Eventually the police allowed seven residents access to the Commission, together with representatives from FAKTA. They requested KOMNAS HAM to act as a mediator and asked for a delay of the eviction, at least until replacement land and housing had been provided.

115 PIELs (Public Interest Environmental Lawyers) vs. Komnas HAM, reproduced in FAKTA 2006: 307-65.

116 Art 1365.

117 For the lawyers the apology was the most important element (interview with Azas Tigor Nainggolan, FAKTA, 19 May 2008).

118 No court cases have been filed against KOMNAS HAM since.

The following day, the residents were served a notice that the land should be cleared within three days. On the 1st of June the residents requested KOMNAS HAM for swift action, and the Commission sent an invitation to the Jakarta government, to engage in mediation on 10 June. Two meetings took place and an agreement was reached that the residents would vacate the land voluntarily. The local government would postpone the eviction until the end of the year and provide compensation, which was negotiated from 750.000 to 1 Million Rupiah (US$ 83-111) per house, depending on the size (FAKTA 2006: 181, 193-4).

This case was regarded a success by all parties involved. A key factor in this outcome was that the Kemayoran residents were very well-organised and a significant number of them were aware of the rights they had. According to a survey conducted by FAKTA, more than 30 percent of the residents had earlier participated in trainings on human rights facilitated by NGOs (FAKTA 2006: 190). They also knew KOMNAS HAM could help negotiate compensation and the terms and manner of eviction.[119] The choice to approach KOMNAS HAM was made consciously, as the residents felt that the Commission would best be able to address their needs. The success of the mediation process was also influenced positively by the Central Jakarta government, in this case represented by DP3KK (*Direksi Pelaksanaan Pengendalian Pembangunan Komplek Kemayoran*, Directorate for the Managing of the Development of the Kemayoran Complex). DP3KK proved willing to engage in the mediation process and to listen to the Kemayoran residents. DP3KK wanted to clear the land as quickly as possible due to commitments to foreign investors, but at the same time wanted to make sure that the clearance was done in a peaceful manner. This would also ensure its reliability in the eyes of the foreign parties and possibly attract more investors.[120] This combination of residents' level of organisation and the willingness of the authorities to cooperate, meant that the Commission had a largely facilitating role.

### 3.4.4 KOMNAS HAM's Report on Regional Regulation 8/2007

While KOMNAS HAM has not paid much attention to evictions in Jakarta in a structural manner, in 2008 it wrote a report concerning Regional Regulation 8/2007, one of the regulations underlying evictions in Jakarta.[121] This report was published by KOMNAS HAM in 2009. This Regulation, which replaced Regional Regulation 11/1988, concerns public order (*ketertiban umum*[122]) and was drafted with the aim for Jakarta to become 'a city that is orderly, peaceful,

119 Interview with Azas Tigor Nainggolan, 19 May 2008.

120 Interviews with Azas Tigor Nainggolan and Tubagus Haryo Karbyanto, FAKTA, 19 May 2008. For a detailed chronology of the case, see FAKTA 2006, chapters 4-5.

121 See 3.4.1.

122 It is often referred to as PERDA Tibum; 'tibum' is an acronym of keter*tib*an *um*um.

safe, clean and beautiful'. The regulation includes provisions on the use of pavements, public transport, parking, green zones and public parks, as well as regulations concerning trade and small businesses. It also has stipulations on building regulations and 'social order', such as prohibitions on begging and informal work such as singing in the streets or washing cars. This Regional Regulation immediately drew strong criticism from NGOs, which formed the coalition *Aliansi Tolak PERDA Tibum: "Jakarta Untuk Semua"*[123] (Alliance Rejecting the Regional Regulation on Public Order: "Jakarta for Everyone"). The Coalition's main concern was the consequences of this Regulation for Jakarta's urban poor. Concerns were also raised regarding a provision that prohibits the selling and use of alternative medicine. In the regional regulation this practice is referred to as *pengobatan tradisional* (traditional medicine) and *pengobatan kebatinan* (spiritual/mystic medicine); the Coalition took a particular interest in the latter, which it regarded as discriminatory because mysticism is not recognised as a religion by the state, and is often perceived as a threat to Islam.

These concerns and an increasing number of complaints were enough reason for KOMNAS HAM to publish a report about this Regulation. Yet again, the report was the initiative of a single commissioner, Stanley Prasetyo, together with two staff members. Prasetyo struggled to get approval to work on the report, as other commissioners considered it a minor issue compared to gross human rights abuses, on which the Commission intended to focus between 2007 and 2012. However, Prasetyo went ahead; and obtained the official approval for writing the report only after it was finished.[124]

The report starts by discussing Indonesia's human rights obligations under national and international laws. It underlines that Indonesia has ratified both the ICCPR and ICESCR without reservations, which consequently 'puts obligations on the Indonesian State and is valid as national law' (KOMNAS HAM 2009: 9).[125]

In the discussion of the concept of public order, the Commission argues - in line with international guidelines- that limitation of human rights for reasons of maintaining public order have to be decided on a case-by-case basis, and that control or supervision by an independent body (for instance parliament or the courts) is necessary. Furthermore, the Commission states, referring to

123 The NGOs involved in the coalition were the Aliansi Bhineka Tunggal Ika, Debt Watch, Jaringan Nasional Perempuan Mahardhika, Yayasan Jurnal Perempuan, Koalisi Perempuan Indonesia untuk Keadilan dan Demokrasi, Kalyanamitra, LBH Apik, Srikandi Demokrasi Indonesia, PBHI Jakarta, Koalisi Anti Perda Diskriminatif, LBH Jakarta and Solidamor. The coalition was supported by Dutch aid organisation HIVOS.

124 Interviews with Roichatul Aswidah, 16 May 2008; and Stanley Prasetyo, 26 May 2008.

125 The report then continues with a discussion of the conditions under which human rights may be limited, a part strongly based on the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights as well as the 1996 Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

case law of the European Court of Human Rights (ECHR), that any limitations must be lawful, have a legitimate aim and necessity, and must be proportional to the desired need (*kebutuhan yang diinginkan*). This is followed by a discussion of relevant domestic law, for instance crimes that violate public order as identified in Indonesia's Criminal Code. The report then briefly pays attention to the hierarchy of laws in Indonesia, before turning to a detailed discussion of the Regional Regulation itself (KOMNAS HAM 2009: 25-35).

The Commission's criticism of the Regional Regulation highlights the definition used for public order, which it says is not in line with human rights provisions. International guidelines (the Siracusa Principles) attest that respect for human rights is an inherent part of public order. This relationship between human rights and public order is not sufficiently acknowledged in the Regional Regulation 8/2007. The Commission suspects that 'respect for human rights has not been regarded by the drafters of the regulation as an important aspect of the definition of public order' (KOMNAS HAM 2009: 42). The Commission also argues that the regulation is not in accordance with domestic development programmes, such as the *Rencana Pembangunan Jangka Panjang Nasional* (Long Term National Development Plan, or RPJPN), which explicitly states that development should respect the supremacy of law and advance the implementation of human rights. Many of the limitations that the regulation places on human rights, moreover, do not meet the standards of necessity, proportionality and legitimacy. The drafting process had also been flawed by not allowing public input.

The Commission also commented that many of the regulations' provisions are difficult to implement, such as the stipulation that pedestrians must use pavements – which are not always available – or that they have been poorly formulated. For example, Article 14(2) states that people may not take water from fountains or other public spaces, unless they have been given permission to do so from an official. According to KOMNAS HAM, this article should include a reference to emergencies (i.e. a fire) in which water from such areas may be used. Another article that needs clarification is Article 47 (1) (a), which prohibits the provision or use of traditional medicine. KOMNAS HAM argues, in line with the coalition of NGOs mentioned above, that this provision should be further explained, so that a difference can be made between medical practices that may be harmful and those that are safe. Such provisions should, according to the Commission, take into account that traditional medicine is often an important part of cultural and religious practices. Moreover, KOMNAS HAM raised concerns over a number of acts that are unnecessarily criminalised in the Regional Regulation, such as the prohibitions to stand on a park bench and to buy from street vendors in spaces that have not been approved for such activities (KOMNAS HAM 2009: 39-41).

With regard to the right to housing,[126] the Commission refers to the provisions prohibiting people from living or building in green zones, parks and other public spaces,[127] as well as from building houses near rivers, railway tracks and bridges.[128] While the report acknowledges that some areas are unsuitable for housing, it is concerned that the provisions in the regulation may lead to the eviction of urban poor[129] who often have no choice but to build their housing in unsuitable areas. Here KOMNAS HAM's concerns lie with the likely consequences of the Regulation's provisions rather than its substance. The Commission argues that forced evictions contradict international and national human rights standards, and will moreover not resolve the issue of poverty in Jakarta; and as such are not proportional to the aim of promoting 'discipline'. The Regulation's provisions contradict the Indonesian government's commitment to reduce poverty as laid down in the *Rencana Pembangunan Jangka Menengah Nasional* (Medium Term National Development Plan). The Commission also argues that the Jakarta government, as 'one of the most developed regional governments must take the responsibility to improve the capacity of government in Indonesia so that it can fulfil its obligations in providing basic services to society' (KOMNAS HAM 2009: 51). KOMNAS HAM then states that the Regulation's provisions may not be applied until the government has provided everyone who lives in unsuitable areas with replacement housing, while taking into account human rights standards (KOMNAS HAM 2009: 46-51).

The conclusions of the report criticise the Regulation for not having been harmonised with the *Rencana Aksi Nasional Hak Asasi Manusia* (National Action Plan on Human Rights, RANHAM), and for violating the Circular of the Minister for Home Affairs regarding regional regulations. In addition, the Regulation does not comply with provisions in the 1999 Human Rights Law and the Constitution. Therefore, the Commission recommends to the Minister of Home Affairs to immediately cancel Regional Regulation 8/2007 and to examine similar regulations for their (in)compatibility with higher legislation. The Minister for Justice and Human Rights, and the Director General of Human Rights at the Ministry of Justice and Human Rights, are recommended to immediately provide training programmes regarding human rights to local governments, in particular to those entities involved in implementing Regional Regulations, such as the SATPOL Pamong Praja.[130] Interestingly, the report also refers to damage this Regulation may cause to Indonesia's international

126 In addition, the report also discusses the PERDA's provisions that impinge upon the right to work and the freedom of movement.

127 Art 12.

128 Arts 13, 20, 36.

129 KOMNAS HAM estimated that this would affect more than 500,000 people (KOMNAS HAM 2009: 50).

130 In an interview, Stanley Prasetyo stated that he was looking into the possibilities for KOMNAS HAM to organise education programmes for the local government and bodies involved in forced evictions (26 May 2008).

image, particularly in light of its efforts to become a member of the UN Human Rights Council (KOMNAS HAM 2009: 63-66).

It is clear that KOMNAS HAM used a whole array of arguments in its report. Most important are the legal ones. The Commission used the opportunity to discuss various international human rights norms, and how they apply to Indonesia. They argued that any challenges which governments face in implementing the right to housing are no excuse for violating international standards. KOMNAS HAM also referred to general principles of administration and legal drafting. Conformity with these principles was deemed particularly urgent in this case, because the Jakarta government needs to set a good example for other regional governments. Finally, the Commission also based its arguments on the notion of development, in the form of post-New Order human rights policies, such as the RPJPN and RANHAM.

The report was not widely publicised, but forwarded to the main parties involved; the Jakarta Governor, the Minister of Home Affairs, the Minister of Justice and Human Rights, and the Office of Human Rights Research and Development (*Badan Penelitian dan Pengembangan Hak Asasi Manusia*, Balitbang) at the Ministry of Justice and Human Rights.

Initially, the Minister of Home Affairs communicated to Prasetyo that he wanted to cancel the Regional Regulation, because it caused unrest within society (*meresahkan masyarakat*), was not in accordance with the Constitution (*bertabrakan dengan Undang-Undang Dasar*), and violated human rights (*melanggar hak asasi manusia*). The reasoning used by the Minister to cancel the Regulation followed the arguments in KOMNAS HAM's report. However, the Minister did act accordingly, and told the Jakarta government to revise the Regulation. This recommendation was supposedly based on a study of the Ministry itself, which was allegedly conducted upon receiving KOMNAS HAM's report. However, the Ministry's study was never made public and KOMNAS HAM was not given a copy.[131]

A week after KOMNAS HAM published the report; the Jakarta government said it would revise the Regional Regulation, but 'no substantive revisions' would be made (Biro Hukum Provinsi DKI Jakarta 2008). Several NGOs referred to the report in a meeting with the new Governor, Fauzi Bowo (elected to office in 2007), who said he supported a revision of the Regulation.[132] This meeting was followed by a round-table discussion, which involved FAKTA, KOMNAS HAM, the Jakarta government and its Tramtib (*Dinas Ketentraman dan Ketertiban*, Agency for Tranquility and Orderliness). After this meeting, the Jakarta government indicated that it was willing to consult with FAKTA regarding the revision

131 Ibid.

132 Interviews with Roichatul Aswidah, 16 May 2008; Tubagus Haryo Karbyanto, 19 May 2008; Stanley Prasetyo, 26 May 2008.

of the Regulation.[133] However, at the time of writing (April 2013), Regional Regulation 8/2007 is still in force.

In summary, KOMNAS HAM's report has stimulated a debate on the Regulation and has contributed to the Jakarta government's initial willingness to revise it. The fact that Fauzi Bowo, who succeeded Sutiyoso as Jakarta's Governor in 2007, seemed more human rights-oriented than his predecessor has been important. This is also apparent in a decreasing number of residential evictions since he became Governor.[134] Moreover, during the election campaign Fauzi Bowo was the only candidate who wanted to sign a social contract (*kontrak sosial*) with FAKTA. In the contract, Bowo promised that if he were elected, he would be a 'Governor Defending the People' (*Gubernur Bela Warga*) and develop housing for the urban poor, as well as revise all Regional Regulations that were not sensitive to their needs. Members of FAKTA have indicated that this contract has also enabled them to access the Governor's office easily and remind Bowo of his promises.

KOMNAS HAM's report on Regional Regulation 8/2007 is a very thorough piece of research. While the Commission directed its recommendations only to the Ministries of Home Affairs and Justice and Human Rights, the report is also relevant for other organisations, such as the Jakarta government. NGOs may benefit from it as well to strengthen their own campaigns against the Regional Regulation. As the report is concerned with the Regional Regulation, it does not deal specifically with forced evictions, and therefore the Commission still does not have a clear policy on how to address that matter. Yet, it is the only document issued by the Commission in which it clearly positions itself against the practice on the basis of international human rights law. This is an important step forward, which will hopefully be followed by a more structural approach to help prevent forced evictions in Jakarta and Indonesia in general.

### 3.4.5 Performance and Effectiveness

As we have seen, KOMNAS HAM has paid attention to the right to housing by addressing individual cases of forced eviction, and by its report on PERDA 8/2007. In addition, the Commission has provided human rights education with regard to the right to adequate housing as part of its training programmes on economic, social and cultural rights. KOMNAS HAM has thus incorporated the right to housing into all of its four tasks of education, research, investigation and mediation.

133 Interview with Tubagus Haryo Karbyanto, 19 May 2008.

134 Interviews with Tubagus Haryo Karbyanto, 19 May 2008; Azas Tigor Nainggolan, 19 May 2008; Stanley Prasetyo, 26 May 2008.

The Commission's discourse on the right to housing is strongly based in international human rights norms, many of which have been ratified by Indonesia. While in the PERDA report KOMNAS HAM expressly states that the right to housing is one that must be realised progressively, the Commission makes no excuses for Indonesia's lagging behind in this area. It has encouraged both the local (Jakarta) and national government to increase their efforts to improve the situation of disadvantaged communities. To some extent, KOMNAS HAM accepts that people who do not hold a certificate to the land they occupy may indeed be evicted,[135] which appears to follow the position of the administration. However, KOMNAS HAM only agrees with evictions provided that they are not in violation of human rights. As such, KOMNAS HAM differentiates between evictions and forced evictions, the latter being incompatible with international human rights standards. This differentiation is also the one made at the international level, and hence the Commission expresses its understanding for national and local challenges; it does not advocate that different standards should apply to Indonesia.

While KOMNAS HAM has yet to develop a systematic approach to addressing violations of the right to housing, it has made an important step forward by publishing the report on Regional Regulation 8/2007.

While some NGO representatives have criticised KOMNAS HAM's reactive – rather than pro-active – attitude,[136] due regard should be given to the perceptions of victims of forced evictions. During a discussion with approximately 30 people at the Urban Poor Consortium in Jakarta, many were critical of KOMNAS HAM but were also positive about the Commission. They said that it was easy to approach the commissioners, and expressed their praise for particular commissioners who had been willing to visit their *kampung* and allowed the residents to put up banners. In several instances, the Commission had managed to delay evictions. In response to the question of why they approached the Commission, a young woman said:

> 'SA: We go to KOMNAS HAM because the President and the Governor do not receive us. KOMNAS HAM does. And KOMNAS HAM is an institution that protects the law, protects human rights.
> KS: What do you mean by protection? And do you feel protected there?
> SA: I mean that we are safe there. We feel protected there. They [staff and commissioners] are friendly when we come. They give us tea, biscuits, and they really listen to us.'[137]

135 Interviews with commissioners Stanley Prasetyo, 25 August 2008 and Ridha Saleh, 26 May 2008.

136 Discussion with victims of forced evictions in Jakarta, 16 May 2008; and interviews with Wardah Hafidz (Urban Poor Consortium), 16 May 2008; and Azas Tigor Nainggolan and Tubagus Haryo Karbyanto, 19 May 2008.

137 16 May 2008.

This illustrates that in addition to the functions outlined in its mandate, KOMNAS HAM has a moral role[138] to play, and the way in which it fulfils this role is an important part of how individuals assess the organisation and eventually its legitimacy.

In some instances KOMNAS HAM has contributed directly to realising the right to adequate housing; for instance in the Kemayoran cases, where the Commission helped the residents secure adequate compensation and where a forced, and possibly violent, eviction was prevented. Similarly, in several other cases the Commission succeeded in delaying evictions until the appropriate eviction orders were issued. A change in the city administration and increased abilities of NGOs to access administrators, as well as a higher level of organisational skills and awareness among residents, has contributed to this positive change.

However, KOMNAS HAM's most significant contribution to the promotion of the right to adequate housing has been its report regarding Regional Regulation 8/2007, in which the Commission has clearly spoken out against forced evictions and made a case for the need to comply with international and domestic human rights principles. The report also contributed to the start of a dialogue between the Jakarta government and citizens, and as such was successful to some extent in bridging the gap between the state and individuals. KOMNAS HAM's efforts thus contributed to human rights awareness, which is an important element of human rights realisation. However, causing real legal change remains difficult: in spite of all efforts by KOMNAS HAM, Regional Regulation 8/2007 is still valid and being applied.

## 3.5 CONCLUSION

In this Chapter we have seen that the performance of KOMNAS HAM with regard to freedom of religion, the right to a fair trial and the right to adequate housing varies highly between the three categories. Where KOMNAS HAM issued special reports, these were consistently of high quality. However, the good performance demonstrated by the Commission in those reports stands in stark contrast to the limited activities it developed with regard to the right to a fair trial where this concerns the judicial process. Similarly, while KOMNAS HAM has given the right to adequate housing attention in its four main tasks, it has not taken a more systematic approach to the issue – the exception being the report on Jakarta's Regional Regulation on Public Order.

In this Chapter we have seen that a key factor in KOMNAS HAM's performance has been the initiative of individual commissioners. None of the reports discussed in this Chapter would have been realised without the individual commissioners taking note of the issues involved and pursuing them. This

138 Interviews with Azas Tigor Naingolan and Tubagus Haryo Karbyanto, 19 May 2008.

strong personal involvement comes at a price. As we have seen, the lack of concern from an individual commissioner meant that KOMNAS HAM did not realise its plans to establish a special team within the Commission charged with forced evictions.[139] Similarly, when commissioners leave KOMNAS HAM, their reports tend to get shelved and forgotten.

Part of this problem can perhaps be solved by establishing and adhering to a plan which outlines the key areas in which the Commission will be active. Such a plan could be based on the RANHAM or the PROLEGNAS (*Program Legislasi Nasional*, National Legislation Program). By combining these policies with the qualities of individual commissioners, KOMNAS HAM could identify its windows of opportunity, or determine in which areas the Commission is most likely to have success. Part of the success of KOMNAS HAM's Report on the National Civil Registry was because Commissioner Soelistyowati Soegondo had been able to connect with an existing debate on the civil registry, and because she made KOMNAS HAM's efforts part of those of a larger group (the Consortium on the National Civil Registry), which had participants from both government organisations as well as NGOs.

Just as the performance of KOMNAS HAM differed in the three categories of human rights discussed, so too does its effectiveness. While the Commission has made a contribution to the realisation of each human right addressed in this Chapter, it has done so in different ways and with different 'dimensions' of effectiveness.[140] The Report on Interreligious Marriage remained a paper tiger: no socialisation efforts were conducted based on the report neither by Chandra Setiawan or his successor, which may be argued to be a waste of an excellent report. By contrast, the draft law included in Report on the National Civil Registry was to a large extent merged into the Law on the Administration of the Population. Similar differences in outcomes were also recorded in KOMNAS HAM's investigations into gross violations of human rights, in which it addressed (associated elements of) the right to a fair trial. In some cases, the Commission's findings led to violators of human rights being held to account, even if in the end the outcomes of such trials have been disappointing.[141] With regard to the right to adequate housing, in some cases the Commission was successful in negotiating compensation for people threatened with forced eviction. Irrespective of the exact degree of effectiveness, in all cases KOMNAS HAM has contributed to more human rights awareness. Further, in several instances KOMNAS HAM's efforts have been important for NGOs, which have used the reports to legitimise their claims. In these cases, KOMNAS HAM has typically taken on the role of bridge-builder between state and society, as is expected of NHRIs.[142]

139 See 3.4.3.
140 See 1.2.3.
141 See Chapter 2, note 74.
142 See 1.1.1 and 1.1.3.

The varying degrees of effectiveness for KOMNAS HAM in the three areas illustrates that good performance does not necessarily lead to a situation where the organisation will reach its goals. This supports the argument put forward earlier[143] that performance and effectiveness should be considered independently from each other. Effectiveness, after all, strongly depends on external factors; as for instance KOMNAS HAM's report on the National Civil Registry has shown us. Looking at effectiveness alone does not tell us enough about how a particular issue was perceived and addressed by an NHRI. This can only be achieved by looking at the preceding stage – by looking at an organisation's functioning or performance with respect to that issue. In other words, separating the concepts of performance and effectiveness, and evaluating them independently, will generate a more complete picture of NHRIs.

In all of the activities discussed in this Chapter, KOMNAS HAM has consistently referred to and argued in favour of international human rights norms. In this respect it has lived up to the expectations of the international human rights community that has promoted NHRIs.[144] Without losing sight of national and local circumstances, the Commission has championed international human right norms. In the three case studies presented in this Chapter, KOMNAS HAM's discursive strategy has been based primarily on legal arguments. Cultural and religious frameworks were seldom used, and where reference to them is made -such as in the Report on Interreligious Marriage- this does not replace the legal argumentation. The fact that Indonesia has ratified all major international human rights treaties and adopted them in national law seems sufficient reason for the Commission to assume the 'Indonesianness' of human rights.

KOMNAS HAM's choice to use legal rather than cultural and religious frameworks sheds new light on the arguments of (amongst others) Merry,[145] who has explained how cultural and religious frameworks can be used to promote international human rights to the national and local context. This does not appear to apply to KOMNAS HAM, which can refer to an extensive national human rights framework that has incorporated international norms. In addition, the use of cultural and religious frameworks may also not be appropriate in pluralistic countries such as Indonesia, where *national* organisations (such as NHRIs) may prefer to emphasise common norms that apply to all citizens, irrespective of religious belief or ethnicity for which national law is well-suited.[146]

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143 See 1.2.3.

144 See 1.1.1.

145 See Chapter 1.2.2.

146 On occasion, KOMNAS HAM members referred to religious frameworks. In September 2006, I witnessed this at a KOMNAS HAM activity in Padang (West Sumatra), when commissioners referred to Islamic concepts of justice in their presentations. When questioned about this approach, the commissioners stated that they did so because they knew their audience was overwhelmingly Muslim.

The centrality of the international human rights discourse in the work of KOMNAS HAM does not mean that these norms are uncontested. This is especially evident in the field of freedom of religion, where the controversies about the Report on Interreligious Marriage led the Commission to drop its recommendation to Parliament to amend the 1974 Marriage Law. When conflicts arise between different groups within the Commission, a compromise is negotiated to make the eventual decision more palatable for all commissioners without negating the human rights norm itself.[147]

However, this Chapter has also shown that when rights are not contested within the Commission (such as the uncontested rights to fair trial and adequate housing), this does not necessarily lead to KOMNAS HAM increasing its activities in these areas. The organisation has paid little attention to due process issues, and the initiative to write a report on Jakarta's Regional Regulation 8/2007 on Public Order was not immediately welcomed. This Chapter has demonstrated therefore that factors underlying the working process of KOMNAS HAM, and subsequently its performance, go beyond the degree of contestation alone. Performance depends on how individuals within the organisation perceive mandate and tasks. Further, within KOMNAS HAM individual initiative of commissioners has been particularly crucial. With regard to effectiveness, our research has shown that although this depends largely on external factors, chances of success are higher when the Commission's efforts resonate with initiatives made at higher levels of national or regional government. The many variables that influence performance and effectiveness of an NHRI can thus best be identified by a close consideration of the way the organisation addresses violations of a particular right. This starts by examining how a right is perceived in law, society, and within the organisation itself.

147 Similarly, in some of its investigations the Commission decided not to release publically the names of those suspected of being responsible for gross human rights violations, and only reveal them to the Attorney General's Office (see 2.3.2).

# 4 Searching for a Space

## The Development of the Malaysian National Human Rights Commission, 1999-2010

### 4.1 INTRODUCTION

We will now leave Indonesia and focus on the Malaysian NHRI SUHAKAM (*Suruhanjaya Hak Asasi Manusia Malaysia*, Human Rights Commission of Malaysia). This chapter examines the Commission's mandate, its tasks and organisational structure, and how it developed between 1999 and 2010 into one of Malaysia's primary human rights organisations. The chapter sets the stage for Chapter 5, which will discuss how SUHAKAM operates, with reference to three case studies.

The first part of the Chapter looks at the period from 1999, when the establishment of SUHAKAM was announced, until 2002, when its first term came to an end. In these first years SUHAKAM was led by Musa Hitam, a former Deputy Prime Minister (1981-1986), who was also known for his criticism on Prime Minister Mahathir Mohamad. The establishment of SUHAKAM coincided with a turbulent time in Malaysia's history. The country had been shaken by the dismissal of Deputy Prime Minister Anwar Ibrahim (1993-1998), who had fallen out with Mahathir and who was subsequently arrested and tried on charges of sodomy and corruption. Anwar's dismissal and trial evoked much discontent within Malaysian society. This resulted in calls for political reform, including increased human rights protection. This Chapter will show that SUHAKAM played an important role in supporting the reform movement.

The second part of this Chapter concerns the 2002-2010 period, when Abu Talib Othman, a former Attorney General, served as the Chairperson of SUHAKAM. During this period, Mahathir resigned as Prime Minister (2003). Many observers were hopeful that the resignation of Mahathir, who was known as a critic of the international human rights regime, would have a positive effect on human rights policies and behaviour. Some attention is also paid to SUHAKAM after June 2010, when Abu Talib Othman was succeeded by Hasmy Agam, who previously served in the Ministry of Foreign Affairs.

By looking at some of the most important events in the Commission's development, this Chapter seeks to identify the factors which have influenced SUHAKAM's performance. The analysis will show that despite external pressure, the Commission has developed a wide range of activities relating to various categories of human rights. This can be attributed to internal factors which have influenced SUHAKAM positively, even though in some cases – particularly

those which are socially controversial – the same factors have had a less desirable influence on the Commission.[1]

## 4.2 1999-2002: GENESIS OF SUHAKAM

### 4.2.1 Rationale for establishing an NHRI in Malaysia

Malaysian politics during the Mahathir era (1981-2003) were characterised by the expansion of executive power to the extent that the prime minister was able to 'undermine democratic norms by circumventing constitutional constraints on the office of the executive' (Gomez 2004: 2). Case (2004) described Malaysia during this period as a pseudo-democracy: a country with moderately competitive elections, but where systemic electoral abuses took place and where government was strongly dominated by one political party (UMNO). The government tightly controlled mainstream media, restricted civil liberties and used preventive detention as a means to curb opposition (Case 2004: 32). To a large degree, these characteristics of the regime were not questioned; as Malaysia prospered economically. However, by the end of the 1990s Malaysia found itself in the midst of the Asian economic crisis, which exposed the many problems that had earlier been camouflaged by the country's impressive economic growth. The economic crisis in Malaysia quickly turned into a political one, as strong disagreements developed between Mahathir and his deputy Anwar Ibrahim. Anwar's subsequent dismissal, arrest and trial made the public realise that 'even the minimal conditions necessary for the practise of democracy […] and minimal protection for the individual from arbitrary state power, do not prevail in Malaysia' (Gomez 2004: 1).

It was in these circumstances that, in the late 1990s, the *Reformasi* (reform) movement emerged.[2] Its primary concern was to transform the way authority was exercised, which challenged Mahathir's domination of the state. The movement was supported by a diverse coalition of Malaysians, from peasants to entrepreneurs and from socialists to Islamists. At a political level, it was represented by the coalition *Barisan Alternatif* (Alternative Front, or BA), comprising of leading opposition parties: the Islamic *Parti Islam Se-Malaysia* (PAS), and the predominantly Christian, socialist-oriented and multi-ethnic Democratic Action Party (DAP). NGO activists who supported *Reformasi* increasingly engaged in mainstream politics, which led to the establishment of a new

1 This will be elaborated further in Chapter 5.

2 The Malaysian *Reformasi* movement took its name from its Indonesian counterpart. Both the Indonesian and Malaysian *Reformasi* movements were concerned with political and economic reform. Nevertheless, they had different outcomes: whereas in Indonesia the *Reformasi* movement played a crucial role in the resignation of President Suharto, in Malaysia Prime Minister Mahathir succeeded in staying in power.

political party, the *Parti Keadilan Nasional* (National Justice Party, or Keadilan).[3] These developments brought about the prospect of genuine political change (Gomez 2004: 2-3).

In this context of growing calls for political reform, Malaysian NGOs stepped up their efforts for the establishment of an NHRI. In fact, NGOs had urged for the establishment of an NHRI since the early 1990s (Wong 2000: 16), but their efforts had failed because the Mahathir government was extremely critical of the international human rights regime. According to Musa Hitam, who between 1981 and 1986 served as Mahathir's Deputy Prime Minister, 'in Malaysia under Mahathir human rights were dirty words. [...] Human rights were a western conspiracy to sabotage us in our progress'.[4] While the Malaysian government was less authoritarian in deeds than the Suharto administration, in words Mahathir surpassed his Indonesian counterpart.

A key person in the establishment of SUHAKAM was Musa Hitam. In 1986 he resigned as Deputy Prime Minister, after a rift developed between him and Mahathir.[5] However, Musa's resignation did not signal the end of his political career. From 1990 to 1992 he became Malaysia's special envoy to the United Nations in New York, and from 1993 to 1998 he served as Chairman of the Malaysian delegation to the United Nations Commission on Human Rights (UNCHR). This was exactly when NHRIs started to become popular, and Musa became an active supporter of the establishment of a Malaysian Human Rights Commission, clearly against Mahathir's wishes. According to Musa: 'his [Mahathir's] first reaction was of course very negative. [...] I said why not? He said, they [the Commission] will turn against us'.[6]

While Musa Hitam's efforts were important for the establishment of SUHAKAM, it was not until 1999 that Mahathir agreed with the establishment of a Malaysian NHRI – a development that cannot be separated from the domestic and international criticism on the treatment of Anwar Ibrahim, who at the time was being detained under the Internal Security Act (ISA) (Case 2002: 134). Anwar's arrest, detainment and subsequent trial came to symbolise an executive-controlled judiciary (Whiting 2003: 85) and the trial was widely criticised for its unfairness. Amnesty International declared Anwar a 'prisoner of conscience' (Amnesty International 8 August 2000) and United States' Vice

3 In 2003, the party merged with the *Parti Rakyat Malaysia* (Malaysian People's Party, or PRM) and assumed the name *Parti Keadilan Rakyat* (People's Justice Party, or PKR).

4 Interview, 13 January 2009.

5 According to Crouch (1996), the rift dated back to Musa's 1981 election as deputy prime minister. Musa narrowly defeated his rival, Tengku Razaleigh. Razaleigh, however, remained a member of cabinet, much to Musa's discontent. As early as 1983 tension rose between Musa and Mahathir, until Musa resigned as deputy prime minister and deputy president of UMNO in 1986 (Crouch 1996: 115-7). According to Musa, ideological differences, particularly regarding human rights and good governance, also contributed to the rift (interview, 13 January 2009).

