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

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2.1 INTRODUCTION

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

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

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

2.2 1993-1998: GENESIS OF KOMNAS HAM

2.2.1 Rationale for Establishing an NHRI in Indonesia

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

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

¹ See 1.1.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Art 2.

6 Art 4.

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

8 Interview with Asmara Nababan, former commissioner, 28 August 2006.

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

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

2.2.2 Presidential Decree 50/1993

KOMNAS HAM was established by Presidential Decree (*Keputusan Presiden*, abbreviated to *Keppres*) no. 50/1993. The Decree gave the Commission three main tasks: to promote human rights; to study international human rights instruments; and to investigate alleged abuses of human rights. This included providing recommendations to the government regarding ratification and human rights implementation.¹⁰ These tasks were to be executed by corresponding sub-commissions, with administrative support from the office of a General Secretary.¹¹ KOMNAS HAM should have no more than 25 members, including one chairperson and two vice-chairpersons.¹² Commissioners were appointed fulltime¹³ for a period of five years, and could be reappointed for one subsequent term.¹⁴ The Commission's funding was to be provided by the State Secretariat.¹⁵

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

9 Interview with Satjipto Rahardjo, 9 May 2008.

10 Art 5(a), (b) and (c).

11 Art 11.

12 Art 8 (1).

13 Art 10 (3), art 12 (2).

14 Art 8 (5).

15 Art 13.

16 Investigation is an optional task for NHRIs in the Paris Principles.

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

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

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

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

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

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

President Suharto asked Ali Said²¹ to select the commissioners. Said's

17 Competence and Responsibilities, para 2.

18 Art 7.

19 Composition and guarantees of independence and pluralism, para 1.

20 Composition and guarantees of independence and pluralism, para 2.

21 Ali Said started his career in the army and eventually became a general. He also studied military law, and at the end of the 1950s became a military prosecutor in Denpasar. He became well-known when in the aftermath of the 1965 events he chaired the extraordinary court-martial (*Mahmillub*), and subsequently became Attorney General (1973-1981), Minister

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

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

2.2.3 Challenges and Achievements: KOMNAS HAM during the New Order

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

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

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

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

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

24 Interview, 28 August 2006.

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

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

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

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

The behaviour of security forces was also central to other widely reported KOMNAS HAM investigations, including the cases of Liquisa,²⁷ Timika²⁸ and the PDI Affair.²⁹ These were thorough investigations and the resulting reports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 Interviews with former commissioners Soetandyo Wignjosoebroto, 19 November 2003; Albert Hasibuan, 8 September 2006; Satjipto Rahardjo, 9 May 2008; and staff member Roichatul Aswidah, 18 May 2004.

33 Interview, 19 November 2003.

34 See note 22 above.

35 Interviews with Soetandyo Wignjosoebroto, 19 November 2003; Satjipto Rahardjo, 9 May 2008; and Saafroedin Bahar, 28 August 2006.

36 Interview, 19 November 2003.

37 See 2.2.3.

38 Interview with Soetandyo Wignjosoebroto, 19 November 2003.

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

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

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

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

40 Interview, 18 May 2004.

41 Interview, 28 August 2006.

42 See 2.3.3.

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

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

2.3 1998-2001: AN AGE OF REFORM

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

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

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

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

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

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

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

During this period Indonesia also established several new state institutions charged with human rights protection, including the National Commission on Violence Against Women⁴⁹ (1998) (*Komisi Nasional Anti Kekerasan Terhadap Perempuan*, KOMNAS Perempuan) and the Directorate General on Human Rights (1999) (*Direktorat Jenderal Hak Asasi Manusia*) within the Ministry of Justice, which was renamed the Ministry of Justice and Human Rights. In addition,

⁴⁶ See 1.1.5.

⁴⁷ Signed by Indonesia in 1985.

⁴⁸ Interview with Soelistyowati Soegondo, commissioner, 11 September 2006.

⁴⁹ Established by the government, the creation of KOMNAS Perempuan was a response to the sexual abuse suffered by ethnic Chinese women during the May riots.

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

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

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

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

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

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

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

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

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

Another change which was introduced is that (candidate) members of KOMNAS HAM must have a track record in the promotion and protection of human rights. The HRL moreover explicitly calls for a plural composition of membership of the Commission, which should include NGO representatives and academics.⁵⁵ The selection procedure⁵⁶ allows for public participation, and final election is done by Parliament.⁵⁷ The maximum number of commissioners has been increased to 35.⁵⁸ The General Secretary is no longer chosen by the commissioners, and the position is reserved for a civil servant.⁵⁹

These changes provided KOMNAS HAM with the necessary tools to become a strong human rights body. The inclusion of the power of summons enables the Commission to obtain evidence from parties who might otherwise be reluctant to answer requests for information – as had happened several times in the past. Similarly, the new appointment procedures brought an end to the non-transparent election of members⁶⁰ and reinforced public participation; increasing the Commission's legitimacy (ICHRP 2004: 60). These improvements have been acknowledged by the International Coordinating Commission (ICC) for NHRIs⁶¹ in its 'A' Accreditation of KOMNAS HAM.

