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3 | The Power of the Individual

Performance and Effectiveness of KOMNAS HAM in Three Case Studies

3.1 INTRODUCTION

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

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

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

2 See 1.2.3.

3 See 1.2.2.

The first right considered in this Chapter, the freedom of religion, is enshrined in various international human rights treaties,⁴ as well as in the Indonesian Constitution⁵ and the 1999 Human Rights Law.⁶ Nevertheless, in practice the freedom of religion has been subject to clear limitations,⁷ with the state recognising certain religions while ignoring or even discriminating against others.⁸ One of the areas in which issues of religious freedom arise is interreligious marriage (*pernikahan beda agama*). The situation is exacerbated because religion is at the core of the 1974 Marriage Law: the performance of a religious ceremony is a precondition for a marriage to be valid.⁹ This provision is problematic for adherents of different religions who want to marry each other as well as for followers of religions or beliefs that are not recognised by the state, such as mysticism. Marriage law in general is an area where law and culture meet, and thus where conflict between the norms of the state and those of social groups is likely to emerge. In Indonesia, interreligious marriage is a very delicate matter that touches upon legal, theological and emotional sensitivities,¹⁰ and it is very difficult to find clergy willing to conclude such interreligious unions (Bedner and Van Huis 2010: 182; Pompe 1988: 260; Pompe 1991: 262).¹¹ This situation thus impinges directly on the freedom of religion. Finally, I have selected interreligious marriages because KOMNAS HAM has addressed the issue in two reports.¹²

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

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

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

6 Art 22(1).

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

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

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

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

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

12 See below.

the right to a fair trial is guaranteed in the UDHR¹³ and in Article 14 (1) of the ICCPR: According to Art 14(1) of the ICCPR,

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

Article 14 (2) concerns the right to be presumed innocent until proven guilty, Art 14 (5) the right to review by a higher court, and Art 14 (7) prohibits double jeopardy. Article 14 (3) includes the minimum fair trial rights in criminal proceedings, which include the right to be informed promptly and in detail about the nature and cause of a charge; adequate time to prepare one’s defence and to communicate with a counsel of one’s own choosing; and the right not to be compelled to testify against oneself or confess guilt. The ICCPR was ratified by Indonesia in 2005, and the right to a fair trial is also guaranteed in the Constitution,¹⁴ the 1999 Human Rights Law,¹⁵ and the Code of Criminal Procedure (*Kitab Undang-Undang Hukum Acara Pidana*, henceforth KUHAP).¹⁶ These rights were systematically violated during the New Order when there was an ‘endemic use of torture’ (HRW 1994: 2) and physical abuse of detainees was likely, especially during interrogation. In addition, Indonesia’s legal system was largely controlled by the executive branch of government that influenced outcomes of proceedings (HRW 1990: 1). Although since 1998 Indonesia has made significant progress in establishing a framework for human rights protection¹⁷ (see, for instance, Herbert 2008), many challenges remain. The UN claims that torture and ill-treatment in detention, particularly in urban areas, is still a ‘routine practice’ and lacks an adequate definition, prohibition and punishment in law.¹⁸ Even though there have been attempts to revise

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

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

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

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

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

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

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

The right to adequate housing, the final right to be examined in this Chapter, is a socio-economic right of particular relevance in developing countries. In addition to international human rights provisions,²⁰ this right is also guaranteed in Indonesian national legislation, including the Constitution²¹ and the 1999 Human Rights Law.²² Each year, KOMNAS HAM classifies around 30 percent of the cases it has received as concerning land rights. These cases include claims of *adat* communities to land, but the vast majority relates to appropriation of land by either government or businesses, and the eviction of the people occupying that land. This Chapter pays particular attention to how KOMNAS HAM has addressed evictions and the right to housing in Jakarta. The assumption is that due to the Commission's geographical proximity to sites of evictions here, as well as the relatively uncontroversial nature of the right at the level of society,²³ adequate housing would be an issue with which KOMNAS HAM could achieve significant success.

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

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

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

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

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

23 When compared to freedom of religion.

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

3.2 KOMNAS HAM AND INTERRELIGIOUS MARRIAGE

3.2.1 Interreligious Marriage in Indonesia

Until 1974, interreligious marriages in Indonesia were regulated by the 1896 *Regeling op de Gemengde Huwelijken* (Regulation on Mixed Marriages, henceforth GHR).²⁵ The GHR stipulated that interreligious marriages should be conducted according to the religion of the husband. While the GHR did not require women to convert, for the purposes of the marriage they were required to follow their husband's religious laws (Butt 2008: 276). In 1973 the Indonesian Government proposed a new marriage law, in an attempt to create a uniform law for all Indonesians and to increase protection of women by placing restrictions on polygamy and unilateral divorce (Pompe 1988: 261-2). The draft law had a secular and general character (Bedner and Van Huis 2010: 179). It did not include specific provisions for interreligious marriage, but this was implicitly allowed. Article 2²⁶ determined that a marriage was valid when conducted

²⁴ See also 1.3.