6 Interview, 13 January 2009.

President Al Gore said the trial was a 'mockery' (BBC News 9 August 2000). The Malaysian Bar Association and human rights NGOs in Malaysia voiced similar opinions (Malaysian Bar 9 August 2000). Anwar's treatment sparked protests across racial and religious boundaries in Malaysia, which was very unusual (Case 2002: 138-9). The establishment of SUHAKAM was Mahathir's personal decision,[7] just as KOMNAS HAM in Indonesia had been Suharto's. On 25 April 1999, the Minister for Foreign Affairs, Syed Hamid Albar, officially announced the government's decision to establish a National Human Rights Commission (Tikamdas and Rachagan 1999: 4).[8] The announcement through that particular Ministry, which would also become the main agency involved in the drafting of SUHAKAM's enabling law, illustrated the Malaysian government's perception of human rights: a matter with international ramifications.

The establishment of SUHAKAM received little attention in the mainstream printed press.[9] Human rights NGOs, lawyers and some members of the opposition were welcoming of the Commission, but also critical and sceptical (see for instance Tikamdas and Rachagan 1999: 5; Faruqi 2000: 12; Wong 2000: 17). 33 NGOs and two opposition parties expressed their concerns in a memorandum submitted to the Minister of Foreign Affairs. The memorandum called for the government to immediately make its plans regarding the Commission public, and to hold public consultations with civil groups as well as government officials to discuss the contents of the draft bill. The memorandum was particularly worried about the Commission's independence, members' appointment procedure and tenure, the Commission's mandate and powers, and guarantees of resources and funds (Memorandum as in Rachagan and Tikamdas 1999: 264-69). Human rights NGOs regarded the Commission as a 'PR exercise'[10] and the leader of the opposition party DAP (Democratic Action Party), Lim Kit Siang, called on the government not to use the Human Rights Commission to legitimise human rights violations (Lim 1999: 111).

The government sent the SUHAKAM Bill to parliament in July 1999. Syed Hamid Albar stressed during its presentation that Malaysia was ready for a human rights commission, as the country was politically stable and had reduced poverty to a sufficient degree. This echoed the Asian Values discourse: socio-economic development first, human rights later. He added that the

7 Musa Hitam argued that Mahathir's leadership was highly personal: 'under Mahathir everything was personal. If the PM agrees, it's on. If he disagrees, it's off. Simple' (interview, 13 January 2009).

8 The establishment of a National Human Rights Commission was mentioned ten days earlier in Parliament by Chia Kwang Chye, Member of Parliament for the *Barisan Nasional* (National Front, or BN) coalition.

9 Based on a study of newspaper reports on SUHAKAM from the announcement of its establishment (25 April 1999) to its inaugural meeting (24 April 2000). The newspapers studied were the two main English language newspapers of Malaysia, The New Straits Times and The Star, as well as two Malay language newspapers, *Berita Harian* and *Utusan Malaysia*.

10 Interview with Yap Swee Seng, coordinator of the NGO SUARAM, 14 November 2006.

Commission was meant to provide a space for the people of Malaysia where they could express their concerns about human rights (Dewan Rakyat Malaysia 15 July 1999: 63-4). Lim Kit Siang and other representatives of the opposition parties reiterated their concerns, and described the establishment of SUHAKAM as a 'cynical attempt' of the government to legitimise human rights violations and to improve its human rights record, both in Malaysia and abroad. Lim Kit Siang also warned that the way in which SUHAKAM had been established would negatively influence the Commission's credibility and independence (Dewan Rakyat Malaysia 15 July 1999: 75, 86).

According to Lim (1999), observers were worried that SUHAKAM would be ineffective for three main reasons. First, the government had not conformed to the Paris Principles by its lack of public consultation and the appointment procedure for SUHAKAM members (discussed below). Second, an NHRI would make little sense as long as the four Proclamations of Emergency[11] and other repressive laws remained in place.[12] Third, serious human rights violations by the government took place in the lead-up to SUHAKAM's establishment. These included the Lim Guan Eng affair,[13] displays of excessive police force,[14] the Sungai Gombak pollution scandal,[15] and the arrests of various people under the ISA (including Anwar Ibrahim). The context surrounding SUHAKAM's establishment gave the impression that the Malaysian Commission - similar to its Indonesian counterpart in 1993- was nothing more than a sham, an attempt of the Malaysian government to improve its image (Lim 1999: 112-3, 117). In spite of the critique, in September 1999 the Bill was passed without

11 States of Emergency were declared in 1964 (confrontation with Indonesia), 1966 (Sarawak political crisis), 1969 (13 May riots) and 1977 (Kelantan political crisis).

12 An example is the Official Secrets Act (OSA), which prohibits dissemination of information classified as an official secret. The OSA is linked to a reduction of transparency in governance. Another example is the Printing Presses and Publication Act (PPPA), which gives the Home Minister absolute discretion in granting and revoking printing licenses, and as such curtails the freedom of speech. In addition to the OSA and PPPA, the Internal Security Act (ISA) allowed detention without trial for up to two years, until this Act was repealed in 2012.

13 Lim Guan Eng, at that time deputy secretary general of opposition party DAP, was sentenced to 18 months in jail after he criticised the government's handling of the statutory rape of a Malay girl by a former Chief Minister of Melaka. The charges against the former Chief Minister, a strong supporter of Mahathir, were dropped for lack of evidence, while the girl was sent to a reform institution. Lim received widespread support from the Chinese as well as Malay community for standing up for a Malay, which was significant in racially divided Malaysia (Weiss 2006: 131).

14 These were, amongst others, the violent breakup of a closed assembly organised by DAP, the killing of several alleged criminals, and crowd dispersal by using water cannons and canes. For a full description, see Lim 1999.

15 In 1998, nine tonnes of decaying fish were found in a high density residential area. By using the Official Secrets Act (OSA), the government did not release any information regarding the source and consequences of the pollution.

amendments as the Human Rights Commission of Malaysia Act (597/1999), henceforth HRCMA 1999.[16]

### 4.2.2 The Human Rights Commission of Malaysia Act 1999

Under the HRCMA 1999, the Commission had four tasks; to promote human rights; to advise and assist the government on drafting legislation; to recommend accession to international treaties; and to inquire into complaints regarding human rights abuses.[17] SUHAKAM's mandate included the power of summons, and any evidence obtained during inquiries was of the same value as evidence given in court.[18] The Act also allowed the Commission to visit places of detention,[19] included provisions to guarantee the Commission's funding,[20] and did not put any restrictions on the cases SUHAKAM may consider, except those which have become subject of court proceedings.[21] The Commission was thus given a broad mandate entrenched in an act of parliament. As such, this mandate was in accordance with the Paris Principles, and the concerns of NGOs and opposition parties were not justified.

By contrast, the provisions concerning SUHAKAM's composition were *not* in accordance with the Paris Principles. Whereas the latter states that members should be appointed by way of an election which guarantees pluralist representation, the HRCMA 1999 made appointments the prerogative of the Prime Minister.[22] Guidelines regarding the qualifications of members were minimal, and only required that they should be chosen from 'amongst prominent personalities including those from various religious and racial backgrounds'.[23] Likewise, the tenure of commissioners – set at two years[24] – was controversial, as it appeared too short, even if it was renewable without limitation.[25]

16 The Act was amended in 2009, see section 4.3.4.
17 Art 4 (1).
18 Art 14(1).
19 Art 4(2) (d).
20 SUHAKAM's funding is to be provided by the government, and while foreign funding is generally not allowed, it may be accepted for educational activities (Art 19).
21 Art 12 (2).
22 Art 5(2). While the Prime Minister selects the members, formal appointment is done by the King.
23 Art 5 (3).
24 Art 5 (4).
25 The Paris Principles do not explicitly stipulate how long the tenure of members should be, and the UN Handbook on NHRIs also does not give a precise number of years, stating only that commissioners 'should be granted guaranteed, fixed-term appointments which are not of short duration' (Centre for Human Rights 1995: 11). In comparison, terms of office are three years in Sri Lanka and South Korea; five years in India, Indonesia and Nepal; six years in Thailand; seven years in the Philippines; and three (chairperson) and six (commissioner) years in Mongolia (FORUM-ASIA 2006).

While SUHAKAM's mandate thus conformed to international guidelines for NHRIs, the provisions on appointment and tenure fell short of the guidelines. Combined with the context in which the Commission was established, there were serious concerns about SUHAKAM's ability to operate independently from the executive.

### 4.2.3 Organisational Structure

According to the HRCMA 1999, SUHAKAM was allowed to have up to 20 members. They were not required to work full-time for the Commission. In 2000, thirteen commissioners were installed and Musa Hitam was appointed as SUHAKAM's first Chairman. Nine commissioners were of Malay origin,[26] two were of Indian descent and two others Chinese, which reflected political practice in Malaysia. Four out of thirteen commissioners came from the civil service and were closely associated with political parties belonging to the ruling coalition, Barisan Nasional (BN).[27] However, the line-up also included some who had been critical of the Malaysian government. Among the latter were well-respected judges, one of them the retired Harun Hashim, who as High Court Judge declared UMNO an illegal organisation[28] and in 1988 ruled that the Printing Presses and Publications Act (PPPA) could be subjected to judicial review[29] (Yatim 1995: 175).[30] One human rights activist was appointed as well: Zainah Anwar, a representative of the NGO Sisters In Islam (SIS). This suggested that Mahathir took public concerns about the impartiality of SUHAKAM seriously.

For each of SUHAKAM's tasks a Working Group was established: Education; Law Reform; Treaties and International Instruments; and Complaints and Enquiries (SUHAKAM 2001: 8). This bore similarities to the initial set-up of its

26 This number includes two commissioners with an indigenous background (one from Sabah and one from Sarawak); who, like Malay, are considered *bumiputera*.

27 K. Pathmanaban, for instance, was a former deputy chairman of the Malaysian Indian Congress (MIC).

28 In 1987, Mahathir's leadership of UMNO was challenged by Tengku Razaleigh Hamzah. Mahathir remained UMNO's president, but won the election by a small margin. Several UMNO delegates then appealed to the courts in order for the assembly and election to be declared void.

29 The PPPA is widely considered a repressive law, curtailing the freedom of speech. It prohibits the owning and use of printed presses that have not been granted a license by the Home Minister. The Minister has the discretion to grant, suspend and revoke licenses. A 1987 amendment to the Act included the provision that decisions from the Minister could not be challenged by the Court, which was subsequently overturned by Harun Hashim. On appeal, the Supreme Court overturned Harun's decision (Yatim 1995: 175).

30 The two other judges were former Chief Justice of Malaya Anuar Zainal Abidin, who had chaired the Commission of Inquiry regarding the treatment of Anwar Ibrahim in detention and found the Police guilty of ill-treatment, and former Court of Appeal judge Mahadev Shankar, who had also been part of the Commission of Inquiry.

Indonesian counterpart KOMNAS HAM, and runs parallel to the main tasks of NHRIs as envisaged in the Paris Principles. By the end of 2000, eight staff members were appointed to assist the commissioners, all seconded (on loan) from government departments (SUHAKAM 2001: 9). During 2001 their number increased rapidly to 38 staff members, usually appointed on a two-year contract (SUHAKAM 2002a: 63). The Commission also appointed a Secretary, a position which is held by a senior civil servant. This remains controversial among Malaysian NGOs,[31] who fear this arrangement may come to the cost of the Commission's independence. However, both SUHAKAM staff and commissioners argue that the Secretary's experience in dealing with other government agencies is an important advantage for the Commission. To fund its operations, SUHAKAM was allocated around RM 6 million (approximately US$ 1.5 million) in 2000 and 2001 (SUHAKAM 2001: 9; SUHAKAM 2002a: 64), which increased to RM 9.5 (approximately U$ 2.5 million) in 2002 (SUHAKAM 2003a: 105). Initially these funds were managed by the Ministry of Foreign Affairs, but from August 2001 SUHAKAM has been given full control over its finances (SUHAKAM 2002a: 74).

SUHAKAM set up headquarters in Kuala Lumpur, its first office located on the premises of the Ministry of Foreign Affairs (SUHAKAM 2000: 3). In 2001 the Commission moved its offices to the Tun Razak Tower, a 30-storey building in the heart of the city and much easier to access by public transport.[32]

Although the HRCMA 1999 did not include any provisions on local offices,[33] in 2001 SUHAKAM opened branches in the states of Sabah and Sarawak to increase access to the Commission for people outside of the Malaysian peninsula (SUHAKAM 2002a: 51, 54). These have been funded from SUHAKAM's general budget and have the same tasks as the Kuala Lumpur office. According to Simon Sipaun, who headed the Sabah office from 2001 to 2010, the local offices alleviate the work of headquarters in Kuala Lumpur. Additional advantages are that the branch offices have direct access to governments in the region, and that they are staffed by locals – which helps to reduce the psychological barriers which may otherwise be felt by justice seekers in the region who want to address the Commission.[34]

31 Conversation with Yap Swee Seng, 29 November 2006.

32 In 2011, SUHAKAM moved to the Perdana Tower, also in the centre of Kuala Lumpur, where it operates from four different floors. Despite suggestions from the government that SUHAKAM should be located in Putrajaya, the federal administrative centre of Malaysia, the Commission decided not to; as the city is less accessible by public transport than Kuala Lumpur.

33 The UN has encouraged the establishment of regional offices to increase physical accessibility to an NHRI (Centre for Human Rights 1995: 13, para 102).

34 Interview, 15 November 2006.

### 4.2.4 Challenges and Achievements

During the first two years of SUHAKAM's operation, the organisation did not shy away from engaging in politics. On numerous occasions, SUHAKAM provided the *Reformasi* activists with a physical space in which to organise their protests, and proved willing to accept formal complaints regarding the treatment of Anwar Ibrahim and other members of the opposition. Musa Hitam recalled that the police tried to prevent the protests and submission of complaints, but that SUHAKAM could negotiate with them about this:

> 'One day, they [the opposition] wanted to send a petition. Wan Azizah, Anwar's wife, was to lead a delegation to go to the head office [and to] hand over their petition to me. I said OK, the police said no, I said yes, we will meet them. […] In the end we negotiated with the police, we want to allow them to go [and submit the petition and there will be] no speeches [from the opposition]. […] I told the police, you stand outside; […] you keep your distance. Never [….] don't stand [with a] baton ready. They will notice you with your red helmet. Stand far away'.[35]

Accommodating such protests for any organisation in Malaysia was remarkable at that time. Hence, for civil society, SUHAKAM played an important role in facilitating the *Reformasi* by providing a space for protests. The mainstream press, which was usually extremely cautious, was moreover not afraid to contact NGOs when on SUHAKAM's premises.[36] Yap Swee Seng, coordinator of the NGO SUARAM (*Suara Rakyat Malaysia*, Voice of the Malaysian People), said that by providing a space for activism, SUHAKAM legitimised the notion of human rights in Malaysia:

> 'Before SUHAKAM, human rights were considered a western and dirty concept. But they [SUHAKAM] legitimised human rights discourse in Malaysia. They generated a lot of media reports on human rights, and it became a less problematic concept. [...] And we [human rights NGOs] finally had a public institution that was on our side'.[37]

During its first years SUHAKAM thus provided human rights activism with a platform from which to promote and create awareness of human rights – a crucial step in the process of human rights realisation. Moreover, SUHAKAM legitimised the notion of human rights from *within* the state. As a result, the Commission gained legitimacy among NGOs which had initially been sceptical.

SUHAKAM also attracted much attention by opening inquiries into serious human rights violations. The first one concerned the Kesas Highway Incident.

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35 Interview, 13 January 2009.

36 Interviews with Josef Roy Benedict, Amnesty International Malaysia, 16 November 2006; and Arutchelvan Subramaniam, JERIT, 23 November 2006.

37 Interview, 18 December 2006.

On 5 November 2000, the police intervened when a demonstration was held at the headquarters of the PKN (*Partai Keadilan Nasional*, National Justice Party), the party led by Anwar Ibrahim's wife Wan Azizah. The police used water cannons and tear gas to disperse the crowd and over 100 protesters were arrested (The Sun 7 November 2000; Malaysiakini 6 November 2000a), some of whom were kicked and punched by police officers (Malaysiakini 6 November 2000b). On 8 November, SUHAKAM released a statement expressing its 'deep concern' and announced that it would hold an inquiry into the incident even if no complaint had been filed (SUHAKAM 2002b: 61). The Commission began its inquiry on 29 November and continued for 20 days, hearing 46 witnesses. In the report released in August 2001, it concluded that 'excessive force had been used on people who had already been arrested' (SUHAKAM 2002b: 34). Furthermore, it said the 'treatment of persons detained was cruel and inhuman [...]. The Police should not assault persons who have been arrested or are otherwise in detention [...]' (SUHAKAM 2002b: 39) and that 'the agency responsible for the human rights violations is the Police' (SUHAKAM 2002b: 50).

The government, of course, was not happy with such criticism and lashed back at SUHAKAM. Prime Minister Mahathir said that the report had been influenced by 'western thinking' and argued that police officers in western countries sometimes misbehaved as well. His parliamentary secretary, Noh Omar, commented that 'SUHAKAM's recommendations would only serve to lower the morale of the police force' and added that the government did not accept the Commission's recommendations (Malaysiakini 23 August 2001). SUHAKAM did not waver, however. The chairperson of the inquiry, Anuar Zainal Abidin, responded that human rights were a universal matter and comparisons with other countries should not be drawn. The Report was received favourably by Malaysian human rights NGOs (Tikamdas 2002: 37).

In April 2001 SUHAKAM criticised the government for detaining seven *Reformasi* activists under the Internal Security Act (ISA), with five more arrests in the following days. In its press statement, SUHAKAM expressed its 'deep regret' over the use of the ISA, arguing that detention without trial constituted a 'fundamental human rights violation'. It requested the immediate release of the detainees and made clear that the Commission would visit them in order to inspect the conditions of detention. Further, SUHAKAM announced that it would evaluate the ISA and that it was of the opinion that the law should be amended or repealed (SUHAKAM 2002a: 82).

This time it was not the government which reacted sharply, but the judiciary. During the *habeas corpus* application of one of the detainees, Judge Augustine Paul argued that SUHAKAM's comments constituted an 'unlawful interference with the lawful exercise of discretion of the detaining authority' (Whiting 2003: 85). According to Whiting (2003), there are many judges who feel that SUHAKAM usurps the role of the courts, and regard the Commission as 'a bearer of unwelcome international norms' (Whiting 2003: 85-8). This has been confirmed by senior SUHAKAM staff, who are aware that the relationship

with the judiciary is precarious. For this reason the Commission has not identified the judiciary as a target group in its education programmes: 'there is a very thin line between the judiciary and us that we cannot cross. […] We are careful not to interfere with judicial independence, they might not appreciate it'.[38]

While the above actions sparked criticism from the government and judiciary, SUHAKAM quickly gained the support of human rights NGOs, the Bar Council, and opposition parties. However, in other cases, SUHAKAM's lack of response tipped the scales in the opposite direction. One example is the Kampung Medan incident. In March 2001, riots erupted in Kampung Medan neighbourhood of Kuala Lumpur, which lasted for several days and left six people dead, hundreds injured, and much property destroyed. Malaysians of Indian descent had been the main victims of the violence, and they alleged that the police (most of them Malays) had refused to offer any protection. Malay police officials were quick to rebuff those claims and accused the Indian population of attacking them. The government was equally quick to dismiss such allegations, claiming it was incorrect 'to attribute the riots to racial motivations', and Mahathir claimed that his opponents had incited them to destabilise his government.

Whatever the grounds for the riots, they were the worst outbreak of intercommunal violence since 1969; and therefore became an extremely sensitive issue. The police warned that criticism of the government's handling of the case could be subjected to the Sedition Act[39] (Whiting 2003: 92-94), and this made SUHAKAM cautious about addressing the case, even though it received many complaints regarding Kampung Medan. In the end, the Commission said there was no need for an inquiry, because police protection for the community had increased – and because it had no jurisdiction, as the case had become subject to court proceedings.[40] However, in fact the case was never addressed in court, and therefore the reasons given by SUHAKAM were invalid.

SUHAKAM's inaction in the Kampung Medan case was heavily criticised by human rights NGOs. Ramdas Tikamdas, President of HAKAM, stated that 'SUHAKAM's failure or neglect or refusal to hold an inquiry into the Kampung Medan incident reflects its lack of courage and conviction to confront "difficult" human rights issues' (Tikamdas 2002: 42). In April 2002, several victims of the Kampung Medan incident filed a lawsuit against the Commission. The victims claimed a compensation of RM 50 million (US$ 13 million) for SUHAKAM's failure to initiate an inquiry, arguing that the Commission had

38 Interview with Nurul Hasanah, Senior Officer in the Complaints and Inquiries Working Group, 8 January 2009.

39 The Sedition Act (1948) curtails the freedom of speech. The Law prohibits discourse that is considered seditious, including any that can upset racial relations. Certain provisions of the Constitution may also not be discussed, such as Art 153 which gives special rights to the Malay.

40 Interview with Musa Hitam, 13 January 2009.

failed to comply with the HRCMA 1999 (Malaysiakini 17 April 2002). In February 2003, the Kuala Lumpur High Court ruled that SUHAKAM had full discretion to decide whether or not to hold an inquiry, and therefore had not violated the HRCMA 1999 (Malaysiakini 17 February 2003).

In summary, SUHAKAM's main achievements in its first two years were to open inquiries into well-publicised cases of human rights violations and to create a platform for human rights activism – a novelty for Malaysia and an important step in contributing to human rights awareness. The Commission also addressed the use and abuse of the ISA, known as Malaysia's most draconian law and a crucial support for the rule of the Barisan Nasional coalition. SUHAKAM thus developed into a protagonist of human rights norms, often directly referring to the international human rights regime. However, when the Commission was confronted with issues of ethnicity, its profile became less clear-cut. As will become apparent in Chapter 5, SUHAKAM took a similar position with regard to freedom of religion. Issues of race and religion are very sensitive matters in Malaysia, which deeply divide Malaysian society and have been largely avoided in public debate, a line which has been followed by SUHAKAM.[41] An additional problem in such cases is the risk of prosecution under the Sedition Act, a possibility which is taken seriously by the Commission. SUHAKAM's inaction in the Kampung Medan incident was thus the expression of a cautious search for balance in addressing human rights issues and preventing interethnic tensions, while also guarding its own institutional survival.

## 4.3 2002-2010: Between State and Society

### 4.3.1 Organisational Development

From its establishment until 2010, the membership of SUHAKAM was dominated by former government officials. This was most evident in the background of the Chairpersons, who had previously served as Deputy Prime Minister (Musa Hitam) and Attorney General (Abu Talib Othman). Many other commissioners were also former high-ranking members of the civil service, including former Director-General of Education Asiah Abu Samah, and Foreign Affairs officials Choo Siew Kioh and Nazihah Tunku Mohamed Rus. In addition, SUHAKAM's membership has also included retired judges, academics, and representatives from indigenous communities in Sabah and Sarawak.[42] Civil society representatives have also been appointed as SUHAKAM commissioners, with the most well-known former member being SIS activist Zainah Anwar; as well as Siva Subramaniam, known for his work in (government-endorsed) trade unions,

41 This will be addressed in more detail in Chapter 5.
42 Also see 4.2.3.

and Denison Jayasooriya, who has been active in work on urban poverty. SUHAKAM's membership has therefore been diverse, and the many direct links between commissioners and state bodies have simplified access to these organisations.[43] While the close association of many SUHAKAM members with the Barisan Nasional coalition has not prevented the Commission from being critical of the Coalition's politics, in general commissioner's perceptions of human rights echo that of the ruling coalition. In addition, many commissioners find it difficult to criticise a government that they have served for years. As such, the general tendency among SUHAKAM commissioners is to perceive their role as one that is constructive and in support of the government, rather than critical – let alone oppositional.[44]

SUHAKAM commissioners are not required to work for the organisation full-time,[45] and most of the workload is therefore borne by the staff. After 2002, SUHAKAM rapidly increased the number of its staff members in order to be able to deal with an increasing workload; from around 40 at the end of 2001 to over 70 in early 2009.[46] Most staff members have a degree in law or international relations and often started their employment at the Commission directly after graduation from university. Although many of them seem quite happy, some of those who have served longer have expressed their interest to leave. Indeed over the years, a considerable number of staff members who were well-regarded by colleagues and commissioners have left the Commission to find employment in other government departments or international organisations.

One of the reasons for this loss of well-regarded staff is likely to have been the lack of job security.[47] Until 2009, SUHAKAM staff members were seldom given permanent contracts, which likely made it difficult for the Commission to attract qualified personnel and keep them. Many commissioners, including the Vice Chairman, identified this as a key problem for SUHAKAM,[48] although the Secretary in a personal interview dismissed those claims, stating that resignations were 'incidents, not a structural problem'.[49]

While SUHAKAM is a state body, staff members are not civil servants, and therefore the rules regarding the racial composition of government departments that give preferential treatment to Malays do not apply. Nevertheless, the

43 Interview with Ahmad Yusuf Ngah, SUHAKAM Secretary, 20 November 2006.
44 This will be further elaborated upon in Chapter 5.
45 Interview with Siva Subramaniam, commissioner, 28 January 2009. Siva argued that the lack of fulltime available commissioners is a key constraint for the Commission.
46 Within SUHAKAM, a division is made between staff employed within the various Working Groups, called officers, and staff who work for supporting divisions (e.g. finance, administration), who are referred to as staff.
47 Other reasons were workplace tensions, monotony of the work, and a desire for new challenges.
48 Interviews with Simon Sipaun, vice-chairperson, 15 November 2006; and Siva Subramaniam, 21 November 2006.
49 Interview with Ahmad Yusuf Ngah, 20 November 2006.

majority of staff is of Malay origin. Some staff members themselves suspect in fact that preferential treatment is given to Malays – or rather, to Muslims.

> 'If you look around, there's not many Indians or Chinese around. Once, a selection procedure was almost finished. I think there was a Chinese on top of the list. Then all of a sudden the Secretary announced he already hired someone. The person was Malay, and had not applied within the required time for the job. It's not that I want to complain about my own race, but the system is unfair and Malays are often lazy'.[50]

The Commission's preferential treatment for Malays was evident until 2006, in its practice to only advertise employment opportunities in Malay language newspapers. Now that advertising has been expanded to English language newspapers, there has been an increase in staff of Chinese and Indian descent.[51] A more pluralistic composition of SUHAKAM's staff, or 'representative composition' (Centre for Human Rights 1995: 14, para 105), is important in order for minorities to feel at ease at the Commission. Likewise, non-Malay staff members often function as interpreters for complainants who are not fluent in either Malay or English.

Although some commissioners are popular among staff members, in general the relationships are rather tense. While conducting field research I observed that some staff members tried to avoid particular commissioners: they changed tables in the canteen so they could not be seen, and one of the drivers would take sick leave if he was asked to assist certain commissioners. Another staff member was annoyed when she received the 'urgent' request by a commissioner to find out when the sales ended at a department store. Most staff members felt that commissioners did not appreciate them, although in practice they do most of the work. However, they are not likely to complain about these matters in a formal way, i.e. to the Secretary – who is responsible for staff-commissioner relations. Staff members tend to ignore disagreements with commissioners, accepting such challenges as part of their jobs. Most of them remain very discreet: even former employees were reluctant to talk about negative experiences. This illustrates that generally speaking, SUHAKAM and its commissioners command loyalty.

For most commissioners, their position at SUHAKAM is a second (or third) appointment. Most of them regard the position as an honorary one,[52] and commissioners themselves decide how much time they will spend on work for the Commission. Some commissioners are rarely present: they only attend the monthly meetings, and are barely known by their own staff. The latter

50 Interview with staff member, January 2009.
51 Interview with Nurul Hasanah, 8 January 2009.
52 Interview with Ramon Navaratnam, former commissioner, 22 January 2009.

are concerned about these absences and consider it necessary that at least one commissioner is available at all times.

> 'We need the commissioners to sign letters. It helps if commissioners are there to come with us on visits. It brings extra status and it is easier to obtain information. We really need a commissioner to be here all the time.'[53]

The sporadic availability of officials seems to be a common practice in public agencies in developing countries (see for instance Grindle 1997: 481). The unavailability of SUHAKAM commissioners does not influence the organisation's performance directly, as most of the work is done by staff. The absence or availability of commissioners does, however, influence how stakeholders – such as representatives of NGOs and complainants – regard the Commission. Further, the absence of commissioners has a negative influence on staff-commissioner relationships. Staff members are more willing to work harder for commissioners whom they like or who take an interest in the work they do. In Chapter 1 it has been argued that one of the prerequisites for NHRIs to be effective is that they become embedded in society. This would clearly be stimulated by representatives (commissioners) who are available, visible, and give the impression that they are committed to their work.

### 4.3.2 Main Achievements

SUHAKAM quickly became an active NHRI, which developed a wide range of activities in the areas of human rights education, research and investigation. Its human rights education programme included the publication of newsletters, poster competitions and essay-writing for children, and workshops on particular human rights for specific groups. SUHAKAM made an important contribution to the promotion of human rights norms by offering such programmes to the police (SUHAKAM 2002a: 52). The first workshop for senior police officers was held in 2002 (SUHAKAM 2003a: 59), followed by many others. In addition to creating human rights awareness, these programmes increased the police force's familiarity with the Commission. In some states this worked very well, as in Melaka where the Head of Police issued an instruction that letters or recommendations from SUHAKAM should be answered or implemented immediately. This instruction has been followed by most police offices in the state, and SUHAKAM can refer to the document in case of delays or hindrance.[54]

Similarly, in 2006 SUHAKAM conducted weekly human rights training in the state of Melaka for officers of RELA (*Relawan Rakyat Malaysia*, Malaysia People's Volunteer Corps). RELA is a civil volunteer corps with more than 2.5

53 Interview with Nurul Hasanah, 14 December 2006.
54 Interview with Nurul Hasanah, 23 November 2006.

million officers.[55] RELA officers are involved in crowd control, and also used for tracking down illegal immigrants. They are allowed to carry and use arms, without having received any training. The training in human rights for RELA officers was reportedly challenging. According to Simon Karunagaram, senior officer of the Education Working Group, the training was 'very demanding, but very important. At first they [the RELA officers] were very defensive. Now we take commissioners with us [to training sessions] and they have quieted down'.[56] A commissioner of SUHAKAM will hold a presentation on human rights principles in domestic and international law (in particular the UDHR), and show pictures of human rights violations. Participants are encouraged to actively participate: they are asked to apply the information to their work and quizzed about their own behaviour.[57] That the Commission has been able to access RELA is an important feat, even though the number of officers that attend (800 per month or about 10,000 on a yearly basis) is relatively small compared to the 66,000 officers in Melaka.

In the field of research, SUHAKAM issued a number of reports on topical human rights issues. Important was the 2002 Report on the Freedom of Assembly, in response to the often violent way in which public assemblies were dispersed by riot police. According to the 1967 Police Act, gatherings of more than three people in public spaces require a Police Permit. Any assembly held without such a permit is considered unlawful. SUHAKAM's report was partially based on the evidence obtained in the Kesas Highway Inquiry, where the Commission concluded that the requirement to obtain a police permit was not necessary. The Commission stated that 'it is definitely possible in present day Malaysia to have peaceful assemblies' and that these 'do not disrupt peace and stability and need not cause any public disorder' (SUHAKAM 2002c: 19-20). SUHAKAM also received much praise for its 2002 report on the Internal Security Act.[58] SUHAKAM concluded that 'the law and practice in relation to the ISA have adversely effected the status of human rights in Malaysia' (SUHAKAM 2003b: 83), and recommended for the ISA to be repealed (SUHAKAM 2003b: 88). In addition to these reports which were concerned with civil and political human rights, SUHAKAM also paid attention to socio-economic rights, most notably by publishing a series of reports on the Millennium Development Goals (MDGs) and their relevance in Malaysia. In doing so, the Commission echoed the government's emphasis on development, and placed those arguments in a human rights framework.

In the area of investigation, two types of inquiries can be distinguished: those based on individual complaints; and the public inquiries into structural

55 As of 2011. See http://www.rela.gov.my/index.php?option=com_content&view=article&id=115&Itemid=152&lang=ms, last accessed March 2012.
56 Interview, 29 November 2006.
57 Personal observation, 22 November 2006.
58 This report will be discussed in more detail in Chapter 5.

human rights problems or into cases which have attracted wide public attention. Among the latter was the inquiry into the death in custody of S. Hendry. Death in custody is a recurring problem in Malaysia.[59] S. Hendry was arrested by the police in September 2005 for his alleged involvement in two murder cases and an armed robbery. In November, he was transferred from one prison to another, where he was found dead in his cell the following day. The police said he had committed suicide, but his family refused to believe this. They referred to bruises on Hendry's head, face and body and said that he appeared to be in good spirits a day before he died. After its inquiry SUHAKAM found that Hendry's death had indeed most likely been suicide, but that his detention had been too lengthy and that both police and prison officials had been negligent in complying with the regulations in place. SUHAKAM here referred to Malaysian law, the 1953 Lock-up Rules and the 1970 Emergency Ordinance (Public Order and Prevention of Crime) (Detained Persons) Rules. In addition, SUHAKAM referred to international human rights standards, urging for compliance with Art 10(3) of the ICCPR[60] (SUHAKAM 2006: 82-4).