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

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

⁵⁴ Art 98.

⁵⁵ Art 84(a), (b), (c), (d).

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

⁵⁷ Art 83 (1).

⁵⁸ Art 83 (1).

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

⁶⁰ See 2.2.2.

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

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

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

olations occurring after the introduction of the law,⁶⁴ and the ad hoc courts, specifically established for cases that occurred before 2000.⁶⁵

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

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

The political reforms that followed the end of the New Order went together with many societal changes, including the rapid growth of civil society organisations and the development of vibrant, independent and more diverse media. New NGOs were established, many of them in the field of human rights and well equipped in terms of human and financial⁷⁰ resources. Academic interest in human rights increased, with many Indonesian universities establishing human rights research centres (*Pusat Studi Hak Asasi Manusia* or PUSHAM, Human Rights Study Centre) (Herbert 2008: 480). These changes were clearly advantageous for KOMNAS HAM, and in combination with the strengthened legal position of the organisation, seemed to beckon a bright future. However, several new challenges emerged. The Indonesian state had become increasingly heterogeneous and fragmented. According to the analysis of Lay and Pratikno

64 Art 2.

65 Art 43 (1).

66 Art 18 (1).

67 Art 20 (1) and art 21 (1).

68 Art 43 (2).

69 See 2.3.3.

70 Often coming from western organisations.

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

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

2.3.2 Challenges and Achievements: KOMNAS HAM Under Pressure

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

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

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

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

72 Interview with Soelistyowati Soegondo, 11 September 2009.

73 Interview with Albert Hasibuan, 8 September 2006.

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

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

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

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

75 Interview with Asmara Nababan, 28 August 2006.

76 Interview with Soelistyowati Soegondo, 17 October 2006.

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

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

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

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

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

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

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

80 Interview with Ratih Rosmayuani, 11 May 2004.

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

82 Interview, 28 August 2006.

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

While this split within KOMNAS HAM was neither new nor surprising, what had changed was the increasing use, by commissioners, of the press to voice their concerns. This contrasted with the previous (unofficial) policy that differences of opinion should not be aired in public. On several occasions these public differences had a clear negative impact on work processes within the Commission. This indicated that KOMNAS HAM was experiencing increasing internal disagreements about how it operated. The strong organisational culture which characterised the Commission in its early years had clearly weakened. Staff member Roichatul Aswidah stated that after 2000, the Commission's leadership commanded far less authority within the organisation than it did before.⁸⁴ Nor was the chairperson immune to the increasing fragmentation of KOMNAS HAM. Djoko Soegianto, KOMNAS HAM's chairperson between 2000 and 2002, was a retired army officer who had not been pleased with the Commission's investigation on East Timor. According to former commissioner Asmara Nababan, in subsequent investigations it took Soegianto longer than his predecessor⁸⁵ to issue the necessary Task Letter (*Surat Tugas*) to start proceedings. Similarly, the necessary funds were often only received once the investigation was already underway, leading to instances in which members of investigation teams had to pay for expenses themselves.⁸⁶

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

⁸³ Interview, 29 September 2006.

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

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

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

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

2.4 2002-2007: A STRONG HUMAN RIGHTS COMMISSION?

2.4.1 Organisational Developments

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

As discussed in 2.3.1, the 1999 HRL introduced a new appointment procedure for commissioners. The new procedure⁸⁷ starts with the formation of a special selection committee, usually consisting of several NGO representatives, academics and retired judges. Candidates apply individually, and are required to submit references from people or institutions to support their candidacy. During the procedure, the general public is invited to submit opinions on the candidates, either via correspondence or during public interviews organised with the candidates. When the committee has compiled its shortlist, the names of the candidates are submitted to a Parliamentary commission, which conducts the so-called 'Fit and Proper Test'. This test is a final assessment, consisting of a presentation by the candidates followed by a question and answer session. Subsequently, the Parliamentary commission elects new members through a vote.

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

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

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

⁸⁸ See 2.2.2.