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

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

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

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

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

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

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

from marrying non-Muslims.²⁹ This is a very unusual interpretation³⁰ of Islamic marriage law, as at least marriages between Muslim males and non-Muslim females are generally allowed, providing that the woman belongs to a religion 'of the Book', meaning Christian or Jewish women (Pompe 1991: 263; Butt 2008: 277).³¹

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

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

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

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

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

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

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

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

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

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

The practice regarding interreligious marriage in Indonesia raises other human rights concerns as well. If in order to marry, people are required to convert to the religion of their partner, this can be considered a case of forced conversion, and therefore in violation of the freedom to religion (Lerner 1996: 94-7).³⁹ The problems faced by couples of different religious beliefs also affect their freedom of marriage⁴⁰ and their right to establish a family.⁴¹ Finally, the difficulties some encounter in obtaining a marriage certificate indicate that they are not receiving equal treatment to other citizens in this respect; which violates the right to equality.⁴²

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

34 Interview with Ahmad Nurcholish, ICRP, 22 April 2008.

35 Comments made during a discussion forum, 4 September 2006. Soegondo was one of the key informants for this Chapter, as she was involved both in the report on the National Civil Registry (3.2.3) as well as issues related to the right to a fair trial (3.3).

36 Interview, 22 April 2008.

37 In 2006, Indonesia ratified the ICCPR.

38 General Comment no. 22, CCPR/C/21/Rev.1/Add.4, 30 July 1993

39 ICCPR, Art 18; the Indonesian Constitution, Art 28E; HRL, Art 22 of the 1999 Human Rights Law (HRL).

40 UDHR, Art 16(1).

41 ICCPR, Art 23(2); the Indonesian Constitution, Art 28B; HRL, Art 10(1).

42 ICCPR, Art 16; the Indonesian Constitution, Art 28D (1); HRL, Art 5(1).

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

3.2.2 KOMNAS HAM's Report on Interreligious Marriage

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

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

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

44 See 2.4.1.

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

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

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

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

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

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

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

46 Interview with Ahmad Nurcholish, 22 April 2008.

47 Ibid.

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

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

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

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

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

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

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

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

49 See 3.2.3.

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

51 See 3.2.1.

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

3.2.3 KOMNAS HAM's Report on the National Civil Registry

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

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

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

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

53 Interview, 16 May 2008.

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

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

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

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

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

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

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

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

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

3.2.4 Performance and Effectiveness

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

⁵⁶ Interview, 16 May 2008.

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

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

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

57 Interview with Ahmad Nurcholish, 22 April 2008.

58 Before his election to KOMNAS HAM, Baso was a member of ICRP.

59 Interview, 7 May 2008.

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

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

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

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

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

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

⁶² Interview, 27 May 2008.

approaches. The draft law on the National Civil Registry was rights-based, and explicitly refers to the right of every person to obtain a civil registry certificate,⁶³ which right is not included in Law 23/2006.⁶⁴ In a critique, Wahyu Effendi has argued that the Law focuses predominantly on obligations and sanctions, which disproportionately target individuals rather than officials (Kompas 19 December 2006).

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

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

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

⁶³ Art 6(b).

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

3.3 KOMNAS HAM AND FAIR TRIAL

3.3.1 The Right to a Fair Trial

In international human rights law, the right to a fair trial is guaranteed in the UDHR⁶⁵ and the ICCPR. According to Article 14(1) of the ICCPR,

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

Article 14 (2) concerns the right to be presumed innocent until proven guilty; Article 14 (5) the right to review by a higher court; and Article 14 (7) prohibits double jeopardy. Article 14 (3) includes the minimum fair trial rights in criminal proceedings, which include the right to be informed promptly and in detail about the nature and cause of a charge; adequate time to prepare one’s defence and to communicate with a counsel of one’s own choosing; and the right not to be compelled to testify against oneself or confess guilt.⁶⁶ The ICCPR was ratified by Indonesia in 2005, and the right to a fair trial is also guaranteed in the Constitution,⁶⁷ the 1999 Human Rights Law⁶⁸ and the Code of Criminal Procedure (*Kitab Undang-Undang Hukum Acara Pidana*, henceforth KUHAP).⁶⁹