Another public inquiry was that concerning the 2006 KLCC incident, in which SUHAKAM addressed another recurrent problem: the violent dispersal of assemblies. On 28 May 2006, there was a public protest involving between 300 and 500 people at the Kuala Lumpur Convention Centre (KLCC), against increases in fuel and electricity prices. The police ordered the crowd to disperse and some police officers hit the protestors with batons, leaving several injured. In its inquiry, SUHAKAM concluded that although the organisers did not have a permit, the gathering had been peaceful and the right to assemble peacefully was constitutionally guaranteed (SUHAKAM 2007a: 83). Moreover, the Commission stated that the police had used excessive force and the arrest of three protesters had not been warranted: the police interference had been 'disproportionate' and 'not necessary in a democratic society' (SUHAKAM 2007a: 85-7).

The discourse SUHAKAM has used in its work has been based consistently on a wide range of legal sources: not only national laws and regulations, but also international human rights standards, including case law from Commonwealth countries and the European Court of Human Rights. This illustrates that SUHAKAM has interpreted the notion of human rights broadly, going beyond the definition in the HRCMA 1999.[61] In many instances, SUHAKAM has combined this comprehensive interpretation of human rights with a discourse

59 The Malaysian Newsagency Bernama reported that between 2003 and 2007, 1535 deaths in custody occurred in Malaysia (Bernama News 8 July 2008).

60 'The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status'.

61 '"Human Rights" refers to fundamental liberties as enshrined in Part II of the Federal Constitution' (Art 2). As noted in Chapter 1, the Federal Constitution only includes a very limited range of human rights. In addition, the HRCMA does not refer to international human rights law or national legislation which includes human rights provisions.

of socio-political development: in its inquiries on the Kesas Highway and KLCC incidents the Commission stated that Malaysia had grown into a democratic society in which peaceful assemblies should not be prevented.

In short, since 2002 SUHAKAM has taken on a wide range of human rights-related activities, from education and research to larger investigations into human rights abuses (public inquiries). In its efforts, the Commission has responded to topical concerns and recurrent problems in a comprehensive way. This means that SUHAKAM has performed well, with the commission's people being the driving force behind its performance: overall, both commissioners and staff have responded adequately to the demands placed upon the organisation.

In socialising human rights, SUHAKAM has mainly engaged in the appropriation[62] or replication of international human rights norms into a Malaysian setting. It has promoted human rights awareness (through education) and urged for the advancement of human rights in legislation (through research). In addition, the Commission has held perpetrators of human rights abuses to account through its investigations and public inquiries. Through its activities SUHAKAM has brought attention to topical rights issues in Malaysia, and therefore contributed to larger debates on and awareness of human rights. The question that follows is, of course, what the effects of SUHAKAM's activities have been. The next section will address the question of SUHAKAM's effectiveness, by looking at some of the challenges with which the Commission has had to deal.

### 4.3.3 Main Challenges

While SUHAKAM has managed to develop many activities, the Commission has also been faced with serious challenges from its external environment; particularly from the federal government. Prime Minister Mahathir, on several occasions, stated that the Commission was 'influenced by the west' (Malaysiakini 23 August 2001). Mahathir's Deputy, Abdullah Badawi, described SUHAKAM's reports as 'biased' (Malaysiakini 9 September 2001). Similarly, Parliamentary Secretary Noh Omar said that SUHAKAM 'must look at Malaysia from a local perspective and not simply dish out western-influenced recommendations' (Malaysiakini 23 August 2001). Other government officials have expressed similar criticisms.

This unsympathetic attitude towards SUHAKAM was reflected in the ignoring of its recommendations. The government also did not ratify any of the international human rights treaties. SUHAKAM's annual reports, submitted to Parlia-

62 Cf. Merry 2006, see 1.2.2.

ment, were read by some MPs;[63] but the reports have never been discussed in a parliamentary debate – in spite of insistence by opposition parties and SUHAKAM itself (Malaysiakini 8 December 2005). Within SUHAKAM, different reactions have been recorded regarding this situation. Most staff members and some commissioners have expressed disappointment,[64] but others have seemed disinterested. In Chairman Abu Talib Othman's words: 'it is only our job to advise the government, it is up to them to decide whether to act on it or not'.[65]

The strained relationship between SUHAKAM and the federal government has been evident in the appointment of new commissioners. In 2002, none of the terms of Anuar Zainal Abidin, Mehrun Siraj and Salleh Mohd Nor – all considered to be 'critical' commissioners – were renewed (Malaysiakini 2 April 2002). Several years later, Anuar said he was not reappointed because of his role in the Kesas Highway Inquiry, and because he disagreed with Mahathir over the publication of the report (Malaysiakini 7 July 2006). Similarly, in 2006 two commissioners who were popular with NGO representatives and lawyers – Hamdan Adnan and Ramon Navaratnam – were not reappointed (Malaysiakini 3 May 2006). A few weeks earlier, Navaratnam had criticised the two-year term, stating that it was too short to achieve anything (Malaysiakini, 13 April 2006). Hamdan Adnan, the popular head of the Complaints and Investigations Working Group, had openly criticised Mohd Nazri Abdul Aziz, Minister for Law and Parliamentary Affairs in the Prime Minister's Department, when the latter said that SUHAKAM was meant to be a 'toothless tiger'.[66] Hamdan condemned Nazri's statement as shameful and presumptuous (Malaysiakini 1 April 2006). Both Hamdan Adnan and Ramon Navaratnam also suspected that their frequent criticism of and disagreements with the Chairman contributed to their dismissal.[67] It is likely that on both occasions, the Prime Minister used his control over the appointment procedure to dispose of these members. In combination with the short tenure period, the appointment procedure thus became an important tool in controlling the Commission.

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63 Interview with Zaid Ibrahim, former Minister of Law (March-September 2008) and Member of Parliament, 21 January 2009.

64 Interviews with staff members Nurul Hasanah, 14 December 2006, 8 January 2009; and Simon Karunagaram, senior officer in the Education Working Group, 29 November 2006; former commissioners Hamdan Adnan, 16 January 2008; Ramon Navaratnam, 22 January 2009; and Siva Subramaniam, 28 January 2009.

65 Interview, 3 January 2007.

66 Nazri issued the comments in response to questions from DAP Member of Parliament Teresa Kok, who asked whether the government would grant the Commission more powers. Nazri replied: 'I think you are dreaming, we never planned to give any teeth to SUHAKAM' (Malaysiakini 27 March 2006).

67 Interviews with Hamdan Adnan, 16 January 2009; and Ramon Navaratnam, 22 January 2009.

In 2002, Musa Hitam requested not to be reappointed to SUHAKAM. The Prime Minister appointed Abu Talib Othman as his successor. This was a controversial appointment, as in his position of Attorney General (1980-1993) Abu Talib had played a key role in the 1988 dismissal of Chief Justice Salleh Abas.[68] Abu Talib was moreover known for his support of the ISA, whereas SUHAKAM had consistently opposed the Act (Malaysiakini 23 April 2002).[69] It therefore seemed likely that Abu Talib's appointment was an attempt by the executive to interfere with SUHAKAM's operations. Nevertheless, as we have seen in the previous sections, the appointment of Abu Talib did not lead to a dramatic change in SUHAKAM's post-2002 work, which in fact expanded by paying greater attention to socio-economic issues.

The federal government's unwillingness to respond to SUHAKAM's recommendations, and the Prime Minister's control over the appointment procedure, have triggered claims that 'there is no place for SUHAKAM' (Whiting 2003: 96). However, this Chapter has shown that despite difficulties, the Commission has carried out its mandate. The government has also continued to give the Commission a reasonable budget, which increases every year; when it could have put in place severe financial constraints.[70] Moreover, SUHAKAM's position appears to strengthen as political configurations in Malaysia change. In the 2008 elections,[71] the coalition of opposition parties *Pakatan Rakyat* (Peoples' Alliance, or PR)[72] won control over five states.[73] The PR parties have frequently submitted complaints to SUHAKAM; and once in government, they have proven to be more responsive than their predecessors towards SUHAKAM and

68 The 1988 Constitutional Crisis saw the dismissal of Salleh Abas and two other judges, for their ruling against government policies. See 1.1.5.

69 Abu Talib remained openly supportive of the use of ISA in some cases, in an interview differentiating between his personal views and the Commission's stance on the matter (3 January 2007).

70 Interview with Ahmad Yusuf Ngah, 20 November 2006. In 2008, SUHAKAM received RM 10 million from the government to fund its operations (SUHAKAM 2009: 225).

71 During the 2008 General Election, opposition parties won 82 of 222 seats, an increase of 62 seats compared to the 2004 elections. Although BN secured a majority of seats (winning 140 of 222), it lost its two-thirds majority. The outcome of the 2008 elections was one of the worst results in BN's history, and holds much significance for the opposition parties and Malaysian civil society. See for instance Kee Thuan Chye (2008), *March 8: The Day Malaysia Woke Up*. Shah Alam: Marshall Cavendish Editions.

72 The Pakatan Rakyat includes PKR, PAS and DAP. Between 2010 and 2011 it also included the Sarawak National Party (SNAP).

73 Between 2008 and 2013, Pakatan Rakyat controlled the states of Kedah, Kelantan, Penang and Selangor. In addition, between 2008 and 2009 Pakatan Rakyat also controlled the state of Perak. However, the state government was taken over by Barisan Nasional after three Pakatan Rakyat assembly members switched their allegiance. In 2013, Pakatan Rakyat lost control over Kedah. While an increasing proportion of the population now votes for Pakatan Rakyat, the coalition has not yet been able to secure control of the federal government. Reasons for this have been postulated to include Malaysia's ethnic polarisation, which has inhibited political mobilisation and change; and the doubts held by many Malaysians about the sustainability of the opposing coalition (Gomez 2004: 6).

human rights issues. With regard to the state of Selangor, Nurul Hasanah, senior staff member of the Complaints and Investigations Working Group said;

> 'Now that they [Pakatan Rakyat] are in government they take action on our recommendations. For instance during the BN [Barisan Nasional] government we never got any replies. But now the new state government has replied and they will look into the case. At least we have a communication line going on now'.[74]

There is definitely a place for the Commission in Malaysia, but its actual operation, performance and ultimately effectiveness need to be viewed in a wider socio-political context.

Another challenge is SUHAKAM's relationship with NGOs. Malaysian human rights NGOs have watched closely and sometimes criticised the Commission. During public inquiries, NGOs and the Bar Council have sent representatives to observe the proceedings, with the Human Rights Committee of the Malaysian Bar publishing its observations online. Public inquiry proceedings are usually meticulously reported by independent newsportals such as *Malaysiakini*. Each year several NGOs organise a national consultation about SUHAKAM, where members of civil society organisation – and sometimes international experts – give their views on the Commission. SUHAKAM commissioners are invited to present on their activities and answer questions. Most commissioners do not like the event: 'It's awful. It's as if we're being thrown before the lions and torn into pieces'.[75] Nevertheless, SUHAKAM has always sent at least one commissioner to the consultation, indicating that the Commission is open to dialogue with its stakeholders, and does not avoid being held accountable.

The strained relationship between SUHAKAM commissioners and NGOs has in part to do with contrasting backgrounds. As mentioned earlier, most of SUHAKAM's commissioners have a background in the civil service, and are indeed government loyalists. Only a few have direct experience or affinity with human rights NGOs. According to Malaysian lawyer Malik Imtiaz Sarwar, many SUHAKAM commissioners are 'more conservative and have a different mindset'[76] than human rights activists and lawyers; views which are in fact commonplace in Malaysia:

> 'People know there is a Constitution, but they do not know what it can do for them. Then there is cultural relativism, and Asian Values. Human rights are just not a big thing in Malaysia. Activists are seen as longhaired hippies, and this idea has filtered through to the government and judiciary'.[77]

74 Interview, 8 January 2009.
75 Interview with Asiah Abu Samah, commissioner, 4 January 2007.
76 Interview, 20 March 2006.
77 Ibid.

The limited knowledge about human rights, as well as human rights activism, has its effects on general perceptions of NGOs within SUHAKAM. Chairman Abu Talib Othman stated in an interview that:

> 'there is a role to play [by NGOs]. SUHAKAM cannot function by itself and they can complement us. […] Where what they say is relevant, we accept. But we do not want to create controversies. […] They [NGOs] have a "you are with me or not with me" attitude, but it is important to guarantee harmony and respect the laws of the country'.[78]

Abu Talib then went on to describe NGOs as groups of 'protesters', criticising this by stating that 'demonstrations are not the way to do it'.[79] This position is shared by other members of SUHAKAM, with commissioner Khoo Kay Kim, an academic involved in the drafting of Malaysia's national ideology, *Rukunegara*,[80] accusing NGOs of 'creating trouble', to be 'not really concerned with Malaysia', and also questioning their impartiality as they 'were funded by foreign governments'.[81] This illustrates that in general, SUHAKAM is very critical of NGOs and the extent of their involvement in the Commission.

Nonetheless, some commissioners – particularly those who have been involved in civil society themselves – have actively sought engagement with NGOs. However, such relationships appear to be on a personal rather than institutional basis.[82] Despite a lack of structural cooperation between SUHAKAM and NGOs, civil society representatives are sometimes asked to sit on committees (small working groups) of SUHAKAM concerned with economic, social and cultural rights.[83] SUHAKAM also calls upon NGOs to get access to certain groups, such as indigenous communities.[84]

While SUHAKAM seems willing enough to engage with civil society, NGOs complain that the Commission is slow in responding to cases, works in a bureaucratic manner, and is afraid to offend the government.[85] They also claim that the Commission prefers to work in non-controversial areas, such as human rights education, rather than to intervene in human rights violations (SUARAM 2007: 114). At one point the NGO community even threatened to

78 Interview, 3 January 2007.
79 Ibid.
80 Rukunegara, or National Principle, was proclaimed in 1970, in a reaction to the 1969 race riots in Kuala Lumpur. The text refers to fostering unity and democracy.
81 Interview, 20 December 2006.
82 Enalini Elumalai, SUARAM coordinator for the Abolish ISA Movement (Gerakan Mansuhkan ISA, or GMI, a coalition of 83 NGOs), stated that some commissioners were happy to give their personal mobile phone numbers, enabling NGOs to contact them directly (interview, 22 January 2009).
83 Interviews with Yap Swee Seng, 14 November 2006 and Josef Roy Benedict, 16 November 2006.
84 Interview with Colin Nicholas, Centre for Orang Asli Concerns (COAC), 22 December 2006.
85 Interview with Yap Swee Seng, 18 December 2006.

disengage with the Commission, and in 2002 a coalition of 32 NGOs stopped communicating or working with SUHAKAM for 100 days, following the dismissal of several critical commissioners and the appointment of Abu Talib Othman as chairperson. In 2005, human rights NGOs did the same when SUHAKAM invited former Prime Minister Mahathir to speak at Malaysian Human Rights Day. In his address, as could be expected, Mahathir accused NGOs of buying into 'western propaganda' (SUARAM 2006: 129). In 2006, NGOs once again threatened to boycott the Commission if it did not open a public inquiry into the KLCC incident (FORUM-ASIA 2006: 40-1). When SUHAKAM opened an inquiry five months later, civil society labelled this as a 'late move' (SUARAM 2007: 119).

In 2008, the sensitive relationship between SUHAKAM and NGOs was challenged by a report in which two NGOs (SUARAM and ERA Consumer) complained to the International Coordinating Committee on NHRIs (ICC) that the HRCMA 1999 did not comply with the Paris Principles, particularly where it concerns the appointment of members (SUARAM 2007: 115). To their surprise, the ICC then recommended that SUHAKAM's accreditation be lowered from 'A' to 'B' status.[86] This was the first time the ICC had responded in this manner to a report submitted by NGOs.[87] Several commissioners regarded the report as an attack on SUHAKAM, but one of its authors, John Liu, held that it was meant to force the Government to amend the Act.[88] SUHAKAM itself submitted a memorandum to the Government to amend the HRCMA 1999. The government responded that it did not agree with the ICC (Malaysiakini 19 November 2008), but nevertheless amended the HRCMA 1999 in 2009 (see below).

Whether they like it or not, SUHAKAM and NGOs need each other. As argued in Chapter 1, one of the most important roles for an NHRIs is to endorse human rights – which are often already promoted by NGOs – at national levels. The societal acceptance of human rights norms is a crucial step towards the realisation of those rights. However, societal acceptance is difficult to achieve when different views on human rights within an NHRI itself. As will be demonstrated in the next Chapter, to align those different and sometimes conflicting views is a complex task, but one crucial to a Commission's survival and success.

86 'A' accreditation is relevant for NHRIs as it gives them independent participation rights (i.e. ability to speak on their own behalf) at the United Nations Human Rights Council and subsidiary bodies. In addition, only 'A' accreditation will enable them to obtain full membership of regional organisations, such as the Asia Pacific Forum of NHRIs (APF), which has considerable advantages in terms of training opportunities for staff.

87 Interview with John Liu, representative of SUARAM, 12 January 2009.

88 Ibid.

### 4.3.4 Amendments to the HRCMA 1999

In late 2008, the Malaysian federal government came under increasing pressure to amend the HRCMA 1999, after the ICC recommended downgrading SUHAKAM's status from 'A' to 'B'. The ICC expressed its concern about the appointment procedure, the lack of participation of societal groups, and the short tenure of commissioners.[89] Eventually the government gave in to international and domestic pressure, and in March 2009 proposed two amendments to the Act.[90] The first amendment proposed to extend the tenure of commissioners to three years and to allow them to be reappointed only once.[91] The second amendment held that the Prime Minister should follow the recommendations of a special committee, prior to giving his advice to the King regarding who to appoint as commissioners.[92] This committee should be chaired by the Chief Secretary to the government, and comprise in addition the Chair of SUHAKAM, as well as three other members appointed by the Prime Minister, who should be 'members of civil society with knowledge of or experience in human rights matters'.[93] The recommendations made by the committee would be binding.

These amendments were submitted to parliament one day before the deadline of the ICC. Opposition parties complained that they had not been given sufficient time and notice to study and debate the proposed amendments, but Minister Nazri Abdul Aziz insisted that one day's notice was enough to discuss five pages and that the government had been 'too busy' with other matters (Dewan Rakyat Malaysia 25 March 2009: 99, 102). He also said that the amendments were necessary because downgrading of SUHAKAM 'would look bad on our country' (Malaysiakini 25 March 2009). In the end, the amendments were adopted unanimously.

These amendments are certainly an improvement for SUHAKAM. The extension of the commissioners' tenure to three years promotes continuity, even if it is still relatively short. The inclusion of an advisory committee for the Prime Minister is also a widely welcomed change, as it reduces Prime Ministerial control over the appointment procedure. However, public scrutiny or participation in the appointment process remains completely absent. The Malaysian government did achieve its main goal, as SUHAKAM retained its 'A' status. The ICC expressed its satisfaction over the extension of tenure, but expressed its continuing concern about the lack of transparency of the new

89 See http://www.nhri.net/2009/SCA%20Mar09%20-%20Malaysia%20(SR).pdf, accessed July 2009.
90 Two amendments were passed, Act A1353/2009 and A1357/2009.
91 Art 5(4).
92 Art 5(2).
93 Art 11A(c).

appointment procedure, and the necessity of societal participation in the process.[94]

### 4.3.5 Developments in 2010

In 2010, the new appointment procedure was put into practice for the first time. On 23 April 2010 the tenure of the incumbent SUHAKAM commissioners expired, and since all had served six years or longer, none was eligible for re-appointment. This left SUHAKAM without commissioners for the duration of the appointment process. According to Malaysian NGOs, this resulted in 136 complaints which had been brought to the Commission remaining unaddressed (Malaysiakini 17 May 2010). On 7 June 2010 the appointment of seven new commissioners was announced. In line with tradition, the position of Chairperson was to be held by former Foreign Affairs official Hasmy Agam.[95] Of the six other commissioners, three had a background in civil society, including indigenous rights; two were current academics, including an expert in Islamic law; and the sixth was a practicing lawyer. Those members with a civil society background were associated with government-endorsed NGOs; therefore their appointment was not a significant break with the past. However, this new composition of SUHAKAM (still current at time of writing) suggests that the emphasis on civil servants in the Commission seems to have been abandoned.

The manner in which the new appointment procedure was conducted attracted considerable criticism. SUARAM coordinator John Liu said the process was 'flawed', as it had been 'completely shrouded in secrecy [and had] not represented all groups in the wider Malaysian society' (Malaysiakini 8 June 2010). No announcement was made about the three members appointed to the selection committee, and a list of nominated candidates was not made public. The members of the selection committee who were known to the public (i.e. SUHAKAM's Chairperson Abu Talib and the Chief Secretary to the government) also refused to answer any questions during the process (Malaysiakini 1 April 2010). Therefore, the amendments did not lead to more public scrutiny of and participation in the appointment procedure, despite this being on the record as a key concern of Malaysian human rights NGOs as well as the ICC.

The influence that the executive still commands, to date, over the appointment procedure has given rise to doubts about the quality of the commissioners. Nevertheless, under the leadership of Hasmy Agam, SUHAKAM has given the impression that it is developing some independence from the government. Hasmy Agam has promised that the Commission will engage more

94 See http://www.nhri.net/2009/SCA_REPORT_March%202009%20Session_(English).pdf, accessed July 2009.

95 Hasmy Agam served as chairperson of the Institute on Diplomacy and Foreign Relations (Malaysiakini 7 June 2010).

actively with the media, NGOs and civil society (Malaysiakini 16 June 2010). The Commission has also started positioning itself clearly in human rights debates in Malaysia. In June 2010, after a visit of the UN Working Group on Arbitrary Detentions, the Commission gave its full support to the Working Group's recommendations, and stated that arbitrary detention is an infringement of human rights. This was a continuation of SUHAKAM's earlier stance with regard to arbitrary detention, and once again the Commission argued that the ISA should be repealed and replaced with a law that 'takes a tough stand on the threat to national security', but 'should also fall in line with the fundamental human rights principles' (SUHAKAM 2010b). In the following month, SUHAKAM condemned the withdrawal of publication permits for the newspapers Suara Keadilan and Harakah, associated with opposition parties PKR and PAS respectively (SUHAKAM 2010c). The Commission also lent its support to the Penan Support Group, after reports that girls and women of the indigenous Penan community in Sarawak had been subject to sexual abuse and rape by government officials (SUHAKAM 2010d). In short, the newly formed Commission gave the impression that it was taking its tasks seriously.

## 4.4 Conclusion

Since its establishment in 1999, SUHAKAM has contributed to the realisation of human rights in Malaysia through human rights education, research, and investigations. The latter include individual cases, as well as public inquiries into human rights violations that concern a larger number of people (i.e. Kesas Highway), and systemic problems (i.e. review of the ISA). While in its work SUHAKAM has acknowledged tensions between international human rights norms and national practices, the organisation has consistently promoted international human rights norms by appropriating them into the Malaysian context. Similar to its Indonesian counterpart KOMNAS HAM, at first sight international human rights norms do not appear to have been contested by SUHAKAM. This is all the more surprising as Malaysia has only ratified a small number of international human rights treaties, and references to human rights in its Constitution are limited.[96]

This Chapter has shown that SUHAKAM has established a wide range of activities pertaining to economic, social and cultural rights, as well as to civil and political rights. In particular by addressing topical issues, such as freedom of assembly and detention without trial (i.e. during the arrest and trial of Anwar Ibrahim), SUHAKAM has taken up the concerns of human rights NGOs and opposition parties. These responses have legitimised the concerns of civil society, and have raised internal awareness of human rights in general. However, although NGOs have expressed their support for SUHAKAM on several

96 See 1.1.5.

occasions, they have also remained one of the organisation's fiercest critics. One of the cases in which SUHAKAM attracted significant criticism was its handling of the Kampung Medan incident, which illustrated that despite establishing many activities, the Commission remained reluctant to address matters which touched on social sensitivities. In the case of Kampung Medan, the matter was ethnicity or race; but as will become apparent in the following Chapter, SUHAKAM has also avoided cases pertaining to religious issues. This suggests that societal controversy plays an important and negative role in the Commission's performance.

SUHAKAM's performance strengths can be attributed to the availability and efficient use of financial and human resources, as well as its knowledgeable staff and the efforts and attitudes of some of its commissioners.[97] In some cases, the personal connections of individual commissioners with state bodies have opened up or simplified access to other government agencies or representatives. Of course, such proximity to the executive has its drawbacks as well. Some commissioners have found it difficult to criticise the same government they have often served for years. SUHAKAM has seldom engaged in lobbying or applying pressure to the government to implement its recommendations. The Commission instead refers to itself as a partner of the government, in an advisory and supporting role; a position which is not always appreciated by NGOs.

The main challenge for SUHAKAM has been the resistance from the federal government, which has ignored most of the Commission's recommendations. More than ten years after SUHAKAM's establishment, it is clear that the federal government does not intent for the organisation to become an effective NHRI. The changes in government from Mahathir to Abdullah Badawi (2003-2009), and Najib Abdul Razak (2009-present), have had no influence on this situation. SUHAKAM has been given the freedom to conduct its activities, but while that may appear to be a good start, to date, it is also where it ends. Further, SUHAKAM has failed -or more precisely, has not attempted – to collaborate with external actors in the face of disinterest of parliament, which still does not even discuss the Commissions' reports and recommendations. The increasing popularity of opposition parties is a positive change for SUHAKAM, and is particularly apparent at state level. However, as yet the *Reformasi* movement has been unable to force a change of government at the federal level, which is considered necessary for wider human rights reforms and strengthening SUHAKAM's position.

Concerns about the Commission's internal structure also remain. In spite of improvements to SUHAKAM's appointment procedure by way of the 2009 amendments, the government can still keep close control over the Commission. The government appears committed to having a state body concerned with

97 This view was widely shared among NGO representatives.

human rights – desirable for Malaysia's international image – while making sure the organisation does not become too vocal or influential, nor have the capacity to challenge the government. To date, SUHAKAM's work has not led to a single ratification of international human rights treaties; or to any human rights violators being held to account in court. Both in the past and present, therefore, SUHAKAM's primary role and success appear to be in legitimising human rights and increasing awareness of those norms. This potential should not be taken lightly: the creation and furthering of human rights awareness is a crucial step towards the realisation of human rights, and is therefore an important aspect of NHRI effectiveness. When, despite SUHAKAM's challenges, its outcomes are considered within the framework of 'organisational effectiveness',[98] with a focus on its degrees or temporal stages, it can be concluded that the Commission has been able to educate target groups and the wider public about human rights. This indicates that SUHAKAM has achieved some initial outcomes. It also means that the Commission, and Malaysia as a nation, have a long way to go to reduce human rights abuses, and to make sure that when they do occur, victims have the means and capacity to redress them. The problem remains that the Commission is still limited by the ongoing strong resistance to human rights norms at federal government level – an attitude that is unlikely to disappear as a result of SUHAKAM's work alone.

The case of SUHAKAM clearly illustrates the distinction between performance and effectiveness. SUHAKAM is an example of an NHRI which has been able to develop many activities based on its mandate, even in challenging circumstances. However, due to the environment in which SUHAKAM operates, the positive effects of its activities – at least in the short term – remain limited. SUHAKAM's primary role is one of creating human rights awareness, and while this is very important, it takes time before this translates into change in the state's human rights behaviour and policies. As such, SUHAKAM's experiences underline the importance of alliances with or support from external parties. Until the government is either more willing to follow SUHAKAM's recommendations, or is pressured into doing so, concessions made to the Commission will be minor. An example of such is the amendment of the HRCMA 1999, which was primarily a reaction towards international criticism of the Act, not a genuine attempt to strengthen SUHAKAM. Indeed during the debate on the amendments, Minister Nazri Abdul Aziz commented that the implementation of human rights in Malaysia, including the recommendations of SUHAKAM, will only take place when these rights 'ensure the unity, stability and safety of the state' (Dewan Rakyat Malaysia 25 March 2009: 78).

98 See 1.2.3.

# 5 Between Disregard and Excellence
# Performance and Effectiveness of SUHAKAM in Three Case Studies

## 5.1 INTRODUCTION

This Chapter will focus on how SUHAKAM has dealt with freedom of religion, the right to a fair trial, and the right to adequate housing. For each of these rights, the Chapter will examine how SUHAKAM operated; why it took those particular actions; and will then evaluate the Commission's performance and effectiveness. As outlined in Chapter 1, these three particular rights were selected in order to investigate whether the behaviour of NHRIs is similar across different types of rights, and because of their specific relevance in a country such as Malaysia.

Malaysia is a plural society, both in terms of ethnicity and religion. The country is home to people of Malay (50 percent), Chinese (23 percent) and Indian (7 percent) descent, as well as an 'indigenous' population (11 percent) and immigrants from different backgrounds. Most Malaysians are Muslim (60 percent), with the remainder of the population adhering mainly to Buddhism (20 percent), Christianity (9 percent) and Hinduism (6 percent). Islam is the state religion, but the Constitution guarantees freedom of religion. In practice, however, this freedom is controversial, particularly when the position of Islam is considered to be at stake. For this reason, those addressing freedom of religion in Malaysia must be careful. This raises the question of how SUHAKAM has dealt with the issue, how it has approached conflicting views, and how it has sought to mediate between them – if at all.

As we have seen in the previous Chapter, the right to a fair trial is of special relevance in Malaysia because of several emergency laws, most notably the Internal Security Act (ISA), which have given far-reaching powers to the government to detain individuals without trial for an extended period of time. Prior to its abolition in 2012, the ISA was a primary target for Malaysian human rights NGOs which, together with the Malaysian Bar Council and opposition parties, had long campaigned for its abolition. Meanwhile, the Malaysian government insisted on the continued need for the ISA, to deal with terrorist threats. From early in its history, SUHAKAM received many complaints regarding detentions under the ISA, and consistently opposed it. In 2002 the Commission undertook a comprehensive review of the ISA, which will be evaluated in this Chapter.

The right to adequate housing derives its relevance from the large number of development projects which have been implemented in Malaysia over the

past 30 years. For this purpose, many poor people have been evicted from their homes. A substantial proportion of the individual complaints received by SUHAKAM have related to the eviction of squatters. This Chapter will look how SUHAKAM has addressed the right to adequate housing, with regard to the squatter settlements in the capital Kuala Lumpur and surrounding areas.

For each of the three rights discussed in this Chapter, I started by looking at SUHAKAM's annual reports. These reports are a rich source of information, not only because they reflect the Commission's opinion on the topic and the activities developed in response, but because they include the views of different stakeholders. In addition to its annual reports, SUHAKAM also published two relevant specialised reports: the review of the ISA, and the report on adequate housing. I also looked at SUHAKAM's response to individual cases involving these three rights. I examined relevant press statements by the Commission, interviewed (former) commissioners and staff members of SUHAKAM, as well as representatives of human rights NGOs. Media reports were used to establish how the general public and the Government reacted to SUHAKAM's actions and recommendations. Taken together, the results of these approaches provide us with a broad overview of how SUHAKAM operated and why it did so, making it possible to present an assessment of the Commission's performance and effectiveness.

## 5.2 SUHAKAM AND FREEDOM OF RELIGION

### 5.2.1 Freedom of Religion in Malaysia: a Source of Tension

The right to freedom of religion is entrenched in Article 18 of the UDHR:

> 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

Article 18 of the ICCPR also guarantees freedom of religion;[1] but, unlike Indonesia, Malaysia has yet to ratify this Covenant. As noted earlier, freedom of religion has not yet become the subject of a specific and legally binding treaty. The most important international human rights document regarding freedom of religion is the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. However,

1 Art 18 (1): 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

because freedom of religion is a contested issue, the Declaration has not yet received sufficient signatories to have entered into force. Particularly the specific right to change one's religion or belief, which implies the right to renounce a religion, attracts opposition from religious groups as well as national governments of countries with a state religion (Lerner 1996).

In Malaysia, freedom of religion is entrenched in Article 11 of the Federal Constitution: 'Every person has the right to profess and practice his religion, and, subject to Clause (4), to propagate it'. Clause 4 prohibits the proselytising of non-Islamic religions amongst Muslims. All jurisdictions – including Penang and Melaka, where Islam is not the state religion – have passed such laws. This has led Harding to argue that the provision has to do with preserving public order, rather than with prioritising one religion over another (Harding 1996: 201; Harding 2010: 511). However, others have considered Clause 4 to refer to the privileged status of Islam in the Constitution, with Thio arguing that the clause was designed to protect Islam from other religious influences, as well as from certain schools of thoughts and opinion within the Islamic religion itself (Thio 2006: xiii).

Further, Article 12(1) prevents discrimination on religious grounds in public education and the administration of scholarships, and Article 12(2) gives every religious group the right to establish and maintain educational institutions for children. Article 12(3) stipulates that no person is required to receive instruction in religion or to take part in any religious ceremony other than his own. Finally, legislation against subversion (Article 149) and during an emergency (Article 150) may not interfere with the freedom of religion.