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

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

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

90 Religious opinion issued by Islamic authorities.

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

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

93 Interview with Soelistyowati Soegondo, 11 September 2006.

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

Likewise, KOMNAS HAM's 2005 investigation into the 1997/1998 disappearance of 25 activists⁹⁵ was badly tainted by the politicisation of the Commission. During the investigation several military officials, including former Commander-in-Chief Wiranto, were summoned but refused to appear. However, during a private meeting with some commissioners, Wiranto stated that he was certain the missing activists had died, even if he did not disclose further information (Tempo Interaktif 1 July 2005). This information was not included in the report, however, because a majority of commissioners argued that this would be improper.⁹⁶ During the presentation of its findings, the investigation team stated specifically that it had no hypotheses about what had happened to the missing persons, even though the information from Wiranto had been published. This angered members of the victims' families, as well as NGO representatives, who were concerned that the omission of such information would contribute to impunity for the perpetrators.⁹⁷

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

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

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

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

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

98 See 2.4.2.

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

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

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

As part of KOMNAS HAM's restructure into two rights-based sub-commissions, the Sub-Commission for Investigation was disbanded and replaced by the Complaint Handling Unit (CHU). The task of the CHU was to receive complaints and forward them to the commissioner whose 'right' most closely correlated with the subject matter. However, because violations are often difficult to assign to a single category, commissioners (or their staff¹⁰²) often disagreed with the CHU's classification, and would forward the case to another

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

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

101 Interview with Habib Chirzin, 29 August 2006.

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

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

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

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

¹⁰³ Interview with Habib Chirzin, 29 August 2006.

¹⁰⁴ Art 81 (3).

¹⁰⁵ See 2.3.2.

¹⁰⁶ Personal conversations with staff members Roichatul Aswidah, May 2004 and Ignas Triyono, September 2006.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

115 Interview with Soelistyowati Soegondo, 17 October 2006.

116 See 2.3.1.

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

This case was not unique, even if the reasoning was a novelty. The Attorney General has rejected most of KOMNAS HAM's findings. In 2002 the Attorney General also refused to follow up on earlier KOMNAS HAM investigations¹¹⁷ into the Trisakti, Semanggi I and Semanggi II cases, where the armed forces opened fire at demonstrators, killing 33 people and wounding nearly 1,000 others.¹¹⁸ The Attorney General first argued that the documents submitted by KOMNAS HAM were incomplete (Tempo Interaktif 4 November 2002). When the requested documents were added, a new claim followed to deny the validity of KOMNAS HAM's investigation because the members of the investigation team had not been sworn in.¹¹⁹ The Attorney General further ignored requests from KOMNAS HAM to discuss the matter, and eventually the Commission stopped pushing. Three years later, the Attorney General issued a statement that it would never open an investigation into the three cases because they were not an issue of gross violations of human rights. In its argument, the Attorney General's office referred to a similar decision made by Parliament in the case. The Attorney General used the same argument again, to justify its refusal to follow up the cases of May 1998¹²⁰ and Wamena and Wasior¹²¹

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

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

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

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

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

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

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

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

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

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

123 See 2.3.1.

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

2.5 DEVELOPMENTS AFTER 2007: A NEW HUMAN RIGHTS COMMISSION?

2.5.1 New Commissioners and Directions

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

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

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

124 Interview with Enny Soeprapto, 19 September 2006.

125 Personal communication with former staff member and deputy director of the NGO DEMOS, Roichatul Aswidah, January 2012.

126 Interviews with Agung Putri, 29 August 2006; Roichatul Aswidah, 25 September 2006; personal communication with Ita F. Nadia, September 2007.

127 Personal conversation with Indria Fernida, representative of the NGO KontraS, May 2008.

128 NGO report on the selection process, on file with author.

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

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

For the first time in KOMNAS HAM's history, the new commissioners announced which issues they would prioritise in the coming five years. Only days after his instalment as Chairman, Ifdhal Kasim, a prominent human rights activist, announced that the Commission would focus on cases of gross human rights violations and established investigation teams for the Talangsari¹³²

129 Ibid.

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

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

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

and Alas Tlogo¹³³ cases, as well as a team to investigate violations that occurred during the rule of Suharto in general (KOMNAS HAM 2008: 12). According to Ifdhal Kasim, the investigation of these cases was crucial for KOMNAS HAM to regain community trust (Koran Tempo 6 September 2007). Another announcement concerned the strengthening of KOMNAS HAM's regional offices and representations (Suara Pembaruan 6 September 2007). The Commission opened up some of its meetings to the public, and started convening monthly meetings with the press and general public to report on its activities (KOMNAS HAM 2008: 12).

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

2.5.2 Fall-out with the Indonesian Armed Forces

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

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

134 Art 94(1).

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

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

2.6 CONCLUSION

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

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

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

136 Interview with Saafroedin Bahar, 25 August 2006.

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

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

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

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

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

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

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