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

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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 HAM¹) and Malaysia (SUHAKAM²). 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 120⁴ 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

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' organisations⁸ 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 agreement¹¹ 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 academics¹⁶ and NGOs.¹⁷ Most often, these studies use the Paris Principles as a benchmark for NHI 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 NGOs²⁰ 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 comparative 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 democracy²⁵ (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 Jaya²⁷ 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 HAM²⁸ 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 regional⁴¹ 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).

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 interpersonal 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.

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' performance⁵¹ 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 not 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, including 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).

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 Law⁶² (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 Maluku 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 CEDAW⁶⁹ 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-authoritarian. 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 KOMNASHAM 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 (KOMNASHAM) 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 KOMNASHAM 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.