Still, according to Article 3(1), Islam is the 'religion of the Federation' and in more recent years arguments have been put forward that Malaysia is an Islamic state (Adil 2007), even if in 1988 the Supreme Court ruled that this Article refers to a ceremonial role of Islam.[2] In addition to Prime Minister Mahathir's (2001) statements that Malaysia is an Islamic state, the 2000 High Court ruling in *Meor Atiqurahman bin Ishak & Anor v. Fatimah Bte Sihi & Anor* (2000) argued that Islam is the primary religion of the country and as such takes precedence over all other religions. At least such allegations indicate how freedom of religion and the equality of adherents of different religions are contested (Harding 1996: 201; Harding 2010: 510).[3]

In response to Islamic revivalism and increasing religious tensions during the 1990s and early 2000s (Harding 2010: 503-504), in 2005 several human rights NGOs and some members of the Malaysian Bar Council tried to establish an Interfaith Commission (IFC). The IFC was meant to be an advisory body to the government, with the authority to open investigations into complaints regarding freedom of religion, including disputes regarding a person's religious status

2 In *Che Omar bin Che Soh v. Public Prosecutor*.

3 Harding has argued that the designation of Islam as the religion of the Federation is not contrary to the principle of the freedom of religion, see Harding 1996: 201.

or conversion.[4] However, many Muslim groups objected to the establishment of the IFC, which they considered 'an attack on Islam' and in particular because the IFC would promote the right to renounce religion (Harakah 27 March 2005). Eventually the initiators abandoned their plans after the government publicly rejected the idea (New Straits Times 27 February 2005).

Another example of the sensitivities surrounding freedom of religion was the opposition to the so-called Article 11 Coalition. This Coalition, which comprised of members of the Malaysian Bar Council and NGO representatives, organised seminars to promote awareness of the Constitution, particularly with regard to freedom of religion. However, the Coalition was criticised for attacking Islam. Several seminars were disrupted by protestors, who forced the organisers to shorten or cancel the seminars (Malaysiakini 27 July 2006). Eventually Prime Minister Badawi told the organisers to 'stop talking', and prohibited the printed press, which is under control of the government,[5] from mentioning the Coalition (Malaysiakini 31 July 2006).

The courts have also been confronted with religious anxieties, in a number of well-publicised cases which have dealt with conversion.[6] Much public debate was provoked by the case of Lina Joy, who converted from Islam to Christianity and wanted to change the religion on her identity card.[7] The National Registration Department (NRD), however, held that Joy should first obtain permission of the Islamic court.[8] Joy then brought a case against the NRD to the High Court. The High Court ruled that Joy could not renounce Islam without permission from the Islamic courts. Moreover, the presiding judge stated that with respect to Article 11, the freedom of choice did not extend to the right to change religion – an argument contradictory to international human rights norms. The judge also made reference to Clause 4, and

4 In terms of the IFC's structure and mandate, the initiators drew from SUHAKAM's enabling act (personal conversations with Malik Imtiaz Sarwar and Sharmila Sekaran, both involved in the IFC).

5 Independent online newsportals (most notably *Malaysiakini*) and blogs are not subject to these restrictions.

6 Conversion is a particularly divisive issue in Malaysia, see for instance Harding 1996: 204 and Adil 2007.

7 Other cases include the Shamala case, in which a father converted his two underage children after his own conversion to Islam without informing the mother of the children. The Sharia Court then gave the father sole custody over the children. In the Rayappan case (2006) a disagreement emerged regarding a deceased person's religion. Despite Rayappan's claims during his life that he was a Catholic, Islamic authorities had obtained the permission of the Sharia High Court to bury him according to Muslim rites. Eventually the Islamic authorities dropped their claim, stating they did not have enough evidence. A similar case was that of Mount Everest climber M. Moorthy (2005), which will be discussed later in this Chapter.

8 Of concern here is the interpretation of Article 121(1A) of the Constitution, which states that the civil courts have no jurisdiction 'in respect of any matter within the jurisdiction of the Sharia Courts'. The precise scope of this Article is the subject of much debate. See for instance Thio 2006; Whiting 2008.

argued that a Muslim's choice to change religions affected public order. Thio (2006) has stated that the Lina Joy case 'significantly addresses the scope of religious freedom within the limiting terms in the structure of Article 11' (Thio 2006: x). This was particularly evident when the judge's invoked Article 3 of the Constitution – which determines that Islam is the religion of the Federation – and argued that the protection of Islam superseded individual religious liberty (Thio 2006: xxi). The High Court's decision was upheld by the Court of Appeal and the Federal Court.

While the Malaysian Constitution does not prohibit conversion out of Islam, the legal process surrounding conversion is shrouded with much uncertainty. As a consequence, Islamic courts are reluctant to allow conversions, particularly for Malays. There is some basis for such reluctance in Article 160(2) of the Constitution, which defines 'Malay' as someone who professes Islam. Adil (2007) notes that between 1999 and mid-2003, 750 persons applied at the National Registration Department to have their Muslim name changed to a non-Muslim name, which is an indicator for conversion. Adil states that sharia courts or religious departments issued permissions in 220 cases, but this usually concerned Muslims by conversion rather than Muslims by birth (Adil 2007: 27-28).

In many Malaysian states, conversion from Islam has been made into a sharia criminal offence and is subject to a monetary fine, jail sentence or caning. These examples illustrate that although freedom of religion is guaranteed in the Constitution, practices may differ, and the scope of the right is contested. Further, the practices surrounding conversion from Islam illustrate that other rights, such as the right to equality and the freedom from cruel punishment, are also involved. This seems to make it into a relevant topic for an NHRI.

### 5.2.2 SUHAKAM and Freedom of Religion

Issues related to freedom of religion have been the subject of individual complaints to SUHAKAM, but since the Commission does not usually include this number in its annual reports,[9] it is unclear how many complaints it receives. Between 2003 and 2006, SUHAKAM also received eleven memoranda on destructions of places of worship (SUHAKAM 2007c).

A notable case among these concerned the Sky Kingdom (*Kerajaan Langit*) commune. In July 2005 the Commission received complaints regarding its demolition in the state of Terengganu, 400 kilometres north of Kuala Lumpur, by the Terengganu Islamic Affairs Department. Sky Kingdom was founded

9 An exception is the 2007 Annual Report, which states SUHAKAM received three complaints regarding the right to religious freedom (SUHAKAM 2008: 64). However, media reports indicate that issues concerning freedom of religion have been brought to the Commission's attention regularly.

in the 1980s by Ariffin Muhammad, who claimed to be the reincarnation of Buddha, Siva, Jesus and the Prophet Muhammad. Called Ayah Pin by his followers, Ariffin emphasised ecumenical dialogue and inter-religious harmony. In 1997, the Terengganu Fatwa Council issued a *fatwa* (religious instruction) against the group, which banned Sky Kingdom for being a deviant cult. This decision was given state support in 2001 by the Terengganu Islamic Affairs Department. Ayah Pin was sentenced to a jail term of 11 months and a monetary fine for 'insulting Islam'. Nonetheless, Sky Kingdom continued to grow and attracted widespread attention by the giant structures it built on its compound, such as an umbrella and a teapot; respectively representing shelter beneath God, and the purity of water. These conspicuous edifices probably led to the July 2005 raids, when the police arrested 75 Sky Kingdom followers and demolished the buildings on the compound. The local authorities stated that Sky Kingdom had violated the National Land Code, which determined that the land concerned had been designated for agricultural purposes (Mohamad 2008: 169-170).

Shortly after these incidents, followers of Sky Kingdom in Kuala Lumpur lodged a complaint at SUHAKAM (Malaysiakini 27 July 2005). Commissioner Hamdan Adnan, who received them, promised to visit the site, but this plan was cancelled two days later (Malaysiakini 29 July 2005). The plaintiffs visited the Commission again, but this time were confronted by staff who made critical remarks about Sky Kingdom's religious practices, and referred them to the Islamic courts. One day later, Hamdan apologised to the complainants. He claimed the Commission had 'spent at least 30 minutes on the issue […] and that is a lot of time for a particular matter' (Malaysiakini 9 August 2005). However, SUHAKAM did not open an investigation when the Sky Kingdom followers who had been arrested during the July raid were tried in court. The Commission also remained silent when the followers were sentenced to jail terms and monetary fines, and when the commune itself was demolished in August 2005.

Another example concerned the death of Mount Everest climber M. Moorthy. This case was brought to SUHAKAM's attention in December 2005 when, after Moorthy's decease, his family became embroiled in a conflict with the Federal Territory Islamic Affairs Council about the body. On the basis of a ruling by the Kuala Lumpur Islamic Court that Moorthy had become a Muslim, the Council claimed Moorthy had converted to Islam and thus had to be buried according to Muslim rites. His wife claimed to know nothing about this conversion (Malaysiakini 4 January 2006). The High Court rejected her appeal, arguing that Islamic matters were the sole jurisdiction of the Islamic courts – which did not want to hear her because she was not a Muslim. The Islamic Affairs Council buried Moorthy's body in accordance with Islamic practices, while his family held a Hindu funeral without it. SUHAKAM refused to get involved; stating that the case was pending in court (Malaysiakini 29 December 2005).

The Commission could not hide behind the court, however, in the cases of complaints about the demolition, by local governments, of places of worship; mainly Hindu temples allegedly built without building permits (SUHAKAM 2007c: 87). In June 2006, caretakers of six such temples asked for an investigation by SUHAKAM (Malaysiakini 7 June 2006). The Commission did not do this, but convened a meeting 'with members of several religious organisations to consider their views' on the matter (SUHAKAM 2007c: 87), as it had done previously in 2002 (SUHAKAM 2003a: 79). After the meeting, the Commission recommended to the Minister of Housing and Local Government and the Minister of the Federal Territories that the government should make sure that religious groups are consulted in such cases; that it should be sensitive to objects and traditions held sacred by the relevant group; that it should preserve places that have historical relevance; and that it should offer alternative sites if necessary. SUHAKAM referred to the freedom of religion as guaranteed in the UDHR and the Federal Constitution, and a provision in the Penal Code which prohibits damaging places of worship.[10] The Commission added that it 'strongly believes that the issue of demolition should be viewed from a wider perspective, rather than being limited to a question of legitimacy of land occupancy' (SUHAKAM 2007c: 87). In August 2007, SUHAKAM issued another press statement reiterating its concerns about temple demolitions, 'as it is a fact that places of worship [...] are regarded as sacred' (SUHAKAM 2007b). Subsequent complaints about similar demolitions have been given some attention through press statements, but have not been further acted upon by the Commission.

In January 2010, SUHAKAM did address another type of violation of the right to freedom of religion. This concerned attacks on several churches and a *surau* (Muslim prayer building), with the Commission stating that it was 'very concerned' (SUHAKAM 2010a). Again referring to the freedom of religion as guaranteed in the Federal Constitution and the UDHR, the Commission underlined the importance of this right for ensuring harmony in the country: 'there is a need for more respect on the sensitivities of places of worship in Malaysia in order to maintain harmony and unity [...]' (SUHAKAM 2007b). This is similar to SUHAKAM's calls for dialogue between religious organisations and authorities to 'help maintain peace and goodwill', and its recommendation that 'leaders [of religious groups] will refrain from making statements [...] detrimental to religious understanding and harmony in the country' (SUHAKAM 2010a).

10 Section 295: 'Whomever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons, or, with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both'.

In all these instances of infringements on the right to freedom of religion, SUHAKAM only took action in the case of the demolition of places of worship, and then apparently only half-heartedly. While the Commission rejected jurisdiction over the Sky Kingdom and Moorthy cases on formal grounds, this reason was not entirely convincing; as in the past SUHAKAM has effectively addressed cases that were pending in court, by focusing its investigation on an aspect outside of the scope of court review.[11] By focusing on demolition, SUHAKAM could have done the same in the Sky Kingdom case. This indicates strongly that SUHAKAM's behaviour is related directly to the sensitivity of a matter in Malaysia. Freedom of religion is a sensitive matter to begin with, and the treatment of religious minority groups and conversion are extremely delicate – far more so than demolition of places of worship. The 'Islamic' factor further complicated the Sky Kingdom and Moorthy cases, in which Islamic authorities were at the heart of the matter. Islam being the official religion and the state having a strong Islamic character, SUHAKAM would have attracted strong criticism not only from Islamic groups but also from the government. Such inquiries could easily be construed as a criticism or even attack on Islam, which could potentially jeopardise the Commission's organisational survival. It seems, as will become apparent in the next section, that this has led to the Commission choosing to avoid such cases as much as possible.

### 5.2.3 Performance and Effectiveness

As mentioned in the previous section, SUHAKAM has received several complaints related to freedom of religion. While there is widespread public interest in the matter, the Commission has held such cases at arms' length. Although the Commission has issued recommendations against the demolition of places of worship, these statements have not become starting points from which to develop other relevant activities, such as education programmes or research into relevant laws and regulations. SUHAKAM has only reported a few occasions where it organised a dialogue between representatives of religious groups. In line with the Commission's general avoidance of issues related to freedom of religion, it has not made many references to international human rights norms on this topic; which is in stark contrast with how SUHAKAM has approached the right to a fair trial.[12] Moreover, SUHAKAM has been unwilling to open investigations into individual complaints. Human rights NGOs and individual complainants have lamented the Commission's approach and attitude in this area, in which it seems that for the sake of its survival, the Commission has decided to turn a blind eye to the issue of freedom of religion.

11 For instance in the Kundasang Public Inquiry, see 5.4.2.
12 This will be discussed in 5.3.

My own observations confirm that attention to the right to religious freedom makes staff and commissioners nervous. When asked, staff members would quickly reply 'we don't get those cases here' or 'we don't do those'. Commissioner Khoo Kay Kim said that freedom of religion is 'a very difficult subject […] we cannot deal with it directly'.[13] This anxiety causes SUHAKAM to address freedom of religion highly selectively. The Commission certainly does not advocate causes for controversial religious minorities.

To justify this response, the Commission tends to argue that religious freedom is beyond its mandate, and insists that religious matters should be dealt with by a separate government department.[14] Commissioner Khoo Kay Kim commented that religious issues 'should not be thrown out into the public' but should be dealt with and decided by the ruling coalition.[15] These arguments have no basis in the HRCMA, which stipulates in Article 4(4) that 'regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution' – and the freedom of religion is firmly entrenched in both.

An important reason for SUHAKAM not to investigate cases regarding freedom of religion is the fear of attracting opposition from more conservative Islamic groups, which consider the human right to freedom of religion as a threat to Islam and its special position in Malaysia (Mohamad 2008:182, Malaysiakini 23 January 2006). Therefore SUHAKAM has tended to ignore these cases, rather than contributing to an open discussion about freedom of religion.

A typical complexity is that in Malaysia, religion and ethnicity (usually referred to as race) are closely connected. As discussed earlier, Islam has been linked with Malays in the Constitution.[16] Similar provisions are not in place for other religions or ethnicities, but Christianity and Buddhism on one hand, and Hinduism on the other, are associated with Chinese and Indians respectively.[17] While Malaysia has known relatively few political or social upheavals, ethnic tensions have erupted several times, and have been coloured by religion. In the lead-up to the 1969 elections, Malays questioned their economic position relative to the prosperity enjoyed by the Chinese ,and expressed dissatisfaction with the main Malay party UMNO, partly for failing to represent their concerns. Many Chinese were equally dissatisfied with their party, the MCA (Malayan (later Malaysian) Chinese Association), regarding its inability to improve their political and cultural position. As a result, many who commonly voted for the 'Alliance' – the coalition of UMNO, MCA and MIC (Malayan (later Malaysian) Indian Congress) – cast their vote in favour of opposition parties; Malays mainly voting for PAS, and non-Malays for DAP. When the Chinese population

13 Interview, 20 December 2006.
14 Interview with Siva Subramaniam, commissioner, 21 November 2006.
15 Interview, 20 December 2006.
16 Article 160 (2), see 5.2.1.
17 See also 1.1.5.

celebrated DAP's success in Kuala Lumpur, Malays' retaliated; which culminated in the ethnic rioting known as the 13 May Incident (Case 2004:31).

The 1969 riots have profoundly influenced political, economic and social policies in Malaysia, and are often used as a warning against emphasising racial differences. Prevention of communal tensions has been a priority for the Malaysian government ever since (Crouch 1996: 241), and in the same vein, SUHAKAM will not consider cases concerning topics or involving groups that are regarded as posing a risk in this respect. Referring to the Sky Kingdom case, SUHAKAM Chairman Abu Talib Othman spoke of 'deviant religious teachings [that] are a threat to multiracial and multireligious Malaysia. They can disrupt harmony'.[18] Human rights NGOs criticising SUHAKAM's attitude claim that it sides with mainstream Islamic groups in Malaysia. However, the Commission instead thinks of itself as serving the country by remaining neutral,[19] and thereby contributing to a peaceful society.

With regard to the freedom of religion, SUHAKAM's position is characterised by an emphasis on national legislation to the detriment of international law. Commissioners argue that national law is just and fair, and that everybody should abide by it at all times. A good illustration is Commissioner Siva Subramaniam's reaction to the Moorthy case, when he declared that

> 'We must understand and respect the law of the nation. As far as religion is concerned, Islam is the official religion and the highest authority is the Sharia Court. […] Whatever that has been said or done, the laws of the nation are important, everybody must follow the law, and there is a need for us to live together as a multi-racial society.' (Malaysiakini 29 December 2005)

In an interview he further explained: 'religious freedom in Malaysia is bound by law. Malaysia has also accepted Islamic Law. Although conversion is allowed by international human rights standards, in Islam it is not'.[20]

This emphasis on national law has been described as a 'limited statist' interpretation of freedom of religion, which is dominant in Malaysia (Mohamad 2008: 170). SUHAKAM's approach here is in direct contrast with the way it addresses other issues such as fair trial, as will be discussed later in the next section of this Chapter.

Finally, freedom of religion is a controversial and potentially disruptive issue within SUHAKAM itself. In early 2006, SUHAKAM commissioners held a special meeting on religious conversions (Malaysiakini 23 January 2006). During the meeting, the question arose whether SUHAKAM should recommend the amendment of Article 121 (1A) of the Constitution. This article stipulates

18 Interview, 3 January 2007.

19 The controversy surrounding the IFC was, according to commissioner Siva Subramaniam, a reason for SUHAKAM not to cooperate: 'it is important for SUHAKAM to remain neutral'. Interview, 21 November 2006.

20 Ibid.

that the High Courts in Malaysia have jurisdiction over civil and criminal matters, but not over any issue that falls within the jurisdiction of the sharia courts. Some human rights NGOs and lawyers[21] called for the Article to be repealed, as on this basis civil courts have refused repeatedly to address cases involving non-Muslim plaintiffs in an Islamic matter,[22] such as the aforementioned alleged conversion of Moorthy. Representatives of human rights NGOs have added that when civil courts cannot review cases decided by the sharia court, non-Muslims involved are without any avenue for redress.[23] In the end the commissioners were not able to reach an agreement on the issue of religious conversion, with only a minority in favour of amending Article 121 (1A) (Malaysiakini 27 February 2006). Following the meeting, staff members were instructed by commissioners not to accept complaints relating to religious freedom:

> 'We have been told to advise them [complainants] to go somewhere else. The Sharia Courts, for instance. This of course does not help them. But they have understood the hint and the number of complaints has decreased'.[24]

The Commission has thus relegated issues of conversion and minority rights to the periphery of freedom of religion, which stands in stark contrast with how the right is conceived of at an international level.[25] This selective approach means that SUHAKAM's performance and ultimate contribution to the realisation of the right to freedom of religion is limited, and has negatively affected the Commission's legitimacy among human rights NGOs and lawyers. SUHAKAM's position on the freedom to religion can be explained by various reasons, ranging from the interpretation of its mandate and its conception of national law in relation to international law, to its desire to avoid conflict both within and outside its organisation.

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21 Human rights NGOs and lawyers also appear to be divided on the issue, with some rejecting a repeal or amendment of Article 121 (1A) and arguing for a judicial interpretation instead (Malaysiakini 20 January 2006).

22 This appears to be a relatively new interpretation of Art 121(1A). Harding (1996) notes that in the 1990s, civil courts have reviewed decisions of sharia courts (p. 137). To some extent, both Thio (2006) and Whiting (2008) discuss the debate regarding the jurisdiction of sharia vis-à-vis civil courts.

23 Interview with Chin Oy Sim, representative of the NGO Women's Aid Organisation, 27 November 2006.

24 Interview with SUHAKAM staff member, December 2006.

25 General Comment no. 22 of the Human Rights Committee on Article 18 of the ICCPR states that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief' (para 2) and '[…] the freedom to 'have or adopt' a religion or belief necessarily entails the freedom to choose a religion of belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief' (para 5).

## 5.3 SUHAKAM AND FAIR TRIAL

### 5.3.1 The Internal Security Act

Until its abolition in 2012, the Internal Security Act (ISA) was one of Malaysia's most controversial laws. It allowed for preventive detention up to two years,[26] a period which could be renewed and extended indefinitely. Preventive detention encompasses several human rights issues, for example freedom from arbitrary arrest, and rights during detention, such as the rights to legal counsel as well as freedom from torture and ill-treatment – which are all part of the right to a fair trial.

The right to a fair trial has been firmly entrenched in international human rights documents. The UDHR includes the right to liberty;[27] freedom from torture;[28] freedom from arbitrary arrest;[29] and the right to a fair trial.[30] Article 9 of the ICCPR provides for the freedom from arbitrary arrest and the right to liberty, as well as the right of detainees to be informed of the charges held against them, the right to be brought before a magistrate, and the right to judicial review. Article 14(1) of the same Covenant refers to the right to a fair trial, and Article 7 guarantees the freedom from torture, which is a non-derogable right. Another relevant human rights convention with regard to the right to a fair trial is the CAT, as detainees are often vulnerable to torture and other forms of ill-treatment.

At a national level, legal guarantees to the right to a fair trial include Article 5(1) of the Malaysian Constitution, which states that 'no person shall be deprived of his life or personal liberty save in accordance with law'. Likewise, Article 5 provides for the right to judicial review,[31] the right of arrested persons to be informed of the grounds of their arrest and to have access to and be represented by a counsel of their choice,[32] as well as the right to be produced before a magistrate within 24 hours of the arrest.[33] The right to be informed of the grounds for arrest is also guaranteed by Article 151(1) (a) of the Constitution. The Criminal Procedure Code (Act 593) moreover provides for open and public courts,[34] the stipulation that arrested persons should be brought before a magistrate without unnecessary delays,[35] the right of the

26 This applied to detention orders made by the Minister under Section 8. When detention is ordered by the Police, it may not exceed sixty days (Section 73(3)), unless an order of detention has been made by the Minister.
27 Art 3.
28 Art 5.
29 Art 9.
30 Art 10.
31 Art 5(2).
32 Art 5(3).
33 Art 5(4).
34 Section 7.
35 Section 42.

accused to be defended,[36] protection against double jeopardy,[37] and the right to appeal.[38] Taken together, these provisions mean that the right to a fair trial is legally guaranteed.

The ISA was enacted in 1960[39] and was one of several preventive detention laws in Malaysia that were passed pursuant to Articles 149 and 150 of the Federal Constitution (Harding 1996: 215).[40] The ISA conferred upon both the Minister of Home Affairs[41] and the Police[42] the power to detain persons preventively, amongst others when they act 'prejudicial to the security of Malaysia'. Detention under the ISA was governed by the 1953 Lockup Rules in those cases where detention was ordered by the police, and the 1960 Internal Security (Detained Persons) Rules, where detention was ordered by the minister. Both include human rights provisions, such as detainees' rights to communicate with family members and have access to legal counsel,[43] as well as rules relating to the treatment of detainees, such as the prohibition of use of physical force against them.[44]

While the ISA was defended by the Malaysian government in the interest of national security, in fact, the Act was used against a wide variety of offences. These were not limited to terrorism, and included drug trafficking, money laundering and being a member of a religious minority. Similarly, climbing expeditions were construed by the authorities as military training. Former

36 Section 255.
37 Section 302.
38 Section 303a.
39 The ISA was enacted following the Emergency (1948-1960) which was declared by the British Government in response to the insurgency by the Communist Party of Malaya (CPM). During the reading of the Bill the then Deputy Prime Minister, Abdul Razak, stated that while the Emergency had come to an end, 'the Government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he has failed by force of arms' (Parliamentary Debates, 21 June 1960, as quoted in SUHAKAM 2003b: 3).
40 Harding argues that the provisions in the Constitution allowing for the enactment of preventive detention laws were influenced by the 1948-1960 Emergency. This caused the Constitutional Commission (the Reid Commission, 1957) to recommend the insertion of special powers against subversion into the Constitution (Harding 1996: 153-4).
41 Section 8(1): 'If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years'.
42 Section 73(1) 'Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe – (a) that there are ground which would justify his detention under section 8; and (b) that he had acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof'.
43 1953 Lockup Rules, rule 22 and 1960 Internal Security (Detained Persons) Rules, rule 81.
44 1953 Lockup Rules, rules 42 to 47 and the 1960 Internal Security (Detained Persons) Rules, rule 42(i).

detainees stated that they were interrogated on their political views, rather than their supposed participation in militant activities. Conditions during detention were described as dirty, congested and degrading, with many detainees confined in small cells without windows or bedding. In addition, many detainees were not informed where they were held and were denied access to family members as well as legal counsel. Physical maltreatment, including beatings, as well as intimidation, lengthy interrogations and verbal abuse were also often reported (Yatim 1995: 264, 298; SUHAKAM 2003b: 34, 39, 40, 43, 50; HRW 2004b: 30; SUARAM 2007: 24).

Due to the often arbitrary use of the Act and the treatment of detainees, the ISA became 'the most feared and despised piece of legislation in the country' (Yatim 1995: 244) and the target of much criticism. It was argued that the ISA violated the right to freedom from torture and other forms of ill-treatment (Yatim 1995: 263-4; HRW 2004b: 11; SUARAM 2008: 5). Concerns were also raised about the limited avenues for judicial review of detentions under the ISA. For detentions ordered by the minister, there was no independent body allowed to review the order. The only possibility for review was by making an application to the Advisory Board.[45] This Board, however, had discretionary powers not to consider the application of a detainee and its recommendations were not binding. According to former detainees the Board was no more than a 'sounding board for the executive' (Yatim 1995: 271).

Detentions under the ISA ordered by the police could be challenged in court. However, the courts were unwilling to review the grounds for arrest, and claimed that the executive was the only judge of what was in the interest of national security. In addition, reviews of detention orders were made difficult by denying detainees' access to legal counsel for the first 60 days of their detention (HRW 2004b: 30). Nonetheless, the courts sometimes struck down detention orders on procedural grounds, for instance when only one copy of a detention order was given whereas two were required by the Act (Harding 1996: 217-23).

Human rights NGOs and opposition parties have long argued that there was no longer a place for the ISA in contemporary Malaysia, as its initial objective (to counter communism) had become irrelevant. As mentioned above, the Act was used in a wide variety of cases. In addition, the ISA was used as a tool to curb political opposition (Yatim 1995: 298). In 1987, 106 people were arrested during *Operasi Lalang* (Weeding Operation), including MPs of the opposition parties DAP and PAS, as well as critical members from coalition party UMNO. In 1998 the ISA was also used to detain former Deputy Prime Minister

45 The Advisory Board was provided for in Sections 11 and 16 of the ISA, as well as Article 151 of the Constitution. The Board consisted of three members, appointed by the King, with the Chairperson being a (former) judge of the Federal Court, Court of Appeal or High Court.

Anwar Ibrahim[46] and in 2001 ten *Reformasi* activists suffered the same fate. In 2007, five leaders of the Hindu Rights Action Front (HINDRAF) were arrested under the ISA, after the group had organised a protest attended by 30,000 people in Kuala Lumpur. According to the human rights NGO SUARAM, 70 people were held under the ISA by the end of 2007. None of the detainees had been charged and more than twenty of them were serving their fifth or sixth year in detention (SUARAM 2008: 8).

### 5.3.2 SUHAKAM's Review of the ISA

The ISA has understandably been a key concern of human rights NGOs, lawyers and politicians critical of the government. In April 2001, NGOs, student groups and political activists formed the coalition *Gerakan Musnahkan ISA* (Abolish ISA Movement, GMI). GMI brought together some 60 organisations representing a variety of societal groups and concerns, and included not only secular human rights NGOs but also Islamic NGOs such as *Angkatan Belia Islam Malaysia* (ABIM, Islamic Youth Movement Malaysia), political opposition parties DAP, PAS and PKR,[47] as well as Malaysian-Chinese and Malaysian-Indian organisations. GMI's composition illustrated that resistance against the ISA transcended divisions of race or religion, which was unique for Malaysia. This was also evident following the arrest of Anwar Ibrahim, when Malaysians of all ethnicities and religions spoke out against the arrest and the Act.

While the government was adamant that the continued existence and use of the ISA was justified in the light of national security, the strong sentiments within society against the Act made it a relatively easy target for SUHAKAM, especially when compared to the right to freedom of religion. In 2002 the Commission opened two inquiries; the first concerning conditions of detention under the ISA and the second being a review of the Act itself. This Chapter focuses on the latter, as many of the Commission's findings related to conditions of detention were integrated into the review, which was released in April 2003. The Commission considered such a review necessary because of the high number of complaints about the ISA, and because of the government's argument that the Act was needed to counter terrorist threats following September 11th 2001. From the outset, SUHAKAM made it clear that concerns over security should be balanced with 'upholding, rigorously, international human rights standards' (SUHAKAM 2003b: 5-8). The review was based on memoranda and complaints from ISA detainees, their family members and NGOs, and discussed international human rights provisions, case law on preventive detention, academic work and media reports. The Commission held a two months-public inquiry and made several visits to the Kamunting Detention

46 See 4.2.1.
47 See 4.2.1.

Centre, where the majority of ISA detainees were held. Dialogue sessions with the Bar Council, NGO representatives, former detainees and the Police added further information (SUHAKAM 2003b: 8-9).

The report comprised four sections: a discussion of preventive detention within the international human rights framework; a review of preventive detention under Sections 8 and 73 of the ISA; conclusions; and recommendations. The first section referred to the UDHR, but also to several international human rights treaties not ratified yet by Malaysia, such as the provisions in the ICCPR and CAT. In addition to these international human rights treaties, the report included a discussion of two international guidelines applicable to the detention of a person: the Standard Minimum Rules for the Treatment of Prisoners (SMR); and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (BOP). Throughout the report, SUHAKAM also referred to the European Convention on Human Rights (ECHR), and to rulings of the European Court on Human Rights. This inclusion of European legislation and precedents was unexpected, given that these were not applicable in Malaysia; although Malaysia's membership of the Commonwealth brought their relevance somewhat closer. In explanation, SUHAKAM argued that 'the case law developed by the European Court of Human Rights is an internationally respected source of guidance for the interpretation and implementation of the UDHR' (SUHAKAM 2003b: 15).

SUHAKAM's review of the ISA was very critical. The Commission took a particular interest in Sections 8 and 73, which were considered to be the most problematic. Although the two Sections referred to different detaining authorities – the Minister for Home Affairs (Section 8), and the Police (Section 73) – most of the provisions in the two Sections were similar. The Commission's report identified five main areas of concern.

The first concern was the grounds for detention. People could be detained under the ISA when the police or the minister had reason to believe that he or she acted, or could act, in a way that was 'prejudicial to the security of Malaysia'.[48] This phrase was not elaborated in any way, and therefore SUHAKAM regarded it as 'at best, very vague' (SUHAKAM 2003b: 33, 64). During the public inquiry, the Commission also paid attention to the various issues that were regarded as a threat to national security. Political dissent, falsification of coins and documents, and alleged conversion of Malays to Christianity had all been brought under this heading. The lack of clear criteria on what constituted a threat to security gave 'rise to the violation of the right not to be arbitrarily arrested and detained' (SUHAKAM 2003b: 34, 64). In addition, as avenues for judicial review of detention were limited, there was hardly any case law to elaborate this.

48 Section 8(1); Section 73(1) (b).

Second, the Commission scrutinised the rules and practice of detention under the ISA.[49] Both fell short of international human rights standards (SUHAKAM 2003b: 49, 76). While SUHAKAM noted that it had not encountered any 'serious violations of the right not to be subjected to torture [...] there have been instances where detainees [...] appear to have been subjected to some form of inhumane or degrading treatment or punishment' (SUHAKAM 2003b: 76).

The third concern was the lack of contact between detainees and the outside world. The general practice was not to disclose the location of detention to detainees, their families or lawyers. SUHAKAM concluded that these practices increase the risk of *incommunicado* detention, which posed 'an inherent danger of abuse of power, particularly in terms of torture'. Furthermore, the 'lack of access to counsel denies [a] person access to justice' (SUHAKAM 2003b: 39, 44).

Fourth, SUHAKAM criticised the length of detention under the ISA. Section 73 allowed for an initial detention period up to 60 days, which the Commission found 'disproportional' (SUHAKAM 2003b: 36) to the aims of the law. Section 8 allowed for detention up to two years – a period which could be renewed indefinitely. The Commission regarded this as 'unreasonable and excessive' (SUHAKAM 2003b: 67) and called for the length of detention to be reduced. The Commission suggested that detention should never exceed six months in the case of Section 8, which it based on national security legislation in the USA, the United Kingdom and Canada (SUHAKAM 2003b: 67).

Finally, the Commission criticised the limited possibilities for judicial review of detainment under the ISA. Those detained under Section 73, on the orders of the police, were able to lodge a *habeas corpus* application, but without legal counsel they could not prepare their case very well. Also, detainees were often not allowed to be present during the proceedings in court. This made it difficult for lawyers to verify information and obtain instructions from their clients (SUHAKAM 2003b: 57-8).

Judicial review of detention under Section 8 was even more problematic, as following a 1989 amendment the decision of the Minister to detain a person cannot be challenged in court. SUHAKAM commented that 'there must be some form of independent check and balance on the exercise of powers by the Executive. [...] judicial review of detention orders made under Section 8 of the ISA ought not to be ousted or restricted' (SUHAKAM 2003b: 81-2).

SUHAKAM concluded that the principle of detention without trial 'goes against human rights principles in that the person detained, is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proven guilty. These rights are enshrined in articles 3, 10 and 11(1) of the UDHR' (SUHAKAM 2003b: 83-4). The application, particularly of Sections 8 and 73 of the ISA, had led to the infringement of human rights, by subjecting people to arbitrary arrest and to inhuman or degrading treatment or punish-

49 Detention under Section 8 was governed by the Internal Security (Detained Persons) Rules 1960; detention under Section 73 is governed by the Lockup Rules 1953.

ment whilst in detention, thus violating articles 5 and 9 of the UDHR (SUHAKAM 2003b: 84-5).

The Commission identified three root causes for the violations. First, the power to detain an individual was not accompanied by the right of a detainee to a fair and public trial. Second, there was a lack of safeguards built in the law to identify potential abuse of the power to detain without trial. Finally, detainees were not given the 'basic fundamental rights that are contained within the framework of the Constitution' (SUHAKAM 2003b: 85-8).

SUHAKAM therefore recommended that the government review the ISA and all other laws related to national security. The Commission proposed 'that the ISA be repealed and in its place, a new comprehensive legislation' should be enacted. This law should only be in force for a maximum of one year and its renewal has to be subject to parliamentary approval. Furthermore, the new law should 'take a tough stand on threats to national security (including terrorism) [while being in conformity] with international human rights principles' (SUHAKAM 2003b: 88).

### 5.3.3 Performance and Effectiveness

Malaysian human rights NGOs and lawyers praised SUHAKAM's review of the ISA, some calling it an 'incredible report'.[50] Former DAP MP and activist Kua Kia Soong stated that the review was a 'breakthrough in the long struggle by Malaysian human rights activists' (Malaysiakini 22 May 2003). SUHAKAM's review was indeed comprehensive, thorough and very critical. Moreover, the review paid attention to how Malaysian courts have interpreted the ISA, and SUHAKAM's analysis was informed by experiences of (former) detainees. SUHAKAM's recommendation for the enactment of another law providing for preventive detention was not to the liking of most NGOs, but it should be noted that many countries have such laws and that they do not necessarily contravene human rights.

The Commission rarely opened investigations into individual cases pertaining to preventive detention.[51] This was not, however, due to a different attitude towards actual than hypothetical cases; but because the Commission had no jurisdiction, as the grounds for detention were already subject to judicial review. In fact, the ISA and preventive detention remained a priority for SUHAKAM. With regard to cases involving the ISA, the Commission con-

50 Interviews with Malik Imtiaz Sarwar, 20 March 2006; Yap Swee Seng, 14 November 2006; Josef Roy Benedict, 16 November 2006. See also Malaysiakini, 10 April 2003; 11 April 2003; 12 April 2003.

51 Exceptions were two cases in 2008, which concerned the health of ISA detainees and their access to medical treatment. In one of these cases, SUHAKAM urged the authorities to review the detention order, as the detainee was paralysed and as such 'could not possibly pose a threat to national security' (SUHAKAM 2009: 38).

tinued to make visits to prisons where people were held, sometimes following a complaint from human rights NGOs but also at its own initiative (SUHAKAM 2002a: 19). SUHAKAM's general procedure with regard to ISA detentions was to interview detainees where possible, and generate publicity for the case by issuing a press statement (SUHAKAM 2002a: 66). In 2003, the Commission started examining other laws that allowed for preventive detention, such as the Dangerous Drugs (Special Preventive Measures) Act (1985) and the Prevention of Crime Act (1959) (SUHAKAM 2004a: 47). In 2005 and 2006, SUHAKAM organised a forum on the Right to an Expeditious and Fair Trial, which included representatives from government agencies, the judiciary, and the Malaysian Bar Council. Many of the recommendations concerning civil and criminal courts touched upon issues also addressed in the ISA report, such as compulsory legal aid and the right to counsel (SUHAKAM 2007c: 99-103).

Hence, there is a sharp contrast between the Commission's efforts when dealing with freedom of religion, and its efforts when dealing with the right to a fair trial. To evaluate SUHAKAM's performance with regard to the ISA, its efforts can be are checked against the three indicators of performance identified in section 1.2.3, namely: efficiency; quantity; and the perceptions of the groups which SUHAKAM is meant to serve. By these indicators, the Commission was efficient; as it produced a strong report in the face of minimal resources. Similarly, the Commission performed well in terms of quantity. In addition to the specific report on the ISA, the Commission also called continuously for the repeal of the ISA, and paid significant attention to the broader issue of preventive detention and human rights through other activities. Finally, many organisations and individuals were satisfied with the ISA review; indicating that SUHAKAM also performed well according to the third indicator of performance.

SUHAKAM's report on the ISA was not confined to the area of freedom of religion; it also included a far more comprehensive discussion of international human rights norms. Even human rights norms which did not apply to Malaysia, such as from the ECHR, were included. By contrast, when dealing with the right to freedom of religion, the Commission made only minimal reference to the UDHR. This suggests that the more an issue is accepted, both within the Commission and at a societal level, the Commission will reference international law. In such cases, the international human rights regime is an important resource to support SUHAKAM's argument.

The manner in which SUHAKAM presented and promoted the international human rights framework was very straightforward. The Commission did not use alternative frameworks to show the validity of the international norms in the Malaysian context. Rather, SUHAKAM seemed to suggest in its report that the validity of these norms was apparent in the Malaysian context. Once again, this indicates the extent to which the report on the ISA, as well as the wider issue of fair trial, was supported within the Commission.

The main reason for SUHAKAM's good performance in this area is that the review was conducted by knowledgeable and motivated staff and commissioners. Several of these were retired judges who, during their tenure, had come to know the ISA quite well, and had always been critical of the statute. The Commission knew it would increase its popular legitimacy by addressing this issue; and that opposition to its report would most likely only come from the government. Addressing the ISA was therefore a relatively safe choice. Conversely, not to have addressed the ISA would most likely have had a negative influence on the Commission's stature.

The next question is to what extent the Commission was effective. The main recommendation of the review was for the government to repeal the ISA and to enact another law in its place, which included adequate human rights provisions (SUHAKAM 2003b: 88-89). In September 2003, Rais Yatim of the Prime Minister's Department announced that the government was reviewing SUHAKAM's recommendations (Malaysiakini 9 September 2003). However, several months later Defence Minister Najib Abdul Razak said that the government had no intention of repealing the ISA, and defended its use – stating that 'prevention is better than cure'. Najib added that the government was open to reviewing certain procedural parts of the law, and that it had made amendments to the Penal Code based on SUHAKAM's review of the ISA (Malaysiakini 19 December 2003). The amendment concerned the inclusion of a chapter on offences relating to terrorism, so the government appeared to have picked up SUHAKAM's recommendation to enact specific legislation for terrorist issues. However, this made no sense as long as the ISA was still in place; leading simply to redundancy rather than legal certainty. The amendments had nothing to do with the primary recommendations of the Commission's report. Despite this, SUHAKAM welcomed the amendments as a potential step towards repealing of the ISA. The Commission did, however, express its concern about the absence of clear definitions, and the increase of life sentences from 20 to 30 years, which it regarded as 'excessive and without justification' (SUHAKAM 2004a: 167-9). So in the short run nothing seemed to have happened at all.

Malaysian civil society, however, remained strongly focused on the ISA and detention without trial, and used the Commission's report to put pressure on the government. A 2009 poll by the Home Ministry revealed that 93 percent of respondents wanted the ISA to be repealed. Later that year, Home Minister Hishamuddin Hussein announced that the government would propose amendments to the ISA, including the detention powers of the minister, the duration of detention, and the rights and treatment of detainees, as well as detention without trial in general. Hussein also said that the government's revision would take into account the strong public opposition to the law (Malaysiakini 24 December 2009). The Home Ministry organised a number of meetings at a governmental level to discuss the revisions to the ISA. SUHAKAM did not participate in these meetings. When SUHAKAM attempted, in 2008, to organise a 'closed-door discussion' about the ISA with the relevant government agencies,

including the Home Ministry, the invitees declined to attend (SUHAKAM 2009: 38).

SUHAKAM's review of the ISA clearly illustrates the temporal dimension of effectiveness.[52] In April 2012, Prime Minister Najib Abdul Razak finally announced the repeal of the ISA and, in line with SUHAKAM' s recommendations, presented its successor – the Security Offences (Special Measures) Bill. This Bill reduces the maximum investigative detention period from two years to 28 days (The Malaysian Insider 16 April 2012). SUHAKAM was not involved in the drafting of the Bill, however; and the Commission was only briefed on it two days before it was tabled in parliament (The Star 22 April 2012). In a press statement, SUHAKAM said it considered the repeal of the ISA a 'positive move towards the improvement of human rights in the country'. However, the Commission also expressed its concerns about some provisions in the Bill, including a lack of judicial oversight on extending a detention to 28 days; the provision that the police may deny a detainee access to legal representation for up to 48 hours; and that permits for the interception of communication may infringe on the right to personal liberty and the right to privacy.

It is unclear to what extent SUHAKAM contributed to the government's decision to take this step. It is certain that from a human rights perspective, the replacement of the ISA is an important step forward. The Commission's role has been one of being a partner in a larger and concerted effort by Malaysian civil society, which has pressured the government for several decades to abolish the law. Through its authoritative 2003 review, SUHAKAM has investigated and supported these claims, and legitimised them. Particularly in the Malaysian context of a relatively authoritarian government, SUHAKAM's role has therefore been quite significant.

## 5.4 SUHAKAM AND ADEQUATE HOUSING

### 5.4.1 The Right to Adequate Housing in Malaysia

The right to adequate housing is entrenched in several international human rights instruments, most notably the UDHR[53] and ICESCR;[54] as well as in other treaties, including CEDAW and CRC,[55] which Malaysia has ratified. At a national level, provisions regarding the right to adequate housing are limited. The Malaysian Constitution guarantees the right to property, which includes

52 See 1.2.3.
53 Art 25(1).
54 Art 11(1).
55 CEDAW Art 14(2) (h) and CRC Art 27 (3). Also see 1.3.

a provision on adequate compensation when land is acquired,[56] but does not refer to the right to housing.

There are three laws relevant for residential evictions in Malaysia. These are the National Land Code (NLC, 1965), the Essential (Clearance of Squatters) Regulations (1969), and the Land Acquisition Act (LAA, 1960, amended 1992). The NLC stipulates that ownership of land is established through registration, and that occupying land or buildings without permission is an offence.[57] Further, the NLC determines that squatters can be arrested without warrant, and contains no requirement for authorities to give residents notice before an eviction.[58] The NLC, together with the 1969 Essential (Clearance of Squatters) Regulations,[59] provides for the involvement of security forces during evictions.[60] Compensation – for the owners of the land, not for those using it – is provided for in the LAA.[61] However, this statute does not elaborate on what is understood by compensation.

As in so many other countries, housing is a major challenge in Malaysia. This is particularly true for low-income earners, who often cannot afford to rent or buy a house, and therefore build houses on land to which they hold no title. Such squatters are found mainly in urban areas, and by some estimates, numbered over half a million people in 1999 (SUHAKAM 2004b: 6), with some NGO representatives claiming the figures were as high as one to two million people (Ali 1998).[62] There is significant variation in squatter settlements. Some, particularly those whose residents have supported ruling political parties, are well-developed and having access to good infrastructure including water and electricity; while other settlements are marginal (Harding and Sharom 2007: 145-6).

The Malaysian government commonly regards squatter settlements as 'eyesores and a hindrance to development' (Abdul Kader 2011: 8). Since the 1990s, urban development has been actively pursued by the government; and as part of that process, squatter settlements have been targeted for clearance. Hence these communities have become increasingly subjected to evictions. In the lead-up to and during the evictions, squatters have often been subject to intimidation, threats and physical violence. Compensation received by squatters following an eviction is generally inadequate to cover the costs of relocation.

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56 Art 13.
57 Section 425.
58 Section 426A (1) (c).
59 The Regulation was enacted during the 1969 Emergency, which was proclaimed following the race riots. After the end of the Emergency, the statute had been widely used to evict squatters.
60 NLC, Section 426(2) and Essential (Clearance of Squatters) Regulations, regulation 15.
61 Art 20 (b).
62 More recent academic work unfortunately does not include an estimate of the total number of squatters in present-day Malaysia (see also Hassan 2004: 114).

This section will look at how SUHAKAM has addressed the issue of the right to housing, specifically in cases of eviction within the Federal Territory of Kuala Lumpur[63] and surrounding areas (the state of Selangor). Squatter settlements in Selangor grew rapidly in the three decades from the 1970s, particularly after the introduction of the New Economic Policy (NEP).[64] Those who left their villages to live in urban areas were usually poor, landless, and with little education. In the absence of a government policy to provide them with housing, they had little choice but to use unoccupied land for building shelter (Sufian and Mohamad 2009: 112). During the tenure of Chief Minister Mohd Khir Toyo (2000-2008), the Selangor state government implemented a so-called Zero Squatter Policy, as part of the Vision 2020 (*Wawasan 2020*) Policy, which aims for Malaysia to be a fully developed and industrialised nation by 2020. The Zero Squatter Policy reduced the number of squatter households in Selangor from around 49,000 in 2005 to only 1,500 two years later (Sufian and Mohamad 2009: 109), by relocation of those concerned to rural areas, as well as by providing low-cost housing schemes.

According to some human rights activists, people who have occupied a plot of land for a long period can obtain rights to that land;[65] however the common law concept of adverse possession is not a part of Malaysian law. Malaysian courts have generally ruled that squatters hold no property rights, but are entitled nonetheless to reasonable compensation, and must be given proper notice to vacate the land (Sufian and Mohamad 2009: 118).

Squatters who vacate land voluntarily often receive little compensation. Only when they resist eviction and initiate legal proceedings are they able to claim some payment, either in cash or kind. Further, compensation in the form of rehousing usually occurs only when the squatters have been supporting the government (Harding and Sharom 2007: 146).

Although the state government has claimed that the Zero Squatter Policy was necessary for the development of the state (Bernama News 16 February 2005; Malaysiakini 20 December 2007), human rights NGOs have criticised the violence accompanying evictions (cf. Harding and Sharom 2007: 147), and denounced the lack of financial compensation for evictees. Arutchelvan Subramaniam, coordinator of NGO coalition JERIT, also commented that replacement housing is mostly inadequate:

> 'Often people have gardens, many squatter communities have livestock, and they cultivate vegetables. Then they are allocated a flat, but that [vegetable gardens;

63 In the Federal Territory, in addition to the three laws mentioned previously, the Federal Capital (Clearance of Squatters) By Laws 1963 and the Municipal Act 1963 also apply to the eviction of squatters.

64 The NEP was announced in 1970 and was a reaction to the 1969 riots. The goal of the NEP was the eradication of poverty, irrespective of race, through economic reforms. These reforms focused primarily on increasing the share of businesses owned by Malay.

65 Interview with Arutchelvan Subramaniam, 23 November 2006.

raising livestock] you cannot do in a flat. Some of them do fishing. They asked when they saw the flat: where do I tie my boat?'[66]

People are moreover often relocated to places far from where they used to live,[67] which makes going to work or school more difficult – or even impossible. This contradicts the definition of 'adequate shelter' in the 1996 Habitat Agenda, which holds that people should have easy access to work and basic facilities, including by public transportation, 'all which should be available at an affordable cost'.[68] Given these issues, evictions are clearly linked not only to the right to housing, but to several other human rights, including the right to freedom from fear, and the rights to work, healthcare and education. These concerns have often been raised by people threatened with eviction, as well as by representatives of human rights NGOs, who have frequently lodged complaints with SUHAKAM.

### 5.4.2 SUHAKAM and the Right to Adequate Housing in Kuala Lumpur

It is difficult to determine exactly how many complaints SUHAKAM receives annually regarding the right to housing in general, and eviction of squatter communities in particular. This is because SUHAKAM does not usually classify complaints within the category of housing.[69] Around 25 to 50 percent of complaints to SUHAKAM relate to land issues,[70] but only a small proportion of them concern evictions. Eviction cases are also often classified under 'complaints about government authorities' and 'police misconduct'. More than 30 percent of complaints per year fall within one of these categories, and a substantial number of them concern eviction. In June 2006, several NGOs submitted a memorandum to SUHAKAM regarding threatened eviction of sixteen squatter settlements in Selangor,[71] but the Commission did not respond.

The number of complaints about evictions did, however, prompt SUHAKAM to publish a special report on the issue, titled 'Adequate Housing: A Human Right', which developed from a 2004 seminar series concerning basic housing needs. This seminar series on adequate housing, and the subsequent report, brought together the experiences and suggestions of representatives from

66 Ibid.
67 As in the Kampung Berembang case, where relocation was offered 30 kilometres from the original site, see below.
68 Paragraph 60.
69 An exception was in 2004, when 19 out of 614 complaints were classified under this heading (SUHAKAM 2005: 126).
70 For instance in 2005, 396 out of 721 complaints related to land; and in 2006, the figure was 94 out of 412.
71 Interview with Arutchelvan Subramaniam, 23 November 2006.

government departments, NGOs, academics, and members of the Housing Developers' Association and the National House Buyers' Association.

The report started by summarising the relevant international human rights provisions regarding the right to adequate housing, including those mentioned in the UDHR, ICESCR, CEDAW and CRC; as well as General Comment No. 4 of the ECOSOC Committee and the Habitat Agenda. In the report, SUHAKAM emphasised Malaysia's obligation as a state party to CEDAW and CRC, and argued that while Malaysia has not ratified the ICESCR, the Commission

> 'is of the view that the provisions of the ICESCR, together with the jurisprudence developed by the UN Committee on Economic, Social and Cultural Rights through its general comments may be used as a guideline in determining the standards that Malaysia could aspire to achieve' (SUHAKAM 2004b: 2).

The report then examined Malaysia's National Housing Policy, which incorporated many of the core components of the right to adequate housing. These include affordability and maintenance of existing housing, as well as special attention to housing for low-income earners. SUHAKAM argued that while progress had been made in terms of access to affordable and quality housing, several concerns remained. These included the high degree of regulation of the housing market, which increases the cost of housing; the problems faced by house buyers, such as poor workmanship and abandoned housing projects; inefficiency in the distribution of low-cost housing; lack of accessibility to adequate housing by disadvantaged groups, including squatters;[72] and the need for a national housing policy drafted in cooperation with all stakeholders (SUHAKAM 2004b: 5-6).

According to SUHAKAM, the responsibility for the fulfilment of the right to adequate housing lies primarily with the state. This does not mean that the state has to build houses for everyone, or that houses have to be provided for free, but that the state has a duty to provide its citizens – and specifically, its disadvantaged citizens – with ways to access housing. In addition, SUHAKAM argued that the realisation of the right to adequate housing is a process, which means that in any case the state should refrain from 'certain practices which violate the right' and that the state should always allocate the maximum available resources to housing, even in times of economic recession (SUHAKAM 2004b: 37-9). Here, SUHAKAM seemed to allude to a duty to allocate a specific percentage of the yearly budget to housing.

In its report SUHAKAM repeatedly acknowledged the efforts of the state, including the existence of a national housing policy, the availability of services

72 Disadvantaged groups identified in the report are the disabled, indigenous peoples, children, elderly, plantation workers, urban settlers including squatters, new villagers (people from isolated villages relocated to designated new areas or 'New Villages' during the 1948-1960 Emergency) , transit-home communities (former squatters sent to live in long houses while waiting for completion of their permanent homes), migrant workers and single mothers.

and infrastructure, and the financial measures introduced by the government to assist people to purchase a house. However, the government's efforts have not always been successful, given delays and even abandonment of housing projects, inadequate supply of water and electricity, delays in the issuance of land titles, insufficient attention to open spaces and recreational facilities, and a lack of safety including high incidences of crime in some areas. Moreover, housing remains generally too expensive for low and middle-income groups, even with the financial support which the government provides. A specific point of critique is the lack of legal enforceability of the Universal Guidelines on Planning and Development (*Garis Panduan Perancangan dan Pembangunan Sejagat*), which include provisions regarding low-cost public housing as well as housing for the disabled and elderly (SUHAKAM 2004b: 49-55).

Whenever SUHAKAM's seminars and written report mentioned squatters' settlements, these were typically referred to in a dismissive manner. This was most evident in the opening speech of the seminar series by Vice Chairman Simon Sipaun, who said the following:

> 'There are 1,032 squatter settlements in Malaysia. This creates a bad image for Malaysia […] High-density areas and poorly constructed houses are not only ugly to the eye, but bring about various problems such as crime, infectious diseases and so on. Therefore the efforts of the State to relocate this group to housing areas that are more comfortable through the Zero Squatter Policy are highly commended.' (SUHAKAM 2004b: 72)

Elsewhere in its report, SUHAKAM stated that the Zero Squatter Policy is 'well-intended' (SUHAKAM 2004b: 50). The Commission noted, however, that in practice the policy has been misused and has led to abuses; thus differentiating between the Policy itself and its implementation. Nonetheless, the Commission conceded that eviction of squatters threatens the 'legal security of tenure of their *homes*' (SUHAKAM 2004b: 54, emphasis added). This interpretation is in line with the judicial opinion that squatters cannot exert claims on the land they occupy, but do have a right to adequate compensation or alternative housing. At the seminar, representatives of the government and academia shared this opinion.[73]

While SUHAKAM's report regarding adequate housing covered a wide range of issues, it was not a strong response to the challenges in this field of human rights. A substantial component of the report discussed problems faced by house buyers, such as delays during construction, poor-quality building materials and crime prevention; or issues affecting specific groups such as

73 Mutallib bin Jelani, Director General of the Peninsular Malaysia Department of Town and Country Planning (SUHAKAM 2004b: 21), and Razali Agus, Deputy Vice Chancellor, University of Malaya (SUHAKAM 2004b: 34).

the disabled and elderly. While these are legitimate problems, they are not at the core of the right to adequate housing. Conversely, the report paid very little attention to the challenges faced by squatter communities, and only one of the presentations during the seminars focused on this issue.[74] A presentation about the accessibility of housing for disadvantaged groups did not even mention squatters, and nowhere in the written report did SUHAKAM call for adequate compensation, nor comment on the often violent ways in which evictions are conducted. Rather, the report indicated that SUHAKAM considered squatter communities to be impeding Malaysia's development. In no way did the report address the needs of squatters, nor did it address any of the key issues raised in cases of forced eviction brought to the Commission's attention.

These shortcomings of SUHAKAM with regard to forced evictions were evident when I conducted fieldwork in Kuala Lumpur in 2006 and observed the lodging of complaints to SUHAKAM. Analysis of the cases below reveals not only how SUHAKAM dealt with eviction issues, but also how SUHAKAM's written report on housing helped determine its behaviour.

On 21 November 2006, SUHAKAM received a complaint from residents and NGO representatives about the eviction of Kampung Berembang. Home to approximately 500 residents, including some who had lived in the settlement for more than thirty years, this *kampung* was situated in the Ampang district, about ten kilometres from the centre of Kuala Lumpur. In 2005, residents had been notified of the local government's intention to clear the land and build high-rise flats. As compensation, residents were offered temporary accommodation in Puchong, approximately 30 kilometres from Kampung Berembang. Residents attempted to negotiate with the local government and developer, assisted by representatives from NGO coalition JERIT (*Jaringan Rakyat Tertindas*, Oppressed People Network) and the Socialist Party of Malaysia (*Parti Sosialis Malaysia*, PSM). Eventually this led to a lawsuit against the developer, regarding ownership of the land.[75] The residents appealed to the local authorities to postpone eviction until the court decision had been announced and permanent houses had become available. They also appealed to the Prime Minister's department, which issued a letter requesting the Selangor Chief Minister to postpone the eviction. The latter, however, overruled the letter; and the eviction remained scheduled for 20 November 2006. On the day of the eviction, residents and NGO representatives called on SUHAKAM for assistance, and

74 Arutchelvan Subramaniam, Housing Rights and Vulnerable Groups – the NGO Viewpoint (SUHAKAM 2004b: 197-210).

75 In December 2007, the court ruled that the developer did not have ownership of the land and therefore was not authorised to demolish the settlement. The court then ordered the developer to pay damages and other costs (such as relocation costs) to the residents. According to NGO representatives this outcome was influenced by the persistence of the residents of Kampung Berembang (Malaysiakini 14 December 2007). Elsewhere (Ali 1998; Harding and Sharom 2007) it has also been argued that in general compensation is only given to people who are willing to put up a fight.

commissioner Siva Subramaniam came to Kampung Berembang to ask the authorities to delay the eviction – to no avail. The eviction, conducted on the basis of the 1969 Emergency (Clearance of Squatters) Regulation, led to the arrests of 23 activists and residents, many of whom sustained injuries inflicted by the police and RELA.[76] Reporters were harassed, and ordered to delete pictures from their cameras. Commissioner Subramaniam then invited the residents to lodge a formal complaint to SUHAKAM the following day, in the presence of the media.

When the residents and NGO representatives brought their case to SUHAKAM, Subramaniam spoke on behalf of the commission and condemned the violence used by the authorities, stating that they had 'abused their powers'. He promised to discuss the matter with the Selangor State Minister of Housing and Local Government. Moreover, he acknowledged that the eviction of urban settlers was an issue of concern for SUHAKAM; but also that the Commission had to remain neutral: 'we cannot choose sides'.[77]

In this particular case, the resistance to the eviction was well-organised. Residents cooperated with representatives of NGOs and political parties to challenge the eviction, by appealing directly to the authorities, initiating court-proceedings, attracting media attention,[78] and by involving SUHAKAM. Calling for help from the Commission was part of a wider strategy, rather a single attempt to address the plight of the residents. The presence of a SUHAKAM commissioner at the site of eviction served to demonstrate that the residents had support from an independent state body. While Subramaniam could not prevent or delay the eviction, his invitation to lodge a formal complaint gave residents and NGOs the opportunity to present their case to a wider audience. During the subsequent meeting, Subramaniam emphasised the use of force by the police and RELA during the eviction, and suggested that this might lead to a public inquiry; however, for this purpose more evidence was required, such as photos and video recordings. Later, SUHAKAM decided not to open an investigation into the Kampung Berembang case, because it would have no jurisdiction pending court proceedings.[79] This argument was used rather selectively, for in the Kundasang Public Inquiry[80] SUHAKAM had addressed

76 The Association of Volunteers of the Malaysian People. See 4.3.2.

77 Interview, 21 November 2006.

78 The case of Kampung Berembang was also well-documented by independent online news portal Malaysiakini.

79 Interviews with Siva Subramaniam, 21 November 2006; and Nurul Hasanah, 14 December 2006.

80 In May 2003, villagers from Desa Monteiki, Kundasang (Sabah) were evicted from agricultural land that they had occupied and cultivated since 1985. They had done so with the approval of the head of the local government. The villagers were evicted by police officers to make way for a company which had claimed ownership. A few days later, eighteen villagers were arrested. SUHAKAM opened an inquiry into the case in December. The Panel appointed to conduct the inquiry was of the opinion that it could not address the issue of which party (the villagers or the company) was entitled to the land. Rather,

excessive use of force by the authorities in a similar situation.[81] That this was not done in the case of Kampung Berembang is likely to be related to the negative perception of urban squatters held by the majority of commissioners, as well as the existence of legislation allowing for customary land claims in Sabah.[82]

On 22 November 2006, one day after SUHAKAM received the complaint about the eviction of Kampung Berembang, another eviction case was brought to the Commission. Referred to as Kampung Chubadak, the case actually included four settlements in the Kelang Valley outside Kuala Lumpur – Kampung Chubadak; Rumah Panjang Jinjang; Rumah Panjang Rawang; and Ampang Mewah – which were to be cleared during construction of a highway. The eviction would affect around 3,000 families, some of whom held title to the land they occupied, but most of whom held only Temporary Occupation Licences. In April 2006, residents had been notified of the eviction and local authorities had promised to help with relocation. However, by July the Kuala Lumpur City Council had done nothing, so residents initiated court proceedings against the Council, in which they claimed 'reasonable and just' compensation. Their claims referred to promises by the local government to give land titles to some residents 40 years ago. On November 15th 2006, although the case had not yet appeared before the judge, authorities started demolishing the settlements – which was when residents appealed to SUHAKAM. Their memorandum was received by Siva Subramaniam, who said the Commission would 'study' the complaint and address the issues with the relevant authorities. Subramaniam criticised the use of the term 'squatter' by the authorities, which in his opinion only applied to people who had been occupying the land for less than six months; he claimed that after six months' occupation, people should be regarded as permanent residents (*penduduk kekal*). He also urged residents to deal with the authorities collectively, rather than individually. SUHAKAM then contacted the authorities, but took no further action when the eviction was carried out two weeks later.

There is a difference in the way SUHAKAM addressed the cases of Kampung Berembang and Kampung Chubadak. The former seemed to be taken far more seriously, as indicated by the two visits paid by SUHAKAM representatives to the site, and their attempt to negotiate directly with authorities. In contrast, the Kampung Chubadak residents received much less attention. The reason lies most likely with the high degree of self-organisation of the Kampung Berembang residents, who from early on had cooperated with NGO represent-

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it focused on the treatment of the villagers in detention. In its inquiry, SUHAKAM found that conditions under which the villagers had been detained 'infringed human rights provisions providing for the humane treatment for detained persons' (SUHAKAM 2004: 40-8).

81 According to senior officer Nurul Hasanah, this was considered by the Commission. Interview, 14 December 2006.

82 Such legislation is also available in Sarawak. See 5.4.3.

atives, and whose appeal to SUHAKAM was part of a broader strategy. The Kampung Chubadak residents did bring a case to court, but on the whole could not muster similar resources: few attended the lodging of their memorandum, and their case attracted far less media coverage. Nonetheless, the basic approach to these cases was similar. SUHAKAM generated media attention during the lodging of complaints,[83] emphasised the need for the authorities to refrain from the use of force, and emphasised the need for compensation, replacement housing, and the right to adequate housing in general. It did not open investigations, allegedly because both cases were still subject to court proceedings. As already noted, SUHAKAM took a different approach in an eviction case in Sabah. The Kundasang inquiry suggests that SUHAKAM could have looked into elements relating to the eviction which were not subject to court proceedings, such as the excessive use of force by the authorities. That this was not done demonstrates that the Commission deals with the right to adequate housing selectively, and has been reluctant to comprehensively address forced evictions of squatters in Selangor.

### 5.4.3 Performance and Effectiveness

While SUHAKAM's report on the right to adequate housing included a discussion of relevant international human rights norms, it paid little attention to disadvantaged groups. The report also did not include a review on the legislation relevant to housing or the lack thereof – such as a constitutional provision of the right – but rather, presented squatter settlements as a problem that needs to be solved, without providing guidelines on how to achieve this from a human rights perspective. SUHAKAM commissioners themselves have also been critical of squatters, some even going so far as to claim that squatters create a bad image for Malaysia. Taking these perspectives into account, it is of little surprise that the Commission is not inclined to forcefully promote the right to adequate housing for the benefit of squatters.

Likewise, SUHAKAM's approach in individual eviction cases does little to support human rights. While SUHAKAM has generated media and public attention for these cases, the Commission has not opened any related investigations. Neither has SUHAKAM paid much attention to the eviction laws violating human rights principles, such as the 1969 Emergency (Clearance of Squatters) Regulation. Only in October 2007 did SUHAKAM call for a repeal of this Regulation – more than three years after the publication of the report on adequate housing.

The manner in which SUHAKAM has positioned itself with regard to adequate housing contrasts starkly with the actions taken by the Commission

83 In the case of Kampung Berembang more attention was generated as the residents and NGOs had done this beforehand and several journalists were present at the eviction.

with regard to the provisions of the ISA and associated issues.[84] While the ISA was addressed comprehensively, the right to adequate housing was not. Such disparity can be explained by considering the strong support for the ISA inquiry from individual SUHAKAM members; support that was not apparent in the case of adequate housing. As discussed earlier in this Chapter,[85] a majority of commissioners regarded squatter settlements as undesirable, and as an impediment towards Malaysia's development. Even Commissioner Siva Subramaniam, who regularly addressed eviction cases and was generally regarded by NGOs as a more progressive member of SUHAKAM, stated that 'squatters are illegal occupants and therefore cannot claim any right to land'.[86] This position contradicts General Comment no.4 on the right to adequate housing, which includes legal security of tenure as an essential component of the right, and argues that 'states parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection'. Given that statement, SUHAKAM would be expected to consider the security of tenure of squatters as a priority.

Evictions, at least where they concern urban squatters, receive little attention from SUHAKAM. In the 2006 Annual Report, no reference was made to either Kampung Berembang or Kampung Chubadak. This is in contrast to cases involving customary land rights, such as the eviction in Bintulu, Sarawak, in which SUHAKAM visited the area, negotiated with the authorities, and managed not only to delay the eviction for six months, but obtained a commitment from the authorities to provide interim accommodation for residents (SUHAKAM 2008: 209-10). A reason for these different approaches can be found in the existence of state legislation in Sabah and Sarawak which allows for customary land claims. SUHAKAM commissioners heading the Sabah and Sarawak offices argued that these legal bases make it easier for SUHAKAM to address such cases.[87] This also means that the lack of legal provisions regarding the rights of squatters, and tenure security in general, has significantly limited SUHAKAM's operations in this area.

In sum, SUHAKAM's performance in this field has been largely inadequate. The few efforts made by the Commission have been half-hearted, falling short in terms of efficiency and quantity, and leaving NGO representatives and individual complainants unsatisfied. In the field of adequate housing, SUHAKAM's actions – or lack thereof – appear to be driven largely by the personal beliefs of commissioners (which was also apparent with respect to freedom of religion). In the case of housing, the dominant perception among commissioners – that squatters do not hold title to the land, and cannot exert

84 See 5.3.3.
85 See 5.4.2.
86 Interview with Siva Subramaniam, 21 November 2006.
87 Interviews with Simon Sipaun, 5 November 2006; and Hirman Ritom Abdullah, 21 November 2006.

any claims over it – is not in accordance with international human rights norms regarding the legal security of tenure. As such, SUHAKAM has not been effective in furthering the realisation of the right to adequate housing.

In 2008, several developments occurred which were favourable to squatters in Selangor. The State Government announced it would grant land titles to long-term urban settlers (Malaysiakini 7 April 2008), and during a meeting with NGO coalition JERIT, the state government member for Housing, Building Management and Urban Pioneers, Iskandar Abdul Samad, announced that all evictions would be halted and eviction notices would be withdrawn. The state government member for Local Government, Ronnie Liu, added that all court cases against settlers would be withdrawn, and the government would not use the 1969 Emergency (Clearance of Squatters) Regulation (Aliran 11 April 2008). Since the announcement, there have been no reports regarding evictions in Selangor. These developments were a direct result of the election of the Pakatan Rakyat (PR) as the government of Selangor; a party which tends to be more responsive towards human rights issues than Barisan Nasional (BN).[88] Further, members of PR had been actively involved in eviction cases, usually in their capacity as representatives of NGOs. PR's election win meant that those concerned with squatter settlements had more direct access to their new state government, which made lobbying for changes to policies and practices easier. This means also that SUHAKAM has been overtaken by new political realities not of its own making.

## 5.5 Conclusion

This Chapter has demonstrated how SUHAKAM deals with different fields of human rights in dissimilar ways. Regarding freedom of religion, SUHAKAM has avoided the issue as much as possible. Regarding the right to adequate housing, the Commission published only a superficial report; while on the right to a fair trial and the ISA, it published a thorough report based on extensive research and two public inquiries. These marked differences are also evident in the extent to which SUHAKAM has promoted international human rights provisions more generally. In the area of fair trial, the Commission has gone so far as to make reference to provisions that do not apply to Malaysia; whereas on the issue of adequate housing it has explained the right in ways which differ from internationally argued human rights interpretations; and on freedom of religious it has kept completely silent.

The differences in SUHAKAM's behaviour are related in part to characteristics of the three rights concerned. The right to a fair trial distinguishes itself from the rights to adequate housing and freedom of religion in having a strong vertical dimension, meaning that it is concerned primarily with the relation

88 See 4.3.3.

between the state and individual, and demands first and foremost that the state abstains from certain acts. The freedom of religion, on the other hand, requires a more active approach from the government, and is related closely to the behaviour of citizens of different religious denominations towards one another. The right to adequate housing implies a similar combination of action and abstinence on the part of the state. Also, the right to a fair trial is relatively uncontested, whereas the right to adequate housing (where it concerns squatters) is controversial in the eyes of 'development' oriented elites – including most of SUHAKAM's members – and freedom of religion is extremely sensitive. In the specific context of Malaysia, the right to a fair trial in general, and the ISA in particular, has moreover been a long-term concern of human rights NGOs and political parties, which provided SUHAKAM with influential allies.

In their attempts to close the gap between international human rights provisions and national norms and practices, NHRIs are supposed to combine support for international guidelines with an understanding of local and cultural differences. SUHAKAM has done so by replicating international human rights norms in the Malaysian social-political space. Mediation between international and national norms then happens primarily – in the terminology of Merry (2006) – through appropriation. However, the differing degrees to which SUHAKAM refers to international human rights frameworks illustrates clearly the balancing act many NHRIs have to perform. The more a field is accepted as a human rights concern domestically, the more freedom an NHRI has to refer to international human rights norms, even those which do not legally apply to the country. It can be assumed that referring to, and promoting, international norms in sensitive areas would put SUHAKAM at risk of alienating stakeholders, which would be detrimental for its long-term goals, as it would close avenues for dialogues with those groups. Conversely, SUHAKAM's willingness to take this risk in the case of the ISA can be explained by the relative acceptance of the issue as a human rights concern, by a cross-section of Malaysian society and parts of the political elite.

In the three areas of rights discussed in this Chapter, SUHAKAM does not translate international human rights norms in the sense that they are rephrased within local and cultural frameworks. SUHAKAM staff and commissioners are very much aware of the difficulty of this in a plural society such as Malaysia. As in Indonesia,[89] choosing a particular cultural framework in the Malaysian context would at best alienate certain 'cultural groups', and at worst make them hostile to the Commission. Moreover, promoting human rights based on laws that apply to everyone, irrespective of ethnicity, also resonates with the Commission's goal to contribute to national unity and harmony.

The extent to which a particular field of human rights is addressed, and the way in which this is done, therefore depends on the dominant interpreta-

89 See 3.5.

tion of a right amongst commissioners; which tends to be a reflection of how an issue is perceived at the level of the political elite.[90] Hence SUHAKAM has been willing to address the violent nature of eviction of squatter settlements, but not their lack of tenure security. Similarly, widespread aversion to police violence explains SUHAKAM's thorough review of the ISA. SUHAKAM's reluctance to address issues pertaining to the freedom of religion is related to the views of individual commissioners on this issue, and also to their preference to avoid conflict, which is expressed as the requirement of 'neutrality'. This illustrates that human rights are indeed a contested concept, even within an organisation which is assumed to support international interpretations of those norms unequivocally.

The different ways in which SUHAKAM has dealt with human rights has had far-reaching consequences for the Commission's performance. In the field of the right to a fair trial, performance has been good; but with regard to adequate housing it has been unsatisfactory. In the area of freedom of religion it has been almost non-existent. This varying quality of performance means also that on the whole, the Commission has only been partially effective.

However, the limitations of SUHAKAM's performance and effectiveness do not mean that the Commission is irrelevant. Even in cases where SUHAKAM has been unwilling to open an investigation (as in the case of religious freedom), it remains available to accept complaints. This opportunity is usually helpful to complainants and their representatives, as it encourages media attention and therefore public support for their problem. While SUHAKAM's performance to date remains well below its potential, in providing a platform for activism the Commission has contributed to human rights awareness and provided a social space for debate.

90 See 4.3.1.

# 6 Comparing KOMNAS HAM and SUHAKAM

## Conclusions on the Socialisation of Human Rights, Organisational Performance and Effectiveness

### 6.1 INTRODUCTION

The NHRIs KOMNAS HAM and SUHAKAM both have their origins in the international human rights system. They have comparable tasks, and both have been required to operate in less than ideal circumstances, in countries where resistance towards human rights norms and their implementation is common. Both KOMNAS HAM and SUHAKAM have responded to such resistance by consistently referring to international human rights norms. They have thus contributed to the legitimacy of human rights and lent fundamental support to the development of a domestic human rights movement in repressive conditions. The role both KOMNAS HAM and SUHAKAM have played in supporting human rights domestically is in accordance with international expectations of NHRIs, and underlines the important role such organisations can fulfil even in the most trying circumstances.

The previous chapters have looked at KOMNAS HAM and SUHAKAM separately as organisations, described their trajectories, and considered how each has dealt with the rights of freedom of religion, fair trial and adequate housing. In these chapters, we have seen that the performances of KOMNAS HAM and SUHAKAM, and the extent to which they have been able to contribute to the realisation of human rights, differ from one right to the next; and that these differences are due to organisational factors as well as to the environments in which the organisations operate. These findings, and the ways in which the two NHRIs have socialised human rights, will be discussed in this Chapter, which presents a comparison of KOMNAS HAM and SUHAKAM.

The theoretical framework that has guided this research can be divided into two parts. The first is that of human rights and their realisation. Although the notion of universality of human rights has become dominant at the international level, at national levels human rights are often contested both normatively and in their application. This research has considered human rights as a site of political struggle, where continuous negotiation and contestation take place. We have seen that for both KOMNAS HAM and SUHAKAM, contestation has applied in particular to the right to freedom of religion. Disagreements about the ambit of the right in protecting religious minorities have had far-reaching implications for the investigations of both Commissions. Other human rights, however, are less contested, and some have been promoted comprehensively.

Anthropological studies have found that the successful implementation of human rights depends on their embedment in society. Progression towards this situation, or 'vernacularisation', consists of two processes: appropriation and translation. The former refers to the replication of norms and programmes in other settings, while the latter means adjusting the language and structure of the norms to local circumstances. Successful translation includes using local frameworks (whether cultural or religious) in order to increase acceptance of human rights (Merry 2006). This research has shown that the process of translation is often not as prominent as one would expect, if we look at the promotion of human rights by NHRIs. Both KOMNAS HAM and SUHAKAM have hardly used cultural and religious frameworks to promote rights, and have relied on the language of law instead. Such a choice raises questions about the suitability of alternative frameworks for vernacularising human rights in pluralistic countries in general. When a specific human rights issue touches upon communal relations (and thereby places obligations on the behaviour of certain groups), NHRIs do use 'alternative' discourses, but when the issue is mainly about state obligations, the law is central. How NHRIs promote human rights thus depends on the specific characteristics of an issue and the type of right involved.

The second part of the theoretical framework for this research relates to organisational performance and effectiveness. This consists of a number of internal and external factors which influence the performance and effectiveness of NHRIs, including human and financial resources; the roles of individuals; leadership; a differentiation between prescribed and actual work processes; and the influence of interest groups and other social and political actors. The research has found that for both KOMNAS HAM and SUHAKAM, internal structures, personal factors, and the leadership's ability to create a 'sense of mission' within the organisation have been central to their performance. Most crucial are individual commissioners. Particularly in the case of KOMNAS HAM, the combination of relative autonomy and the personality of leading commissioners has determined organisational success and failure. The difference between KOMNAS HAM and SUHAKAM in this respect lies in the higher degree of autonomy of the former's commissioners in comparison to the latter's. This means that KOMNAS HAM may still address issues, even when these attract little support within the organisation as a whole.

This relatively strong influence of individuals has several implications. First, the professional backgrounds of commissioners are key to their success in particular tasks. Commissioners with backgrounds as NGO activists or academics are well suited for educational activities, where those with connections with the administration or security forces can play an important role in accessing these bodies and encouraging the implementation of NHRIs' recommendations. This highlights the importance of the appointment procedure for commissioners, as a key to the organisation's success.

This finding also points at the importance of the socio-political context. For NHRIs, neither Malaysia nor Indonesia is an easy country in which to operate. SUHAKAM has to work in an environment in which human rights guarantees are still minimal. On paper, KOMNAS HAM can call upon a strong human rights system; but the implementation of these norms leaves much to be desired. In addition, there are many societal and political actors who actively oppose the implementation of human rights, and have attempted to influence the course of KOMNAS HAM's activities, with varying degrees of success. The case of Indonesia underlines that for the realisation of human rights, law is not enough: political support for those rights remains indispensable (cf. Lev 2000: 336).

The findings discussed above will be addressed further in the following section, which compares KOMNAS HAM and SUHAKAM. This next section will discuss the similarities and differences between the two organisations, and the reasons for these. This will provide the basis for a number of recommendations, both for KOMNAS HAM and SUHAKAM and for their national and international stakeholders, as well as suggestions for further research.[1]

## 6.2 COMPARING KOMNAS HAM AND SUHAKAM

### 6.2.1 Performance

In this research, performance has been defined as a relationship between inputs and outputs, which refers to the process whereby NHRIs turn their tasks into activities. In the following section, the factors that have influenced the performances of KOMNAS HAM and SUHAKAM will be analysed. These factors have affected the performances of these organisations in two ways. First, they have influenced the Commissions' decisions regarding whether to take on a particular issue; and second, they have influenced how an issue, once taken on, is addressed. In turn, these factors have also influenced the extent to which the organisations have promoted the international human rights framework. Finally, this section will pay attention to the differences between KOMNAS HAM and SUHAKAM, and how these disparities can be explained.

The first factor which has influenced the performance of KOMNAS HAM and SUHAKAM is the commissioners' personal views on a right; which are often in accordance with dominant societal perceptions. As an example, the strong support within SUHAKAM for a fair legal process – which reflected widely-held views within Malaysian society – translated into a detailed inquiry by SUHAKAM into the ISA. The more support which a particular issue (or right) generates, the more likely it is for the Commission to address that concern.

1 See Appendices.

Similarly, the minimal attention which both Commissions have accorded to the right to freedom of religion reflects the general lack of support for this right within society. Further, KOMNAS HAM's responses with regard to freedom of religion show that the behaviour of NHRIs can differ between issues even within a particular right. KOMNAS HAM did nothing about the attacks on the Ahmadiyah, because most commissioners considered its adherents to be members of a deviant sect; but the Commission did produce a report on Interreligious Marriage, and also touched upon that matter in its report on the National Civil Registry. These observations indicate that the means by which an issue is addressed are also important: a research-based report is less confrontational than an investigation, such as may have been required to address the Ahmadiyah attacks.

The second factor influencing the performance of KOMNAS HAM and SUHAKAM is the nature of a particular right, in terms of the demands it places on the state. Both Commissions have preferred to address rights which require negative action from the state. This explains SUHAKAM's efforts with regard to the issues of fair trial and freedom of assembly, and KOMNAS HAM's investigations into gross violations of human rights. In contrast, both Commissions have paid less attention to issues that require positive action from the state, such as the right to adequate housing. Rights which depend on the actions of societal groups for their fulfilment, such as the right to freedom of religion, are even more neglected by both KOMNAS HAM and SUHAKAM – related also of course to the first factor of commissioners' personal views.

Both factors discussed above are closely related to a third factor: the level of resistance or controversy which a right evokes. The more contested a right, the less likely that KOMNAS HAM and SUHAKAM will address it. The degree of contestation of a right within the Commission often reflects general attitudes towards the issue, and is particularly evident in the case of freedom of religion. Such reluctance to address controversial issues can be explained by the fear amongst commissioners that engaging in such issues will jeopardise the organisation's survival, either from within or outside. This is particularly so in the case of SUHAKAM, which has defined its role strongly in terms of becoming a contributor to national harmony and avoiding possible controversies.

It is important to differentiate between societal and political controversy, as the latter has had less of a negative impact on the Commissions' performances. For instance, the ISA was strongly supported by the Malaysian government, and thus SUHAKAM's report on the law was politically controversial; yet the Commission opened the inquiry because there was strong societal support. Similarly, KOMNAS HAM has opened investigations in politically sensitive cases, such as the disappearances of human rights activists (1997/1998), and the shooting of students by security forces in May 1998. Even during the Suharto years, KOMNAS HAM consistently demanded attention for human rights violations by the security forces, although the latter were strongly supported by the political elite. Of course, in some instances political contro-

versy may have a negative impact on performance. KOMNAS HAM's inaction with regard to the Ahmadiyah case was due largely to societal resistance, but was no doubt reinforced by the political ties established between commissioners and political parties through the election procedure. In SUHAKAM's case, political considerations have played a role more generally in avoiding cases that have the potential to increase tension or upset racial or religious relations. These examples indicate that it is usually a combination of considerations that determine a Commission's decision not to intervene – political controversy alone is not enough.

Finally, the performances of KOMNAS HAM and SUHAKAM have been influenced by strategic consideration of opportunities. This means that both Commissions have focused on issues for which they were of the opinion that their activities could lead to improvements. KOMNAS HAM's success with its report on the National Civil Registry was due largely to the fact that parliament was debating a related Bill. In choosing to publish a report on the National Civil Registry, KOMNAS HAM connected with existing concerns, thereby increasing its chances of success. Similarly, the ISA had been a long-standing concern for Malaysian civil society, which had exerted pressure on the government for many years. Given this context, SUHAKAM considered that a report on the matter could lead to concessions by the government, which indeed it did.

Similarly, a low perceived likelihood of success may be sufficient reason not to address a particular issue. KOMNAS HAM did not participate in revising the Code of Criminal Procedure, because it knew that these revisions would not be passed by parliament, since they were not a legislative priority. With respect to freedom of religion, both KOMNAS HAM and SUHAKAM have held the opinion that improvements in the area are unlikely, given the controversial nature of the right; and this has contributed to the silence of both Commissions on the issue.

The four factors discussed above do not only affect decisions about whether a right will be addressed, but also how this will be done. As identified above, the research into KOMNAS HAM and SUHAKAM indicates a general rule of thumb: a right is more likely to be addressed when (1) it is supported by commissioners; (2) it requires primarily negative action by government; (3) it is relatively uncontroversial at societal levels; and (4) commissioners perceive that taking action will have a relatively high chance of success. It is when these requirements are met that Commissions are more likely to develop activities that address the core of the particular human rights issue – SUHAKAM's report into the ISA is an excellent example.

The factors identified above also influence the ways in which the Commissions refer to the international human rights framework. Although in general both SUHAKAM and KOMNAS HAM have framed their arguments within a discourse about international and national human rights norms, they have tended to do this more comprehensively when the issue in question is widely supported. For more controversial issues, notably the freedom of religion, the

Commissions have either used alternative frameworks to complement the legal discourse (KOMNAS HAM), or have minimised any reference to the international regime (SUHAKAM). Likewise, with SUHAKAM we have seen that the greater the acceptance of a particular issue within society, the more willing the Commission will be to include a wide range of international human rights norms as part of its assessment. The limited support for the right to adequate housing meant that the Commission, when building its argument, focused much less on the international human rights discourse than it did in the case of the ISA.

The observation that Commissions have chosen to frame their arguments within international and national human rights norms is particularly remarkable in the case of SUHAKAM, as this Commission – in comparison to its Indonesian counterpart – is obliged to engage with a more restricted human rights framework. By referring to international norms that have yet to be ratified by Malaysia, SUHAKAM has used a rights framework that does not legally apply to Malaysia.

The use of legal frameworks contrasts with the argument that alternative frameworks, such as those based on culture or religion, are particularly effective in socialising human rights. While in some cases[2] both KOMNAS HAM's and SUHAKAM's reports have made reference to religious norms, they have always emphasised legal interpretations of human rights. Both Commissions have thus relied primarily on the language of law. Representatives from both Commissions have argued that using alternative frameworks carries the risk of alienating groups which do not identify with those frameworks, which in turn may promote hostility towards the Commission. As such, they have preferred to use a framework that applies to all citizens, irrespective of ethnicity or religion; and hence national laws are their primary source of reference. Further, both organisations have also wanted to assert their status as a *national* organisation, which means that they do not associate with a particular ethnic group or religion. The use of legal frameworks, which apply to all citizens, has therefore been a logical choice for both Commissions.

While there are many similarities between KOMNAS HAM and SUHAKAM, and many of the identified factors which influence their performance are the same, there are also several differences between the two Commissions. First, personal initiative has influenced KOMNAS HAM's performance far more than that of its Malaysian counterpart. None of the KOMNAS HAM reports discussed in this research would have been published without the personal attention of a particular commissioner. Within SUHAKAM, conversely, the decision to take up an issue is more dependent on the support which a particular human right commands among the commissioners as a team. The advantage of the individual approach within KOMNAS HAM is that a wide range of issues can potentially be addressed; but there are no guarantees of continuity of a pro-

2 This was particularly evident in KOMNAS HAM's report on Interreligious Marriage, see 3.2.2.

gramme when a commissioner stops working on it, or when those members leave the Commission. For example, today KOMNAS HAM's report on Interreligious Marriage is just another book in the library, rather than a starting point for other activities.

The different relative weights of personal initiative and support in the performance of KOMNAS HAM and SUHAKAM can be explained by their respective organisational structures. Although KOMNAS HAM commissioners are required obtain formal approval for their programmes, in practice they initiate programmes regardless, and in some instances they have decided to continue with a programme even without approval. Individual initiative is thus an inherent aspect of how KOMNAS HAM functions, with an additional difference between prescribed and actual work processes.

At SUHAKAM, programmes are decided upon by the Commission as a whole, and it would be almost impossible for a commissioner to conduct any programme simply because he or she desires so. In the case of the Sky Kingdom case, commissioners who were willing to investigate the case further eventually acquiesced to the wish of the majority not to do so. This difference between KOMNAS HAM and SUHAKAM is reinforced by the composition of their membership, as a result of their respective appointment procedures: in SUHAKAM's case all commissioners are elected by the same committee, whereas in KOMNAS HAM's case they are elected by parliament, after a process of political negotiation, which means that KOMNAS HAM's composition is more diverse. Negotiation and compromise are hence an inherent part of KOMNAS HAM's working processes, as shown for instance by the way in which recommendations were formulated in the report on Interreligious Marriage.

The election procedure for KOMNAS HAM also means that the political external influence on the Commission's performance has become more direct and substantial: it has resulted in a degree of politicisation that at times has negatively influenced its proceedings. Examples are the concessions made in the case of the report on Interreligious Marriage, and the Commission's refusal to open an investigation into the Ahmadiyah case. As a consequence of this politicisation, KOMNAS HAM has sometimes closed its eyes to crucial information in investigations into gross human rights violations, for instance in the case of the activists who disappeared in 1997 and 1998. In these instances, it would have been desirable for the Commission's leadership to take a more proactive role in limiting the negative influences of the politicisation. In practice, however, this has been hampered – particularly between 2002 and 2007 – by internal factors, including the leadership's inability to command authority over other members. This can be explained by the contrasting backgrounds of the Chairperson – a former NGO activist – and many other commissioners who were former government officials or members of the security forces. KOMNAS HAM's structure also plays a role, in that the chairperson do not have a higher official status than fellow commissioners, and therefore does not automatically command more authority.

In the case of SUHAKAM, the Chairperson is specifically appointed to his position by the Prime Minister, which immediately gives him some authority. SUHAKAM commissioners, even when they were known to disagree with the Chairperson, would not comment on this in public. They were also very discreet: even former commissioners were unwilling to talk about their experiences in this regard. This is different from the case of KOMNAS HAM, where both present and past commissioners were quite open in criticising their (former) colleagues, including the Commission's leadership.

SUHAKAM's strong outcomes in the case of the ISA demonstrate what the Commission can achieve, given a long-term plan and a focus on issues that are widely supported within the organisation. As we have seen, the situation is different in KOMNAS HAM, which relies heavily on individual initiative. Both modes of operation have their advantages and disadvantages. SUHAKAM's structural approach has clearly been effective, even though it took quite some time. The disadvantage of this approach is that some issues are not addressed, simply because a majority of the commissioners do not want to address those particular topics. In contrast, KOMNAS HAM's commissioners have addressed cases and developed programmes against the wishes of other members; albeit with the risk that such programmes become incidental projects which are forgotten once the commissioners in charge of them leave. NHRIs therefore might wish to combine these two approaches, allowing both individual initiative as well as a long-term plan to focus on issues that are widely supported within the organisation.

When the performances of KOMNAS HAM and SUHAKAM are compared, it appears that the latter has taken a much more careful, or selective, approach. SUHAKAM has avoided cases which are controversial because of a racial or religious dimension. Although religious sensitivities are also a concern for KOMNAS HAM, it has looked into the controversial topic of interreligious marriage. It did so through research, which attracts less public attention and therefore opposition than investigations. Where gross human rights abuses were suspected, however, KOMNAS HAM has consistently opened investigations.

The fact that KOMNAS HAM has dealt more comprehensively with human rights issues than its Malaysian counterpart is related directly to the different socio-political environments in which they operate. Since the fall of the New Order in 1998, KOMNAS HAM's environment has changed dramatically, and although serious challenges to the implementation of human rights remain, the organisation has much more leeway than SUHAKAM, which operates in more restrictive conditions. The changes that have taken place in Indonesia since 1998, including the development of a vibrant civil society, have also put more pressure on KOMNAS HAM to actively address human rights issues.

The different socio-political contexts, including the human rights climate, may also explain why human rights in general are more contested within SUHAKAM. While adequate housing is relatively uncontested within KOMNAS HAM, it is a problem for SUHAKAM. This contestation of human rights may also

be a reflection of SUHAKAM's composition. While KOMNAS HAM includes many representatives with an NGO or academic background – whose perceptions of human rights norms tend to be more in line with international interpretations – SUHAKAM is dominated by former government officials.

Another difference in the performances of KOMNAS HAM and SUHAKAM is that the latter has a stronger focus on amending laws and reforming institutions, which correlates with the advocacy approach in human rights promotion as identified by Merry. In the case of SUHAKAM, the strong legal focus is reinforced by the Commission's main constituency – primarily lawyers. This conforms to Merry's third dimension of translation.[3] Moreover, SUHAKAM's legal orientation can also be explained by Malaysia's legal culture, which – following British tradition – is more concerned with legal procedure than Indonesia's. While the Malaysian judiciary has its problems,[4] in comparison to Indonesia, the judiciary is still known for its competence and good performance (Harding 1996: 152; Lev 2000: 331). It is therefore unsurprising that SUHAKAM has focused mainly on legal reforms. By contrast, Indonesia is still struggling with the legacy of 40 years of authoritarian rule, which has seriously undermined Indonesia's legal system, elevating political over legal norms and making legal process peripheral to discretionary authority (Lev 2000: 170, 326). During the New Order, the Indonesian judiciary became a loyal servant to the government, resulting in a steady decline of judicial autonomy (Pompe 2005: 171).

The human rights trajectories of Indonesia and Malaysia have influenced both KOMNAS HAM and SUHAKAM. As argued earlier,[5] Indonesia has a violent history in which there was little respect for the rule of law. Consequently, KOMNAS HAM has concentrated mainly on legal reform in response to the abuse of law in the past, and has given much attention to gross violations of human rights involving the security forces. Repression in Malaysia has been of a different order, and while the country has experienced human rights challenges, its legal system is stronger than Indonesia's. This explains why SUHAKAM has chosen to focus on defending and strengthening the existing constitutional order, as well as the Commission's concern with classic human rights issues such as fair trial.

The experiences of both SUHAKAM and KOMNAS HAM have shown us that their performance depends strongly on internal factors, or how a particular right is perceived within the organisation. This is in line with the general insight that individuals' views play a particularly important role in how tasks are defined, and thus how work is done when the individual's role is not strongly defined by laws, rules and circumstances (Wilson 1989: 54), leaving

3 See 1.2.2.
4 See 1.1.5.
5 See 1.1.5.

them free to develop their role to their liking. Likewise, this finding emphasises the importance and effects of NHRIs' composition.

This finding adds to the existing literature on NHRIs which, following the Paris Principles, has defined internal factors primarily in terms of composition of membership, with more recent studies calling for an inclusion of day-to-day operations (Murray 2007; Mertus 2009), as well as identifying independence and accountability (Smith 2006) as the crucial factors underlying NHRI performance and subsequent legitimacy and effectiveness. While independence and accountability give information about an NHRI's position and its actions with regard to its constituencies, these factors tell us little about how decisions are made within the organisation, or why a particular rights issue is or is not addressed. Such an analysis will generate more knowledge about the exact degree of NHRI independence and accountability, and lead to a more detailed appraisal of internal factors influencing performance in general.

The findings of this research into KOMNAS HAM and SUHAKAM also demonstrate that the two NHRIs have developed their human rights programmes in distinct ways, in response to Indonesia's and Malaysia's differing legal, political and social histories. This illustrates how NHRIs adapt to the specific circumstances in which they have to operate.

### 6.2.2 Effectiveness

In this section, attention will be paid to the effectiveness of KOMNAS HAM and SUHAKAM and the factors underlying it. Effectiveness has been defined as the extent to which an organisation is able to make a contribution to the realisation of human rights, whether in the form of legislative protections, holding perpetrators to account, or increasing human rights awareness. Effectiveness is supported, but not guaranteed, by good performance of the NHRI. Effectiveness depends strongly on external factors; as NHRIs are advisory bodies and therefore depend on other organisations for their recommendations to be implemented.

The experiences of KOMNAS HAM and SUHAKAM demonstrate that in order to generate support, both organisations have had to strike a balance between doing their work fully – including addressing controversial human rights issues – and retaining sufficient support to ensure their organisational survival and increase their chances of achieving some of their goals. NHRIs thus find themselves in constant tension between the need to avoid antagonising government organisations, and the need to scrutinise governments sufficiently to obtain societal support. Their position between state and society is therefore both enabling and constraining. As a result, several highly relevant and pressing human rights issues in Indonesia and Malaysia have often not been addressed by their NHRIs; leaving unprotected people in need of support.

This research has also shown that the effectiveness of NHRIs differs considerably from one right to the other. The major determining factor is whether a particular right is controversial -and then socially rather than politically. The effectiveness of an NHRI also depends on whether its efforts connect to existing concerns and willingness for change. KOMNAS HAM's Report on the National Civil Registry was effective because the issue was already part of the legislative agenda. In this situation, a report meets far less resistance than an official investigation, as illustrated by SUHAKAM's report on the ISA; which blended in well with existing pressure exerted by the *Reformasi* movement on the Malaysian government.

In addition, this research has demonstrated that the effectiveness of NHRIs has a temporal dimension. This has been particularly evident in SUHAKAM's review of the ISA. In this case, it took eight years before the recommendations were followed by the desired result. This time frame illustrates, first, that perceptions of what is right and wrong can change over time, and second, how important it is for an NHRI to call continuously for change. During the eight years between the publication of the Review and the announcement of the ISA's repeal, SUHAKAM – together with civil society groups – kept insisting on abolishing the law. During this time, SUHAKAM had three different Chairs and experienced several changes in the composition of its membership. The review of the ISA was thus obviously not a programme belonging to a particular commissioner, but a primary focus of the Commission as a whole.

Both KOMNAS HAM and SUHAKAM have struggled with the implementation of their recommendations, which highlights the point that even when a Commission performs well, this did not necessarily translate into effectiveness. However, there are differences between the two organisations, notably with regard to the socio-political contexts in which they operate. While Malaysia's legal framework of human rights is weak, in general the Commission has not been hindered in its work. The Malaysian government may not, as yet, have responded formally to SUHAKAM's annual reports; but at public inquiries SUHAKAM has not encountered resistance from summoned parties. By contrast, in Indonesia – where on paper the legal framework of human rights is much stronger – KOMNAS HAM is faced with a variety of obstructions. The military has refused repeatedly to answer summons; in which, at least on one occasion, it was supported by the government. Nor has KOMNAS HAM been able to count on the courts to coerce the military into attending the inquiries. KOMNAS HAM has also struggled in its relationship with the Attorney General's Office, which has felt threatened by the Commission's role in conducting preliminary investigations.

In comparison to SUHAKAM's situation, the opposition which KOMNAS HAM faces from government and other state agencies is more diverse and frag-

mented.[6] The end of the New Order has completely changed the number and nature of groups confronting KOMNAS HAM. Before 1998, the situation was straightforward, in that the Commission could expect opposition from the government and security forces. After 1998, this became less clear-cut. The Commission may now also expect opposition from political parties and other interest groups. Through the enactment of the HRCL, the Attorney General's Office has become an important stakeholder for KOMNAS HAM, with which it is often at loggerheads. Likewise, since the fall of the New Order, human rights NGOs in Indonesia have become much stronger. To some extent, they have even usurped the monopoly KOMNAS HAM had on human rights promotion before 1998, and they have become increasingly critical of the Commission and its work. Since the end of the New Order, liberalisation and decentralisation have divided power in Indonesia among many groups, which all seek to influence the course of human rights reforms. This means that KOMNAS HAM has to consider far more, and more diverse, external organisations than before.

Although political opposition towards the incumbent BN Government is rapidly increasing, Malaysia has not yet seen political change similar to that which Indonesia experienced in 1998. SUHAKAM still operates in circumstances similar to those in its early years. It has to confront fewer and more homogenous external organisations, and in general only has to deal with one opponent: the BN-led government.

As calls for the democratisation of the Malaysian government continue, SUHAKAM may find itself in a situation similar to that of KOMNAS HAM. Most likely this will not be the case, as Malaysia and Indonesia have different starting points for change, in terms of constitutionalism, legal culture and human rights. Authoritarianism has been shaped in different ways in each country, and human rights violations in Indonesia have been far more severe than in Malaysia (Heryanto and Mandal 2003). Moreover, as Lev (2000) has argued, Malaysia's tradition of constitutionalism and its respect for legal process are far stronger than Indonesia's. The Malaysian political elite has also generally been supportive of constitutionalism. While at present human rights guarantees in Indonesian laws dwarf those in Malaysia, their implementation is hampered by many factors, not least an ill-functioning judiciary. This could not be more different in the Malaysian context, where the judiciary – despite many challenges – has remained strong (Harding 2010: 504). This situation has given Malaysia and SUHAKAM a clear advantage when the time has come for a government that is more responsive to human rights issues.

6 See also 2.6.

## 6.3 PROMOTING HUMAN RIGHTS

National Human Rights Institutions have been promoted by the international human rights regime as organisations which can contribute substantially to the realisation of human rights, by embedding international norms in domestic structures. They have been perceived as bridge-builders between the international community on the one hand, and national governments on the other. In this study we have seen that the manner in which NHRIs promote human rights differs between categories of rights. Within KOMNAS HAM and SUHAKAM, the promotion of international human rights standards is often hampered by the contestation of these norms. This has sometimes led to half-hearted approaches and even inaction or silence on the part of the NHRIs. While one may understand such behaviour, it is also deeply concerning. The performance of NHRIs is thus influenced by factors specific to the organisation and the environment in which it operates, illustrating that the role of 'bridge builder' is not as straightforward as has been hoped by the international community.

The effectiveness of both organisations leaves much to be desired due to their socio-political contexts. The political and social circumstances in which SUHAKAM operates have inevitably placed limitations on what the Commission can achieve. While since 1998 KOMNAS HAM has operated in a (new) democracy, where legislative protection of human rights has rapidly improved, the Commission has not been able to improve its effectiveness accordingly. KOMNAS HAM's performance and effectiveness has suffered from internal problems, most notably politicisation, as well as opposition from powerful political and societal groups to certain human rights reforms. The experiences of SUHAKAM and KOMNAS HAM tell us, perhaps unsurprisingly, that bringing international human rights norms home to the national and local levels is challenged by organisational and environmental constraints.

Although many challenges remain, it should be acknowledged that in general both KOMNAS HAM and SUHAKAM have used an international human rights framework in national conditions, and therefore comply with the basic purpose for NHRIs as envisaged at the international level. Their acceptance of many international rights norms also illustrates that human rights are *adopted* by organisations, and subsequently into societies, rather than imposed (cf. Merry 2006: 225-227). Furthermore, the extent to which both NHRIs have relied on and promoted the international human rights framework shows that this framework carries weight, even in more authoritarian contexts.

Both Commissions have made significant contributions towards realising human rights. KOMNAS HAM and SUHAKAM have played important roles in supporting and furthering domestic human rights movements under repressive circumstances, an achievement that should not be underestimated. However, as time has passed, and particularly after a radical change in the socio-political context (as in Indonesia), increasing demands have been placed on the NHRIs, to which the organisations have had difficulty adjusting. The story of KOMNAS

HAM illustrates that even when mandates are strengthened and human rights are guaranteed in law, this does not necessarily translate into better performance, let alone effectiveness of the organisation. Rather, the performance and effectiveness of NHRIs depend on the interplay of both internal and external factors, which are unique to every organisation.

Although the responses of governments and other state agencies towards KOMNAS HAM and SUHAKAM have often been unsupportive and obstructive, both Commissions have made an important contribution in that they have consistently demanded attention for human rights, and in so doing, have supported the claims of human rights NGOs. By addressing human rights issues and calling for violators of human rights to be held accountable, the Commissions have legitimised the very notion of human rights. This is an important achievement in countries with a history of disdain for human rights as a 'western' concept, and where still the legal protection of human rights is limited (Malaysia) or where their implementation leaves much to be desired (Indonesia). The experiences of KOMNAS HAM and SUHAKAM underline the potential and relevance of NHRIs in authoritarian states, and in new democracies where legal protections are relatively new and where there are many challenges with regard to their implementation.

This research has shown that KOMNAS HAM and SUHAKAM have engaged in various activities to promote human rights in their respective countries. In some cases, they have had success, although these achievements may seem small in comparison to the human rights challenges people in Indonesia and Malaysia actually face. Yet, their contributions have been significant. The most important achievement of both KOMNAS HAM and SUHAKAM is that, despite adversity, both Commissions have been able to create a space both for themselves and for broader human rights movements in their respective countries. Their presence and their actions will at the very least continue to remind the state of its human rights obligations, and may very well continue to lead to better protection of human rights. The invaluable support which KOMNAS HAM and SUHAKAM have given to their domestic human rights movements shows that there is a crucial role for NHRIs to play in making human rights an integral part of both the state and society, so that they are impossible for even the strongest opponents of human rights to deny.

# Summary

This doctoral thesis concerns the National Human Rights Commissions (NHRCs) of Indonesia and Malaysia (KOMNAS HAM and SUHAKAM). This research focuses on how both NHRCs have performed their tasks, and to what extent they have made a contribution to the realisation of human rights, as well as on the factors which have influenced these processes.

Chapter 1 starts with an introduction of National Human Rights Institutions (NHRIs), the wider category of organisations to which NHRCs belong. NHRIs are advisory bodies that have been established by their respective governments, but which operate independently. Their mandate includes human rights education, the study of (inter)national law, and investigation of human rights violations. Since the 1990s NHRIs have grown rapidly in number. The general assumption is that NHRIs, due to their unique position between state and society, can function as a bridge between the two. In so doing, they can play an important role in the embedment of international norms in national contexts, in turn contributing to the realisation of human rights. Inevitably, this raises the question of the extent to which NHRIs fulfil their promises.

The NHRCs of Indonesia and Malaysia are interesting case studies of NHRIs, as they operate in countries with a weak human rights record, and a history of authoritarian rule where human rights have often been contested both by the state and societal groups. As such, the experiences of KOMNAS HAM and SUHAKAM may generate insights into the role and potential of these organisations in general. For reasons of feasibility, the choice was made to look at how these NHRCs have addressed three rights in particular, i.e. the rights to freedom of religion, fair trial, and adequate housing.

The theoretical framework upon which this research is based comprises two parts. The first concerns human rights. Human rights are generally considered to be valid for everyone: they are universal. Although this idea has become hegemonic at the international level, these norms remain contested and their implementation is difficult. This means that if NHRIs are to be successful, they need to be mediated between conflicting groups. The goal of this mediation process is that human rights will be accepted and considered to be just, both at the level of the state as well as in society. Anthropological research on human rights has shown that the embedment of human rights norms can take place by translating them to national and local contexts by using frameworks based on culture, religion or local history.

The second part of the theoretical framework builds on the assumption that if NHRIs are to be successful in the promotion of human rights, they must be successful as an organisation. As such, it is important that NHRIs perform well, which means that they adequately translate their tasks into activities. This process is primarily influenced by internal factors, such as human, financial and material resources, but is also determined by internal behaviour and relations of staff, commissioners and the organisation's leadership. The better an NHRI performs, the more likely it is that it will be effective. Effectiveness is defined as the extent to which the organisation achieves its goals. In the case of NHRIs, this refers to their contribution to the realisation of human rights. Effectiveness is primarily determined by external factors, as the implementation of NHRIs' advice is dependent on other organisations and the more general socio-political context.

Chapter 2 describes the development of the Indonesian NHRC, KOMNAS HAM. At the time of its establishment (1993), there were few expectations of the Commission, as the Suharto regime was systematically abusing human rights. In addition, KOMNAS HAM was given a limited mandate and a weak legal status, and it was chaired by a retired general. Against all odds, KOMNAS HAM developed into a critical organisation and conducted a number of investigations into human rights violations involving the army. While Indonesia's human rights situation on the whole did not improve, KOMNAS HAM gained the trust of NGOs and the public at large.

The resignation of Suharto in 1998 saw the beginning of many reforms in Indonesia. The position of KOMNAS HAM was improved by the 1999 Human Rights Law, and its mandate was broadened by way of the 2000 Human Rights Courts Law. The improvements of the Commission's mandate, together with the positive changes in the socio-political environment, led to higher expectations of KOMNAS HAM's effectiveness.

In practice, however, KOMNAS HAM has not been able to meet these expectations. The functioning of the Commission has been influenced negatively through the politicisation of commissioners. The enactment of the Human Rights Law established a procedure by which commissioners are selected by parliament, a method preferred by international organisations. In practice, the selection process seems to be influenced by political considerations and personal preferences, rather than the quality of the candidates. As such, relationships have developed or deepened between commissioners and the groups that have voted them into KOMNAS HAM. This has led to situations in which some commissioners have been inclined to protect the interests of these groups – sometimes in direct contradiction to the protection of human rights.

Despite the positive changes that have taken place in Indonesia since 1998, the external environment of KOMNAS HAM still poses many challenges. The Commission faces resistance from amongst others the security forces and the Attorney General's Office. In addition, many political parties remain reluctant to support human rights reforms. This means that the context in which KOMNAS

HAM operates remains challenging, and that the Commission struggles to translate its recommendations into tangible results.

Chapter 3 examines how KOMNAS HAM has approached certain civil and political rights, as well as social and economic rights. KOMNAS HAM has opened very few investigations into violations of the right to freedom of religion, as this is a highly controversial topic within the Commission. Nevertheless, some commissioners have been able to generate enough support to publish two reports related to this right: respectively concerning interreligious marriage and the civil registry. While the report on interreligious marriage was not effective, the report on the civil registry yielded results. The draft law included with that report was largely incorporated into the Law on the Administration of the Population (2006); meaning that there is now the possibility for interreligious marriages to be legally recognised.

With respect to the right to a fair trial, KOMNAS HAM has dealt indirectly with this right, by opening investigations into gross human rights violations in which the organisation focused on associated rights, such as the freedom from torture and enforced disappearance. However, KOMNAS HAM has paid little specific attention to the right to a fair trial. This can be explained partly by the Commission's stated opinion that fair trial is the responsibility of other organisations, such as parliament and the Judicial Commission. In addition the Commission has avoided the issue because it has been of the opinion that there is little chance of successfully addressing this right. Based on this argument, KOMNAS HAM chose not to participate in developing a proposal to amend the Code of Criminal Procedure.

Since its establishment, KOMNAS HAM has received many complaints regarding forced evictions in Jakarta. In general the Commission has responded to these complaints by opening investigations, and offering mediation between residents and the organisations demanding the eviction. Nevertheless, NGOs have criticised KOMNAS HAM for not dealing with the right to adequate housing in a more structured way. In 2008 KOMNAS HAM addressed this criticism by publishing a report about the Regional Regulation regarding Public Order (2007). The Commission recommended that the Regulation be abolished, but authorities did not comply. Nevertheless, forced evictions in Jakarta have since declined; and discussions have begun, including within the regional government, regarding abolishing the Regulation.

In the three areas of human rights discussed, KOMNAS HAM has consistently referred to international human rights norms and used these as a starting point for its recommendations. As such, the Commission complies with the expectations of NHRIs at the international level. In its work, the Commission has generally used a legal framework. This is a deliberate choice, as KOMNAS HAM is of the opinion that alternatives may evoke resistance from groups that do not identify with those other frameworks. The decisions made by KOMNAS HAM offer new insights into how human rights can be promoted, and highlight

questions about assumptions that alternative frameworks are usually well-suited to this end.

The performance of KOMNAS HAM has been strongly influenced by the initiatives of individual commissioners. Without these initiatives, the reports discussed in this research would not have been realised. This illustrates the important role that individual commissioners can play.

The performance of KOMNAS HAM has resulted into various degrees of effectiveness. The extent of effectiveness is influenced by both internal and external factors. As for the latter, effectiveness has depended in part on how other organisations have responded to KOMNAS HAM's reports. In particular, the positive results achieved by KOMNAS HAM with its report on the civil registry illustrate that likelihood of success is increased when the Commission (or an individual commissioner) can build on existing priorities of government and political institutions.

Chapter 4 describes the development of the Malaysian NHRC, SUHAKAM. The Commission's establishment (1999) was not transparent, and commissioners were chosen by the Prime Minister. Opposition parties and NGOs therefore had few expectations of SUHAKAM, but the Commission surprised observers by taking a critical stance towards the government on issues which are politically controversial, as well as those which relate to the relationship between the state and individual citizens, such as freedom of assembly and police violence.

However, the Commission has positioned itself differently in cases with a religious or ethnic character. In such cases, SUHAKAM has refused to start investigations. An important reason for SUHAKAM's reluctance to address more controversial cases is that commissioners have regarded the promotion of harmony between ethnic groups in Malaysia as a priority. Most commissioners are of the opinion that it is better to avoid controversial cases altogether. In addition, any action which fuel ethnic tensions, which could be triggered by a SUHAKAM investigation, is considered a criminal act in Malaysia.

SUHAKAM's most prominent challenge is its external environment. Since the establishment of SUHAKAM, this issue has barely changed: the government is still in the hands of the same dominant political group, and it is reluctant to further human rights reforms and generally ignores SUHAKAM's recommendations. In addition the government has tried to influence the functioning of the Commission through its appointment procedure – as the tenure of outspoken commissioners has not, in general, been renewed. While in 2009 the appointment procedure has been somewhat improved following amendments to the Human Rights Commission of Malaysia Act, the process still lacks transparency, and doubts remain regarding the Commission's independence.

Chapter 5 discusses how SUHAKAM has approached the rights of freedom of religion, fair trial and adequate housing. While SUHAKAM has regularly received complaints regarding religious freedom, the Commission's response to such cases has been very limited. A decisive factor in the response to these

cases is how they relate to the position of Islam, which is the religion of the majority in Malaysia. An additional complication is that religion is closely associated with ethnicity, and as such SUHAKAM prefers to ignore such cases. Within the Commission most commissioners are of the opinion that national laws regarding religion are just – even when they contravene international human rights norms.

While the right to freedom of religion is controversial, the right to a fair trial is not. In 2002 SUHAKAM started research into the Internal Security Act (ISA). The ISA was one of Malaysia's most controversial laws. The Commission issued a highly critical report in which it argued that the ISA does not comply with international human rights standards. The recommendation by SUHAKAM to replace the ISA with another security law was initially ignored by the government. Nevertheless, SUHAKAM reiterated its concerns regarding the ISA, together with many NGOs, lawyers and opposition parties. In 2012 the government conceded and repealed the ISA.

SUHAKAM also receives many complaints regarding forced evictions. In 2004 the Commission published a report on the right to adequate housing. The report indicated that SUHAKAM has little sympathy for people faced with forced eviction. The report argued that slum residents who complained about eviction affected the image of Malaysia negatively, and it linked such evictees with crime and infectious diseases. In addition, SUHAKAM has conducted few investigations into forced evictions. SUHAKAM's limited actions with regard to the right to adequate housing can be explained by the backgrounds and individual opinions of commissioners, who often perceive that the urban poor are illegal occupiers of land, and therefore do not have the right to exert any claims on that land or the houses that they occupy.

SUHAKAM thus takes quite different positions with respect to rights, depending on the right in question. These different approaches are linked to the natures of the different rights: for example SUHAKAM does not have any problems when it comes to fair trial rights, which mainly impose requirements on the state. In contrast, the right to freedom of religion is closely associated with the relationships between different societal groups, and SUHAKAM has demonstrated more reluctance to become involved in this area.

A second factor which influences whether and in what way SUHAKAM takes action about a particular right, is the extent to which that right is accepted by Malaysian society. The right to freedom of religion, for example, is highly controversial. The right to adequate housing is also not generally accepted by commissioners. As a consequence, SUHAKAM has developed few activities in either of these cases. In contrast, the societal disapproval of the International Security Act helps explain the Commission's detailed research into and criticism of the Act. The extent to which a particular right is accepted by society also influences the extent to which the international human rights discourse is used and referenced by the Commission, during its efforts to address that right. This was especially remarkable in the context of the right to fair trial,

when SUHAKAM's report on the ISA referenced international norms which are not actually applicable in Malaysia. In contrast, when rights are less accepted by society, international norms are not cited by SUHAKAM.

SUHAKAM has primarily used a legal discourse. Cultural and religious frameworks have been avoided, as the Commission is concerned not to raise societal resistance. In addition, SUHAKAM has preferred the use of legal frameworks because they apply to all Malaysians, irrespective of their ethnic or religious background.

Chapter 6 compares the performances of KOMNAS HAM and SUHAKAM, their effectiveness, and the conclusions that can be drawn from the findings of this research to apply to NHRIs in general. When the performances of SUHAKAM and KOMNAS HAM are compared, it is evident that both Commissions have addressed different human rights in different ways. The most important factor influencing the Commissions' decisions about whether to address a particular right appears to be the extent to which a right evokes controversy in society. Strong societal resistance to a particular right is more likely to discourage the Commissions from addressing that right, than when the right is being strongly resisted politically. This illustrates that human rights are often contested even within the organisations that are supposed to promote these norms.

Although human rights remain contested within the Commissions, both Commissions have also cited international norms a part of their work, and have based many of their recommendations upon these norms. This suggests that the international human rights system is important for such cases, even in authoritarian countries.

As said above, in promoting international human rights, both KOMNAS HAM and SUHAKAM have avoided using alternative frameworks. This choice appears to have been made by both organisations due to their concern that the use of alternative frameworks could lead to alienation of groups which do not identify themselves with those particular frameworks or ideas. Both KOMNAS HAM and SUHAKAM want to be regarded as national organisations which do not associate themselves with a particular ethnicity or religion. As a consequence, they have chosen legal discourses rather than other approaches. This indicates that the use of alternative frameworks may be less suitable for NHRIs in pluralistic countries. The use of international human rights norms by both Commissions indicates that these norms are accepted voluntarily and have not been imposed by external organisations.

There are also important differences between the performances of the two Commissions. The performance of KOMNAS HAM is strongly dependent on individual initiative, whereas SUHAKAM's is not. This can be explained by the different organisational structures of the two Commissions. In particular, KOMNAS HAM allows individual members to develop activities to address rights issues, while this has not been permitted for members of SUHAKAM.

A second difference is that the direct, external influence on KOMNAS HAM is larger than that exerted on SUHAKAM. External influence refers to the extent

to which other individuals or groups try to influence the operations of a NHRI. The differences in external influences between KOMNAS HAM and SUHAKAM can be explained by the appointment procedures in place, which in the case of KOMNAS HAM have become politicised. In the case of SUHAKAM, the external influence is smaller. While the Prime Minister has a considerable influence in the appointment procedure, there are no indications that he has directly influenced the functioning of SUHAKAM.

A third difference is that SUHAKAM operates more cautious and selectively than KOMNAS HAM. SUHAKAM has opened investigations into the ISA and freedom of assembly, but has avoided cases with a religious or ethnic dimension. While religion is also sensitive within KOMNAS HAM, the Commission has developed more activities in this field than has its Malaysian counterpart. This difference can mainly be explained by the socio-political contexts in which the two Commissions operate: freedom of religion is socially and politically more controversial in Malaysia than Indonesia, as in the former it is more closely associated with ethnicity and social upheavals in the past (1969).

The fourth difference is that SUHAKAM deploys a more legal approach – focusing on the amendment of existing legislation – in its work than does KOMNAS HAM. This can be explained by the relatively high number of lawyers in SUHAKAM's membership, but it also reflects the different legal cultures of Indonesia and Malaysia. When compared to Indonesia, Malaysia has a stronger constitutional tradition, including respect for the judicial process and a relatively independent judiciary.

When the effectiveness of KOMNAS HAM and SUHAKAM is compared, it is evident that both have made strategic decisions in order to increase their chances of success. SUHAKAM's response in the case of the ISA was made based largely on the assumption that the government could be forced to make concessions. Similarly, with its report on the civil registry, KOMNAS HAM successfully played into existing discussions and priorities at the level of the legislature.

In order to be effective, NHRIs must ensure that they have sufficient support from other organisations: the more support, the more likely it is that their recommendations are followed. Both KOMNAS HAM and SUHAKAM face challenges in this area. It is evident that there is significant resistance to these institutions in both countries, even though Indonesia has now ratified all major international human rights treaties.

In general, KOMNAS HAM faces broader and more diverse resistance to its operations than does SUHAKAM. This is due largely to the different environments in which the two Commissions operate. During the New Order, KOMNAS HAM faced resistance from both the government and the army. After 1998, the Commission faced resistance from the Attorney General and political parties as well. NGOs have also become stronger, and have to some extent usurped the monopoly on human rights that KOMNAS HAM had claimed before. This demonstrates that a more democratic environment does not necessarily

mean a more successful NHRI. In contrast, Malaysia is still an authoritarian state, and therefore SUHAKAM predominantly experiences resistance from a single source: the government.

The analysis of SUHAKAM and KOMNAS HAM shows that in general, both these organisations meet the expectations of NHRIs at the international level. However when the performances of these organisations are studied, it becomes apparent that the ways in which they operate, including how they promote international human rights, is dependent on internal factors as well as factors associated with their socio-political contexts.

This research has shown that while NHRIs often perform reasonably well, their effectiveness often lags behind. Nevertheless, both KOMNAS HAM and SUHAKAM have made important contributions to the realisation of human rights. They have played important roles in legitimising human rights and created a space for human rights within their countries. These are considerable achievements in states where legal protections for human rights are limited (Malaysia) or where their implementation leaves much to be desired (Indonesia). This suggests that there is an important role to play by NHRIs, especially in the context of an authoritarian regime or during a nation's transition to more democratic ways of governance.

# Samenvatting
## (Dutch Summary)

MENSENRECHTEN BEVORDEREN
*Nationale Mensenrechten Commissies in Indonesië en Maleisië*

Dit proefschrift gaat over de Nationale Mensenrechten Commissies (NMRC) van Indonesië en Maleisië (KOMNAS HAM en SUHAKAM). In dit onderzoek staat centraal hoe deze NMRC hun taken hebben uitgevoerd, in hoeverre dit heeft geleid tot een verbetering in de mensenrechtensituatie en welke factoren hierbij van belang zijn geweest.

Hoofdstuk 1 begint met een introductie van Nationale Mensenrechten Instellingen (NMRI), de bredere categorie van organisaties waartoe NMRC behoren. NMRI zijn adviesorganen op het gebied van de mensenrechten die zijn opgericht door hun respectievelijke regeringen, maar die onafhankelijk opereren. Hun mandaat omvat het verzorgen van voorlichting op het gebied van de mensenrechten, het bestuderen van (inter)nationale wetgeving en het onderzoeken van mensenrechtenschendingen. NMRI hebben met name sinds de jaren negentig een opvallende groei gekend. De algemene aanname is dat NMRI door hun unieke positie een schakel kunnen zijn tussen staat en samenleving en door het helpen met het inbedden van internationale normen in een nationale context een belangrijke bijdrage kunnen leveren aan de realisering van mensenrechten. Dit roept onvermijdelijk de vraag op wat hiervan in de praktijk terecht komt.

De NMRC van Indonesië en Maleisië zijn interessante voorbeelden van NMRI, aangezien zij werken in landen met een zwakke reputatie op het gebied van mensenrechten, met een geschiedenis van autoritair bestuur en waar zowel door de staat als groepen in de samenleving mensenrechten vaak betwist worden. Daarmee bieden de ervaringen van KOMNAS HAM en SUHAKAM ook inzicht in wat de rol en het potentieel is van dit soort instellingen in het algemeen. Om het onderzoek praktisch haalbaar te maken is gekozen om te kijken naar hoe deze NMRC zich in het bijzonder hebben opgesteld met betrekking tot de rechten op godsdienstvrijheid, een eerlijk proces, en behoorlijke huisvesting.

Het theoretisch kader dat ten grondslag ligt aan dit onderzoek bestaat uit twee delen. Het eerste deel heeft betrekking op het concept mensenrechten. Mensenrechten worden over het algemeen gezien als normen die gelden voor iedereen: zij zijn universeel. Hoewel dit concept op internationaal niveau nu dominant is, blijven deze normen toch betwist en is hun implementatie proble-

matisch. Dit betekent dat als NMRI succesvol willen zijn, zij moeten optreden als bemiddelaars tussen groepen die met elkaar in conflict zijn. Het doel van die bemiddeling is dat mensenrechten uiteindelijk worden geaccepteerd en als rechtvaardig worden gezien, zowel op het niveau van de staat als op dat van de samenleving. Antropologisch onderzoek op het gebied van mensenrechten heeft laten zien dat de effectieve inbedding van mensenrechten meestal plaatsvindt door een 'vertaling' naar nationale en lokale omstandigheden met gebruik van specifieke kaders.

Het tweede deel van het theoretisch kader bouwt voort op het uitgangspunt dat als NMRI een bijdrage willen leveren aan het realiseren van de mensenrechten zij ook succesvol moeten zijn als organisaties. Het is daarom van belang dat NMRI goed functioneren, wat betekent dat zij hun taken op een adequate manier vertalen in activiteiten. Dit proces wordt in het bijzonder door interne factoren beïnvloed, zoals personele, financiële en materiële hulpbronnen, maar verwijst ook naar de manier waarop individuen zoals commissieleden en leiders van de organisatie het functioneren bepalen. Hoe beter een NMRI zijn taken uitvoert, des te groter haar kansen op effectiviteit. Effectiviteit wordt gedefinieerd als de mate waarin de organisatie haar doelen weet te bereiken. In het geval van NMRI is dit een bijdrage aan het realiseren van de mensenrechten. Effectiviteit is in het geval van NMRI sterk van externe factoren afhankelijk, aangezien voor het implementeren van adviezen NMRI afhankelijk zijn van andere organisaties en van de sociaal-politieke context meer in het algemeen.

Hoofdstuk 2 beschrijft de ontwikkeling van de NMRC van Indonesië, KOMNAS HAM. Toen deze Commissie werd opgericht in 1993 waren er weinig verwachtingen: het bewind van President Suharto maakte zich schuldig aan structurele mensenrechtenschendingen. KOMNAS HAM had een zeer beperkt mandaat, een zwakke juridische status, en werd geleid door een gepensioneerd generaal. Tegen alle verwachtingen in bleek de Commissie echter zeer kritisch jegens het regime en verrichtte het verschillende onderzoeken naar mensenrechtenschendingen waarbij het leger betrokken was. Hoewel dit niet leidde tot structurele verbeteringen in de mensenrechtensituatie, wist KOMNAS HAM het vertrouwen te winnen van NGO's en kreeg het de steun van de publieke opinie.

Het aftreden van Suharto in 1998 was het begin van grootschalige hervormingen in Indonesië. De positie van KOMNAS HAM werd verstevigd door de Wet op de Mensenrechten (1999) en haar mandaat werd verbreed door de Wet op de Rechtbanken voor Mensenrechten (2000). De verbeteringen ten opzichte van KOMNAS HAM's oorspronkelijke mandaat en de positieve veranderingen in het sociaal-politieke klimaat van Indonesië zorgden ervoor dat de verwachtingen ten aanzien van wat de Commissie kon bereiken stegen.

KOMNAS HAM heeft echter in de praktijk nauwelijks aan deze verwachtingen kunnen voldoen. Het functioneren van de Commissie is negatief beïnvloed door de politisering van de commissieleden. Sinds de invoering van de Wet op de Mensenrechten worden de leden van KOMNAS HAM gekozen door het

Parlement, een methode die de voorkeur geniet van internationale organisaties. In de praktijk spelen in dit proces echter politieke overwegingen en persoonlijke voorkeuren vaak een belangrijkere rol dan de geschiktheid van de kandidaten. Daarmee heeft de huidige aanstellingsprocedure er toe geleid dat banden ontstaan tussen commissieleden en de politieke partijen die hen in de Commissie hebben gekozen, of dat die banden -als ze er al waren- zijn versterkt. Hierdoor zijn sommige commissieleden geneigd om de belangen van specifieke partijen en groepen te beschermen, wat haaks kan staan op het beschermen van de mensenrechten.

Ondanks de positieve veranderingen die sinds 1998 in Indonesië hebben plaatsgevonden, blijft de externe omgeving waarin KOMNAS HAM werkt problematisch. De Commissie stuit nog op veel weerstand van onder andere het leger en het Openbaar Ministerie. Daarnaast zijn veel politieke partijen zeer terughoudend op het gebied van de mensenrechten. Dit alles betekent dat KOMNAS HAM in een lastige situatie opereert en haar aanbevelingen niet altijd ziet leiden tot concrete resultaten.

Hoofdstuk 3 bestudeert hoe KOMNAS HAM heeft gereageerd op het terrein van zowel burgerlijke en politieke, als sociaal-economische, rechten. KOMNAS HAM heeft nauwelijks onderzoeken geopend naar schendingen van godsdienstvrijheid, omdat dit een controversieel onderwerp is binnen de Commissie. Wel hebben individuele commissieleden voldoende steun gevonden om twee rapporten te kunnen publiceren met betrekking tot het recht op godsdienstvrijheid, respectievelijk over interreligieuze huwelijken en de burgerlijke stand. Hoewel het rapport over interreligieuze huwelijken niet geleid heeft tot concrete veranderingen, heeft KOMNAS HAM wel succes geboekt met het rapport over de burgelijke stand: het bijbehorende wetsvoorstel werd voor een groot deel opgenomen in de Wet op de Bevolkingsadministratie (2006), waardoor er nu mogelijkheden zijn voor de erkenning van interreligieuze huwelijken.

KOMNAS HAM heeft het recht op een eerlijk proces indirect behandeld in haar onderzoeken naar grove mensenrechtenschendingen, door veel aandacht te besteden aan verwante rechten zoals het martelverbod en gedwongen verdwijning. Het recht op een eerlijk proces heeft echter weinig specifieke aandacht gekregen van de Commissie. De reden is dat KOMNAS HAM van mening is dat dit onderwerp in eerste instantie de verantwoordelijkheid is van het Parlement en de Commissie voor de Rechterlijke Macht. Daarnaast was KOMNAS HAM ook van mening dat er weinig resultaten te verwachten waren. Op grond van die redenering heeft de Commissie niet meegedaan aan het schrijven van een voorstel tot herziening van het Wetboek van Strafvordering.

Sinds haar oprichting heeft KOMNAS HAM regelmatig klachten ontvangen over onvrijwillige ontruimingen in Jakarta. In het algemeen heeft de Commissie hierop gereageerd door het openen van onderzoeken en waar mogelijk door te bemiddelen tussen bewoners en het bedrijf of de overheidsinstantie die de ontruiming eiste. NGO's hebben echter regelmatig kritiek geuit op het verzuim

van KOMNAS HAM om te komen tot een structurelere aanpak van het recht op behoorlijke huisvesting. Pas in 2008 kwam KOMNAS HAM hier enigszins aan tegemoet door het publiceren van een rapport over de Regionale Verordening inzake de Openbare Orde (2007). De eis van de Commissie dat de Verordening zou worden ingetrokken is echter niet ingewilligd door de betrokken autoriteiten. Toch is het aantal onvrijwillige uitzettingen in Jakarta gedaald en zijn er nu wel discussies, om de Verordening inderdaad in te trekken.

KOMNAS HAM heeft in alle bestudeerde gevallen consequent verwezen naar internationale mensenrechtennormen en deze als uitgangspunt voor haar aanbevelingen genomen. Wat dat betreft heeft de Commissie voldaan aan de verwachtingen die internationale organisaties hebben van NMRI. In haar werk heeft de Commissie over het algemeen een juridisch kader gebruikt. KOMNAS HAM heeft bewust gekozen voor deze benadering en is van mening dat het gebruik van lokaal-specifieke alternatieven weerstand kan oproepen van groepen die zich daarmee niet kunnen identificeren. De keuzes die KOMNAS HAM heeft gemaakt bieden daarmee nieuwe inzichten in de manieren waarop mensenrechten kunnen worden bevorderd en nuanceert de verwachting dat inbedding van deze rechten beter kan plaatsvinden door het gebruik van culturele of religieuze kaders.

Van essentiële invloed op het functioneren van KOMNAS HAM zijn de initiatieven van individuele commissieleden geweest. Zonder deze initiatieven zouden de rapporten die zijn besproken in dit onderzoek niet tot stand zijn gekomen. Dit illustreert de belangrijke rol die commissieleden kunnen spelen.

Het functioneren van KOMNAS HAM heeft geleid tot verschillende gradaties van effectiviteit. Deze is mede beïnvloed door de manier waarop andere organisaties hebben gereageerd op de rapporten van KOMNAS HAM, wat laat zien dat effectiviteit in sterke mate afhankelijk is van externe factoren. Het resultaat dat KOMNAS HAM heeft behaald met het rapport over de burgelijke stand laat zien dat de kansen op succes vergroot kunnen worden wanneer de Commissie (of een individueel commissielid) met de keuze van een onderwerp weet aan te sluiten bij bestaande discussies.

Hoofdstuk 4 beschrijft de ontwikkeling van de NMRC van Maleisië, SUHAKAM. De regering won geen advies in van NGO's tijdens de oprichting in 1999, en commissieleden werden direct aangewezen door de Minister-President. Oppositiepartijen en NGO's verwachtten daarom weinig van SUHAKAM. De Commissie verraste echter door een zeer kritische en consistente houding tegenover de regering aan te nemen ten aanzien van politieke gevoelige onderwerpen, zoals vrijheid van vereniging of politiegeweld.

Dit was niet het geval in zaken met een religieus of etnisch karakter. In deze zaken heeft SUHAKAM geweigerd onderzoeken te verrichten. Een belangrijke reden voor SUHAKAM's terughoudendheid in deze is dat commissieleden het als hun belangrijkste taak zien om de harmonie tussen de verschillende etnische groepen in Maleisië te bevorderen. De meeste leden zijn daarom van mening dat ze deze zaken beter kunnen vermijden. Bovendien is het strafbaar

etnische spanningen te versterken en is het niet denkbeeldig dat een onderzoek van SUHAKAM als zodanig wordt opgevat.

De voornaamste uitdaging voor SUHAKAM is het adequaat omgaan met haar externe omgeving. Deze is sinds de oprichting van de Commissie weinig veranderd: het bewind wordt nog steeds geleid door dezelfde regeringspartij, die afwijzend staat ten opzichte van mensenrechtenhervormingen en die aanbevelingen van de Commissie meestal negeert. Daarnaast heeft de regering geprobeerd om het functioneren van de Commissie te beïnvloeden via de aanstellingsprocedure: de termijn van meer kritische commissieleden wordt doorgaans niet verlengd. Hoewel de aanstellingsprocedure enigszins verbeterd is na de amendering van de Wet op de Mensenrechten Commissie van Maleisië (2009), blijft het proces nog steeds weinig transparant en zijn er twijfels blijven bestaan over de onafhankelijkheid van de Commissie.

Hoofdstuk 5 behandelt hoe SUHAKAM zich heeft opgesteld ten aanzien van de rechten op godsdienstvrijheid, een eerlijk proces en behoorlijke huisvesting. Hoewel SUHAKAM regelmatig klachten krijgt op het gebied van godsdienstvrijheid doet de Commissie daar weinig mee. Van groot belang is in hoeverre een onderzoek van SUHAKAM in dit soort zaken de positie van Islam, de godsdienst met de meeste aanhangers in Maleisië, zou bekritiseren. Een extra complicatie is dat religie nauw verbonden is met etniciteit en SUHAKAM dit soort zaken dus ook vermijdt om etnische spanningen te voorkomen. Binnen de Commissie zijn de meeste leden er bovendien van overtuigd dat de nationale wetgeving met betrekking tot religie juist is – ook al is die in strijd is met internationale normen.

Waar het recht op godsdienstvrijheid controversieel is, is het recht op een eerlijk proces binnen SUHAKAM algemeen geaccepteerd. In 2002 startte SUHAKAM een onderzoek naar de Wet op de Binnenlandse Veiligheid (*Internal Security Act*, ISA). De ISA was één van Maleisië's meest omstreden wetten. De Commissie stelde in een zeer kritisch rapport dat de ISA niet voldeed aan internationale mensenrechtenstandaarden. De aanbeveling van SUHAKAM om de ISA te vervangen door een nieuwe wet werd in eerste instantie door de regering genegeerd. SUHAKAM bleef echter aandringen, samen met veel NGO's, advocaten en oppositiepartijen. In 2012 bezweek de regering onder de druk en trok zij de ISA in.

SUHAKAM ontvangt verder regelmatig klachten over onvrijwillige ontruimingen van bewoners die de benodigde vergunningen missen. In 2004 publiceerde de Commissie een rapport over het recht op behoorlijke huisvesting. Uit het rapport bleek dat SUHAKAM weinig sympathiek stond ten opzichte van de genoemde doelgroep: de bewoners zouden een negatieve invloed hebben op het imago van Maleisië en werden geassocieerd met criminaliteit en besmettelijke ziektes. Het rapport is ook weinig kritisch over de verschillende wetten die voorzien in onvrijwillige ontruimingen. Daarnaast heeft de Commissie niet veel onderzoeken gedaan naar dit onderwerp. De beperkte aanpak van het recht op behoorlijke huisvesting kan verklaard worden door de sociale achtergrond en de individuele opvattingen van commissieleden zelf: stedelijke

armen worden gezien als illegale grondbezetters en kunnen daarom geen grondbezit of huisvesting opeisen.

SUHAKAM heeft zich dus heel verschillend opgesteld ten aanzien van de verschillende rechten die in dit onderzoek centraal stonden. Dit kan vooral verklaard worden uit de aard van de rechten. SUHAKAM heeft geen problemen met het recht op een eerlijk proces, dat met name verplichtingen oplegt aan de staat. Dit is anders voor het recht op godsdienstvrijheid, dat nauw verbonden is met betrekkingen tussen verschillende groepen in de samenleving en het recht op huisvesting, dat de belangen van de armen beoogt te beschermen.

Naast de aard van het recht speelt ook de mate van maatschappelijke steun een belangrijke rol in het bepalen van SUHAKAM's programma's. Zo is godsdienstvrijheid maatschappelijk omstreden. Maar ook het recht op behoorlijke huisvesting is niet algemeen geaccepteerd binnen de Commissie. Het gevolg daarvan is dat voor beide rechten SUHAKAM weinig activiteiten heeft ontwikkeld. De maatschappelijke afkeer van de ISA verklaart juist SUHAKAM's gedetailleerde studie van de wet. De mate van acceptatie van een recht heeft ook gevolgen voor de mate waarin de Commissie gebruik maakt van het internationale discours. Dit is met name opvallend in SUHAKAM's rapport over de ISA, waarin het zelfs verwees naar normen die niet van toepassing zijn op Maleisië. Waar rechten minder of niet geaccepteerd zijn, worden internationale normen juist opzij geschoven.

Het discours dat SUHAKAM gebruikt is vooral juridisch van aard. Culturele en religieuze kaders worden gemeden, omdat de Commissie bang is maatschappelijke weerstand op te roepen. Daarnaast geeft de Commissie de voorkeur aan het gebruik van juridische kaders omdat zij van toepassing zijn op alle Maleisiërs, ongeacht hun etnische of religieuze achtergrond.

Hoofdstuk 6 vergelijkt het functioneren van KOMNAS HAM en SUHAKAM, hun effectiviteit, en wat op grond daarvan verondersteld kan worden over NMRI in het algemeen. Duidelijk is dat beide commissies verschillende mensenrechten op verschillende manieren hebben benaderd. De belangrijkste factor daarbij is de mate van controverse die een recht oproept, waarbij maatschappelijke gevoeligheden belangrijker zijn dan politieke. De mate waarin een recht wordt behandeld wordt ook bepaald door persoonlijke opvattingen over het onderwerp binnen de commissies zelf. Dit laat zien hoe mensenrechten zelfs binnen organisaties die zijn aangewezen om deze normen te bevorderen worden betwist.

Desondanks hebben de commissies in hun werk verwezen naar internationale normen en hebben op die basis hun aanbevelingen gedaan. Dit suggereert dat ook in meer autoritaire landen het internationale systeem van mensenrechten belangrijk is.

In het bevorderen van internationale mensenrechten hebben zowel KOMNAS HAM als SUHAKAM, zoals hierboven uiteengezet, nauwelijks alternatieve kaders gebruikt, zoals culturele of religieuze, omdat zij bang zijn dat dit leidt tot weerstand van groepen die zich hiermee niet kunnen identificeren en zich

dientengevolge van de commissies afkeren. Zowel KOMNAS HAM als SUHAKAM willen worden gezien als nationale organisaties die zich niet identificeren met een bepaalde etniciteit of religie. Het logische gevolg daarvan is dat er gekozen wordt voor een juridisch discours. Dit zou erop kunnen wijzen dat het gebruik van alternatieve kaders minder geschikt is voor NMRI in pluralistische landen. Het verwijzen naar internationale mensenrechtennormen door de commissie laat zien dat deze door nationale instellingen vrijwillig worden geaccepteerd en niet van buitenaf worden opgelegd.

Naast deze overeenkomsten zijn er ook belangrijke verschillen in het functioneren van de twee commissies. Het functioneren van KOMNAS HAM is meer dan dat van SUHAKAM afhankelijk van individueel initiatief. Dit kan verklaard worden door de organisatiestructuur van beide commissies. Waar die van KOMNAS HAM de ruimte laat aan individuele commissieleden om activiteiten te ontplooien is daar binnen SUHAKAM geen sprake van.

Een tweede verschil is dat de directe externe invloed op KOMNAS HAM groter is dan op SUHAKAM. Het verschil tussen KOMNAS HAM en SUHAKAM kan verklaard worden door de aanstellingsprocedures. In het geval van KOMNAS HAM is de aanstellingsprocedure sterk gepolitiseerd geraakt. Bij SUHAKAM is deze invloed kleiner. Hoewel de Minister-President grote bevoegdheden heeft ten aanzien van de aanstellingsprocedure zijn er geen aanwijzingen dat hij het functioneren van de Commissie op die manier beïnvloedt.

Een derde verschil is dat SUHAKAM over het algemeen voorzichtiger en selectiever te werk gaat dan KOMNAS HAM. SUHAKAM heeft zaken met een religieuze of etnische dimensie vermeden, terwijl KOMNAS HAM op dit terrein wel activiteiten heeft ontwikkeld. Dit kan verklaard worden door de verschillende situaties waarin de commissies zich bevinden: godsdienstvrijheid is maatschappelijk gezien nog veel gevoeliger in Maleisië omdat het onderwerp nauw is verbonden met etnische verhoudingen, die in het verleden (1969) tot grote spanningen en onlusten hebben geleid.

Een vierde verschil in het functioneren van de twee commissies is dat SUHAKAM een meer juridische aanpak heeft, die zich met name richt op het amenderen van wetgeving. Dit komt in de eerste plaats door het grote aantal juristen dat in SUHAKAM zit, maar zegt daarnaast ook iets over de rechtscultuur in Maleisië. In vergelijking met Indonesië heeft Maleisië een sterkere constitutionele traditie waar de rechtsgang meer aanzien heeft en ook de rechtspraak relatief onafhankelijk is.

Wanneer de effectiviteit van KOMNAS HAM en SUHAKAM vergeleken wordt, is duidelijk dat zij beiden strategische keuzes hebben gemaakt om meer te kunnen bereiken. Zo heeft SUHAKAM bewust voor de ISA gekozen, omdat zij wist dat het een onderwerp was waar de regering wellicht tot concessies kon worden overgehaald en haakte KOMNAS HAM met succes aan bij bestaande discussies in haar rapport over de burgerlijke stand.

Om effect te kunnen sorteren, moeten NMRI er voor zorgen dat ze voldoende steun hebben van andere organisaties. Zowel KOMNAS HAM als SUHAKAM

hebben de nodige problemen op dit gebied. Duidelijk is dat er binnen de respectievelijke overheden aanzienlijke weerstanden bestaan tegen KOMNAS HAM en SUHAKAM; dus ook in Indonesië dat officieel het internationale mensenrechtendiscours heeft geaccepteerd.

Een groot verschil tussen de twee commissies is dat de weerstand tegen KOMNAS HAM veel sterker en diverser is dan die tegen SUHAKAM. Dit heeft te maken met de verschillende omstandigheden waarin de Commissies werken. Tijdens de Nieuwe Orde waren het vooral de Indonesische regering en het leger die het de Commissie moeilijk maakten. Na 1998 stuitte de Commissie eerder op tegenwerking door het Openbaar Ministerie en politieke partijen. Ook NGO's zijn sterker dan voorheen, waardoor het aantal gezaghebbende organisaties op het gebied van mensenrechten gegroeid is. Dit laat zien dat een democratischer omgeving niet automatisch betekent dat een NMRI ook meer succes zal hebben. SUHAKAM ondervindt met name tegenwerking van de regering omdat Maleisië, ondanks toenemende kritiek, nog steeds een autoritaire staat is.

De analyses van SUHAKAM en KOMNAS HAM laten zien dat zij doorgaans voldoen aan de internationale verwachtingen ten aanzien van NMRI. Als echter het functioneren van deze commissies nauwkeuriger wordt bestudeerd blijkt dat hun werkwijze en de precieze manier waarop het internationale discours wordt bevorderd sterk afhankelijk zijn van interne factoren en maatschappelijke en politieke omstandigheden.

Dit onderzoek heeft laten zien dat hoewel de bestudeerde NMRI goede prestaties leveren, hun daadwerkelijke invloed vaak beperkt blijft. Niettemin hebben zowel KOMNAS HAM als SUHAKAM belangrijke bijdragen geleverd aan het realiseren van mensenrechten. Zij hebben een grote rol gespeeld in het legitimeren van mensenrechten en een ruimte gecreëerd voor deze normen. Dit is een belangrijk resultaat in landen waar de juridische bescherming van mensenrechten beperkt is (Maleisië) of waar de implementatie te wensen overlaat (Indonesië). Het zou kunnen betekenen dat er een belangrijke rol is weggelegd voor NMRI, juist in de context van een autoritair bewind of bij de overgang naar een meer democratische regeringsvorm.

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INTERVIEWS - INDONESIA

Abdul Hakim Garuda Nusantara, former KOMNAS HAM chairperson, 25 April 2008.
Ahmad Baso, KOMNAS HAM commissioner, 7 May 2008.
Ahmad Nurcholish, representative of the NGO ICRP, 22 April 2008.
Agung Putri, chairperson of the NGO ELSAM, 29 August 2006.
Albert Hasibuan, former KOMNAS HAM commissioner, 8 September 2006.
Anshari Thayib, KOMNAS HAM commissioner, 26 September 2006.
Asmara Nababan, former KOMNAS HAM commissioner, 28 August 2006.
Azas Tigor Nainggolan, representative of the NGO FAKTA, 19 May 2008.
Chandra Setiawan, KOMNAS HAM commissioner, 21 September 2006.
Enny Soeprapto, KOMNAS HAM commissioner, 26 September 2006.
Habib Chirzin, KOMNAS HAM commissioner, 29 August 2006.
Heru W. Susanto, KOMNAS HAM staff member, 19 September 2006.
Ifdhal Kasim, chairperson of the NGO Reform Institute, 20 September 2006.
Ilma Sovri Yanti, representative of the NGO ICRP, 16 April 2008.
Ita F. Nadia, KOMNAS Perempuan commissioner, 26 September 2006.
M.M. Billah, former KOMNAS HAM commissioner, 26 April 2008.
Mugiyanto, chairperson of the NGO IKOHI, 16 October 2006.
Ratih Rosmayuani, KOMNAS HAM staff member, 11 May 2004.
Ridha Saleh, KOMNAS HAM vice-chairperson, 26 May 2008.
Roichatul Aswidah, KOMNAS HAM staff member, 18 May 2004; 25 September 2006; 16 May 2008.
Ruswiati Suryasaputra, KOMNAS HAM commissioner, 29 August 2006.
Saafroedin Bahar, KOMNAS HAM commissioner, 25 August 2006; 28 August 2006.
Saparinah Sadli, former KOMNAS HAM commissioner, 27 May 2004.
Satjipto Rahardjo, former KOMNAS HAM commissioner, 9 May 2008.
Siti Aminah, victim of forced eviction in Jakarta, 22 May 2008.
Soelistyowati Soegondo, KOMNAS HAM commissioner, 11 September 2006, 17 October 2006, 16 May 2008 (former commissioner at the time of the last interview).
Soetandyo Wignjosoebroto, former KOMNAS HAM commissioner, 19 November 2003.
Stanley Prasetyo, KOMNAS HAM commissioner, 26 May 2008.
Uli Parulian Sihombing, former director of the NGO LBH Jakarta, 16 May 2008.
Usman Hamid, chairperson of the NGO KontraS, 9 October 2006.
Wardah Hafidz, representative of the NGO UPC, 16 May 2008.
Wicipto Setiadi, Director for the Harmonisation of Legislation at the Ministry of Justice and Human Rights, 27 May 2008.
Zoemrotin K. Susilo, KOMNAS HAM vice-chairperson, 13 October 2006.

INTERVIEWS – MALAYSIA

Abu Talib Othman, SUHAKAM chairperson, 3 January 2007.
Ahmad Yusuf Ngah, SUHAKAM Secretary, 20 November 2006.
Asiah Abu Samah, SUHAKAM commissioner, 4 January 2007.
Arutchelvan Subramaniam, representative of the NGO coalition JERIT, 23 November 2006.
Chin Oy Sim, representative of the NGO WAO, 27 November 2006.
Colin Nicholas, coordinator of the NGO COAC, 22 December 2006.
Enalini Elumalai, representative of the NGO SUARAM, 22 January 2009.
Hamdan Adnan, former SUHAKAM commissioner, 16 January 2009.
Hirman Ritom Abdullah, SUHAKAM commissioner, 21 November 2006.
John Liu, representative of the NGO SUARAM, 12 January 2009.
Josef Roy Benedict, representative of Amnesty International Malaysia, 16 November 2006.
Khoo Kay Kim, SUHAKAM commissioner, 20 December 2006.
Malik Imtiaz Sarwar, human rights lawyer, 20 March 2006.
Musa Hitam, former SUHAKAM chairperson, 13 January 2009.
Nurul Hasanah, SUHAKAM staff member, 23 November 2006; 14 December 2006; 8 January 2009.
Ramon Navaratnam, former SUHAKAM commissioner, 22 January 2009.
Simon Karunagaram, SUHAKAM staff member, 22 January 2009.
Simon Sipaun, SUHAKAM vice-chairperson, 15 November 2006.
Siva Subramaniam, SUHAKAM commissioner, 21 November 2006; 28 January 2009.
Yap Swee Seng, coordinator of the NGO SUARAM, 14 November 2006; 18 December 2006.
Zaid Ibrahim, Member of Parliament and former Minister of Law, 21 January 2009.

# Appendices

# I Recommendations

## 1. Recommendations for KOMNAS HAM

*To establish action programmes based on -for instance- the National Action Plan on Human Rights (RANHAM) and the National Legislation Programme (PROLEGNAS)*

In Chapters 3 it became evident that KOMNAS HAM's performance has been influenced positively by individual initiatives. It has been argued that the individual approach had many advantages: without it, KOMNAS HAM would not have addressed important yet controversial issues (interreligious marriage),[1] or those which were considered to be of a low priority (adequate housing and public order regulations).[2] While KOMNAS HAM's report on the National Civil Registry[3] also came about due to personal initiative, the report also resonated with existing legislative concerns, which had a positive effect on the Commission's effectiveness. In order to increase its chances of success, KOMNAS HAM should continue to identify areas of opportunity. This can, for instance, be done by looking at priorities set out by the government, such as in the RANHAM or PROLEGNAS.

*To increase its institutional cooperation with state agencies and civil society organisations*

KOMNAS HAM's reliance on individual initiative is also reflected in its relationships with other organisations, which are dependent on personal ties. The use of personal networks has its advantages: in the past this has greatly facilitated KOMNAS HAM's access to high-ranking officers in the security forces.[4] However, the dependency on personal connections also means that these relationships are often not sustained when the composition of the commission changes.[5] Since 2007, this has been particularly noticeable in the Commission's relationship with the military, as this period has coincided with no former members of the security forces being elected to KOMNAS HAM. Institutional cooperation

1 See 3.2.2.
2 See 3.4.4.
3 See 3.2.3.
4 See 2.2.3 and 2.3.3.
5 See 2.5.2.

does not only need to be fostered with state agencies, but also with independent state bodies (in particular, KOMNAS Perempuan and KOMNAS Anak), and human rights NGOs.

*To promote the establishment of regional offices in order to alleviate the workload*

One of the challenges KOMNAS HAM faces is that it does not seem to have enough personnel or resources to deal with the vast and increasing number of cases.[6] Rather than increasing personnel and resources (and thereby expenditures), it is recommended that the Commission takes advantage of the provision in the 1999 Human Rights Law, which provides for the establishment of regional offices.[7] KOMNAS HAM is recommended to encourage the establishment of these offices by lobbying local governments, which play a key role in regional office formation. An increased number of regional offices – at least one per province – would also enhance access to the Commission, which is particularly necessary in areas outside Java and urban areas. In addition, the Commission can ease its workload by making a clear division between the cases addressed by the regional offices and those addressed by head office. This could, for instance, include a division whereby regional offices focus on the tasks included in the 1999 Human Rights Law, while head office could concentrate predominantly on investigations under the 2000 Human Rights Courts Law and matters with a national character, such as national legislation.

*To strictly implement the provisions of the Ethical Code in order to minimise the negative effects of the politicisation of KOMNAS HAM's membership*

In recent years, the performance of KOMNAS HAM has been negatively influenced by the politicisation of its membership, which has been a direct result of the Commission's election procedure.[8] This research does not call for this procedure to be changed, as it is in accordance with international guidelines, provides for the participation of the public and civil society, enhances transparency of the election process, and ensures pluralist representation. Nevertheless, the negative influences of the politicisation of the Commission's membership[9] can be limited when KOMNAS HAM's leadership takes on a more proactive role in demanding compliance with the Ethical Code. The Code stipulates that members who are in any way associated with a particular case must not take part in deliberations about the action to be taken on the matter.

6 See 2.4.3.
7 See 2.3.1.
8 See 2.4.1.
9 As in the Ahmadiyah case and the investigation into the 1997/1998 disappearance of activists, see 2.4.1.

*To continue efforts to call for the amendment of the 2000 Human Rights Courts Law*

External factors have played a major role in limiting the effectiveness of KOMNAS HAM. Despite the many positive changes in the field of human rights which have taken place in Indonesia since 1998, KOMNAS HAM's recommendations are rarely followed. This can be attributed to ongoing resistance to human rights implementation and reform at the political level, where remnants of the New Order regime remain dominant influences.[10] This has led to recurring calls to give KOMNAS HAM implementation or prosecuting powers; however, this would be in contradiction to the very nature of NHRIs, which are meant to be advisory bodies, and would also create conflicts of jurisdiction with other agencies, both in the executive branches of government and in the Attorney General's office. Improvements to KOMNAS HAM's performance, and therefore potentially its effectiveness, can be made by amending the 2000 Human Rights Courts Law. KOMNAS HAM's performance and effectiveness in its investigations into gross violations of human rights has been compromised by a lack of clarity in this law.[11] It is therefore recommended that KOMNAS HAM, in coordination with NGOs, lobby the government and parliament to amend this Law as soon as possible; at the very least to include the power of summons for KOMNAS HAM in a comparable manner to the provision on the power of summons in the 1999 Human Rights Law.

## 2. RECOMMENDATIONS FOR SUHAKAM

*To further develop structural and long-term approaches towards human rights issues*

SUHAKAM's key concerns have generally reflected those that are dominant in Malaysia's civil society and attract relatively little societal controversy.[12] In these matters, SUHAKAM has used a structural and long-term approach, which in the case of fair trial and the Internal Security Act has been successful.[13] Moreover, through its work SUHAKAM has given valuable support to the Malaysian human rights movement, which is commendable in the country's political climate. This strategy of identifying opportunities is therefore one that the Commission should maintain and develop as much as it can, including in areas that are more controversial, in order to enhance its performance.[14]

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10 See 2.6.
11 See 2.4.2 and 2.5.2.
12 See 5.5.
13 See 5.3.2 and 5.3.3.
14 For instance freedom of religion (see 5.2.3) as well as the right to adequate housing (see 5.4.3).

*To allow individual commissioners to conduct preliminary research into matters of personal interest*

SUHAKAM's reluctance to address the freedom of religion has attracted criticism from Malaysian human rights NGOs.[15] While there is some merit in the Commission's reasoning that addressing such cases might jeopardise SUHAKAM's position, it would be better if some action is taken. Some commissioners have expressed their concern for these issues, and have appeared willing to address them, only to be held back by the opinion of the majority.[16] SUHAKAM could consider giving these commissioners the opportunity to conduct preliminary research in these areas. This would mean SUHAKAM's work processes would allow for both a structural approach, and individual initiative. This would serve several purposes. First, SUHAKAM would answer to pressing issues within society and among human rights organisations, which may contribute to the Commission's legitimacy. Second, it is particularly in more sensitive areas that SUHAKAM may be able to fulfil a bridging function between state and society, as well as between various societal groups.

*To continue efforts to amend the Human Rights Commission of Malaysia Act, in order to comply fully with international guidelines*

The effectiveness of SUHAKAM is influenced strongly by its external environment. Human rights reforms in Malaysia, including the implementation of the Commission's recommendations, remain minimal. Nevertheless, some important concessions have been made, most notably in the government's announcement to repeal the ISA. Similarly it is promising that some state governments, particularly those controlled by the Pakatan Rakyat coalition, appear to be becoming more responsive towards human rights issues and SUHAKAM.[17] While such external factors cannot be directly influenced by SUHAKAM, the Commission can continue to contribute to human rights awareness and support the domestic human rights movement. Together, these can place increasing pressure on the government to continue reforms. Part of these reforms is also the strengthening of SUHAKAM, which can be done through further amendment of the Human Rights Commission of Malaysia Act.[18] This review should take into account the fact that international standards for NHRIs require an appointment procedure that is transparent and one that ensures pluralism.

15 See 5.2.3.
16 See 5.2.2.
17 See 4.3.3.
18 See 4.3.4.

*To enhance the relationship with civil society, in particular human rights NGOs*

While there is much contact between SUHAKAM and civil society organisations, the Commission's relationship with human rights NGOs has been tense at times, due in part to the often contrasting backgrounds between commissioners and NGO representatives.[19] Structural cooperation between SUHAKAM and civil society is, however, crucial for both parties. It is therefore recommended that SUHAKAM continues to develop these relationships. This would strengthen ties between SUHAKAM and civil society, which in turn will have a positive impact on the Malaysian human rights movement.

## 3. Recommendations for National Stakeholders, in particular Governments and NGOs

*For NGOs to work structurally with and monitor NHRIs*

Both NHRIs and NGOs are important organisations in the process of human rights realisation. Whereas NGOs often have specialised knowledge on a particular human right or issue and have relatively easy access to communities, NHRIs often have more financial and human resources, as well as invaluable access to the state apparatus.[20] The characteristics and roles of NGOs and NHRIs thus complement each other, and both can benefit from continuing structural cooperation and engagement. NGOs should also continue to play an important role in monitoring NHRIs and therefore their accountability, which in turn is important for an NHRI's legitimacy.

*For governments to ensure the independence of NHRIs*

Both the Malaysian and Indonesian Governments have an important role to play in ensuring that SUHAKAM and KOMNAS HAM can operate freely and without constraints. This includes providing NHRIs with sufficient financial means to operate; the freedom to consider any questions within their jurisdiction; and sufficient access to individuals and other organisations, at both state and societal levels.[21] It can be expected that NHRIs which have a high degree of independence will be better able to perform their tasks.

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19 See 4.3.3.

20 For examples of the roles of NGOs and NHRIs and how they complement each other see 3.2.2. (KOMNAS HAM report on Interreligious Marriage and the role of the NGO ICRP), 3.4.3 (KOMNAS HAM and the Kemayoran case and the role of the NGO FAKTA), and 5.3.3 (SUHAKAM's report on the ISA and the wider Malaysian movement against the Act).

21 See 1.1.3 and 1.1.4.

*For governments to consider and comply with the recommendations of NHRIs*

Both SUHAKAM and KOMNAS HAM struggle to have their recommendations considered, let alone followed, by their respective governments. The consideration of the NHRIs recommendations would not only have a positive impact on the organisation, but also enhance the government's credibility in terms of human rights, including at the international level.

*For the Indonesian and Malaysian governments to amend legislation affecting KOMNAS HAM and SUHAKAM*

In order to enhance the performance of KOMNAS HAM and SUHAKAM, the Indonesian and Malaysian governments should consider amending the laws affecting the NHRIs. In the case of KOMNAS HAM this is the Human Rights Courts Law; and in the case of SUHAKAM, the Human Rights Commission of Malaysia Act. This will allow for greater transparency in the appointment procedure, and active participation for members of civil society.[22]

## 4. Recommendations for International Stakeholders

*For international guidelines – most notably the Paris Principles – to give more consideration to the specific circumstances in which NHRIs operate*

This research has shown that the performance and effectiveness of NHRIs do not depend on factors related to mandate and composition alone. The performance of an NHRI is also determined by the personal views of its members regarding a particular human rights issue and what the role of their organisation should be,[23] as well as strategic opportunities in response to its socio-political environment, and the relationship of other state bodies to the organisation.[24] These findings indicate that international stakeholders should be sensitive to these specific circumstances in which NHRIs operate, which should be given more prominence in the assessment of NHRIs.

*For international stakeholders to provide NHRIs with specific assistance*

In addition, this research has shown that both the performance and effectiveness of NHRIs can differ depending on the particular human right at issue.

22 Also see above recommendations to KOMNAS HAM and SUHAKAM.

23 For example, see both SUHAKAM and KOMNAS HAM's approaches to freedom of religion and adequate housing (3.2, 3.4, 5.2, 5.4).

24 For example, see how both Commissions have approached the right to a fair trial (3.3 and 5.3).

For international stakeholders, this means that before providing assistance (whether financial or material) to an NHRI, the stakeholder must consider what they hope to achieve by providing this support, and relate this to the specific circumstances of the NHRI, to consider the extent to which the organisation may be successful in the matter at hand. International stakeholders may wish to consider directing their assistance to a particular task or human rights issue, depending on the result they hope to attain. Once again, this calls for greater sensitivity towards and knowledge about the socio-political environment of a particular NHRI.

*To encourage the establishment and strengthening of NHRIs*

This research into KOMNAS HAM and SUHAKAM has demonstrated that while both organisations face many challenges, they have been able to perform reasonably well, and in some areas have made important contributions to the realisation of human rights.[25] As such, international organisations should continue to encourage the establishment and strengthening of NHRIs, including in authoritarian regimes; as these organisations can play an important role in strengthening the domestic human rights movement.

25 See the conclusions of Chapters 2, 3, 4, 5 and 6.

# II Suggestions for Future Research

Existing research on NHRIs focuses predominantly on the assessment of these organisations based on features of their mandate and composition, often using the Paris Principles as a benchmark. However, such research tells us very little about how NHRIs actually operate and why. This can only be achieved by observing NHRIs in their day-to-day operations, and by relating these to their respective socio-political contexts. By combining an assessment of mandate and composition with actual functioning, a more complete and nuanced image of the NHRI will emerge, which will generate a better understanding about the organisation's (potential) success and challenges.

Further nuance in research on NHRIs can be achieved by considering performance and effectiveness as two different concepts. This research has shown that in most cases, good performance does not mean that an NHRI has been effective. Separating the two concepts creates a more accurate view of an NHRI, and allows for a more complete and precise analysis of the factors that encourage or obstruct the organisation's performance and/or effectiveness, which in turn provides us with more information about the NHRI as an organisation.

This research has shown that the extent to which an NHRI addresses an issue (and therefore its effectiveness) is dependent on how a particular right is perceived within the Commission, often reflecting dominant views on the matter in society. This means that to be able to assess the performance (and effectiveness) of an NHRI adequately, it is necessary to include an analysis of that particular right; including both a legal analysis and an analysis of societal perceptions. Similarly, the effectiveness of NHRIs can only be understood by taking into account the socio-political environment and the various factors that affect the organisation.

Current assessments of NHRI performance and effectiveness are increasingly based on lists of indicators. While these are a useful starting point, the appraisal of NHRIs should include the specific characteristics and historical background of a country, particularly with regard to human rights. This includes an analysis of how different human rights or issues are perceived within society, and to what extent this influences an NHRI. NHRIs should thus be considered as organisations which are constantly in motion, and which respond to human rights issues in ways which can only be understood through an analysis of context. This approach to NHRIs will enrich existing research and inevitably tell us more about how these organisations actually work, and

the extent to which they are able to make a substantial contribution to the realisation of human rights.

# Index

# Curriculum vitae

Ken Marijtje Prahari Setiawan was born in Jakarta on 9 December 1981. In 1999, she completed her secondary education at the Rijksscholengemeenschap Broklede, Breukelen, the Netherlands. She obtained a master's degree in Southeast Asian Languages and Cultures from Leiden University in 2004. As part of her study, in 2000 Ken attended a summer course on the Indonesian language in Yogyakarta at PURI Institute. In 2002, she studied at Monash University, Melbourne, Australia. She wrote her master's thesis on the educational work of the Indonesian National Human Rights Commission (KOMNAS HAM), and for that purpose spent two months researching at the Commission. In 2005, Ken worked at the Van Vollenhoven Institute (VVI) at Leiden University as secretary in the INDIRA (Indonesian-Netherlands studies of Decentralisation of the Indonesian 'Rechtsstaat' [*Negara Hukum*, Rule of Law] and its impact on *Agraria*) project, and as a researcher in the VVI's research project on sharia and national law in Muslim countries. In September 2005, she was awarded a *Mozaïek* scholarship from the Dutch Organisation for Scientific Research (NWO) and started working at the VVI as a PhD researcher. She is currently a member of staff at the Australian Catholic University (ACU), Melbourne, Australia.

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