At the beginning of this Chapter it has been noted that the Indonesian law includes many guarantees, but Indonesia has serious problems in implementing these guarantees, both legally and in practice. As regards the legal problems, many of the KUHAP’s provisions do not meet international human rights standards, and in practice police and public prosecutors often neglect the legal protections in place (Amnesty International 2006: 2; Fitzpatrick 2008: 504; HRW 2004: 33). It has been argued that particularly in conflict areas such as Aceh and Papua, and previously East Timor, where KOMNAS HAM has offices⁷⁰ and performed many investigations, the KUHAP has had ‘little meaning or application’ (Fitzpatrick 2008: 504). To make matters worse, Indonesia’s judiciary has done little to improve this situation, a problem which can be attributed to a history of political interference by the regime in the judicial process. Particular-

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

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

67 Art 28D (1).

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

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

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

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

3.3.2 KOMNAS HAM and Fair Trial

It is difficult to determine exactly how many complaints KOMNAS HAM receives on the right to a fair trial, as the Commission does not classify its complaints under this category. However, it seems there are many; since in 2002 half of all complaints concerned arbitrary arrest, detention and enforced disappearances (KOMNAS HAM 2002: 66-7). Similarly, in 2006 KOMNAS HAM received 557 complaints⁷¹ associated with the right to a fair trial, around 40 percent of all complaints received that year (KOMNAS HAM 2007: 69-70).⁷² One would therefore expect that KOMNAS HAM would continuously seek to improve the quality of the regular judicial process.

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

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

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

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

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

75 Interview with Asmara Nababan, 28 August 2006.

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

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

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

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

77 See also 2.4.2.

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

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

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

In 1999, KOMNAS HAM was approached by the Ministry of Justice and Legislation (later renamed the Ministry of Justice and Human Rights) to participate in the revision of the Code (Komnas HAM 1999: 55), but the Commission declined the invitation⁸⁶ for reasons that will be explained below.

3.3.3 Performance and Effectiveness

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

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

⁷⁹ LBH staff member, May 2007.

⁸⁰ Personal communication with KOMNAS HAM and LBH Jakarta representatives, June 2008.

⁸¹ These include the right to an expeditious trial (Art 50), the right to legal assistance (Art 54 and Chapter VII on legal assistance), and the right to be free from duress during interrogation and trial (Art 52).

⁸² I.e. that this should occur at the time of the arrest or shortly thereafter, in any case before interrogation starts as provided for in the ICCPR, Art 14(3) (a).

⁸³ ICCPR, Art 14(1).

⁸⁴ ICCPR, Art 4 and 7; CAT, Art 2(2).

⁸⁵ CAT, Art 15.

⁸⁶ Interview with Roichatul Aswidah, 25 September 2006.

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

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

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

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

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

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

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

90 Interview, 16 May 2008.

91 See 2.2.3.

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

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

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

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

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

⁹² Interview, 25 April 2008.

⁹³ The Judicial Commission may open investigations into the functioning of judges. In addition, the Judicial Commission selects candidate Supreme Court judges.

⁹⁴ See 3.3.1.

⁹⁵ Personal communication with Roichatul Aswidah, April 2012.

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

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

3.4 KOMNAS HAM AND ADEQUATE HOUSING IN JAKARTA

3.4.1 The Right to Adequate Housing

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

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

The right to adequate housing is further clarified in General Comment no. 4 of the Commission on Economic, Social and Cultural Rights (1991), which is an authoritative interpretation of the right under international law. According to General Comment no. 4, the right to housing does not only refer to shelter, but also to the right to live somewhere in security, peace and dignity.⁹⁷ The Comment therefore considers forced evictions⁹⁸ '*prima facie* incompatible with the requirements of the Covenant'.⁹⁹ In the 1993 Resolution on Forced Evictions, the UN Commission on Human Rights has stated that forced

⁹⁶ See 1.1.5.

⁹⁷ Para 7.

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

⁹⁹ Para 18.

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

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

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

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

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

100 Resolution 1993/77, para 1.

101 Para 4.

102 Art 28H (1).

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

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

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

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

3.4.2 Residential Evictions in Jakarta

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

105 ICCPR, Art 12(3).

involving the security forces¹⁰⁶ and intimidation and violence. Only rarely have the victims of these evictions been given compensation. For many occupants, eviction has not only meant the loss of their homes, but also of their livelihoods; as many of them had small businesses close to their homes that were also demolished. The loss of income makes moving to another place almost impossible, and has meant that many parents were no longer able to afford school fees, forcing their children to drop out of school.¹⁰⁷ A study conducted by the NGOs FAKTA (*Forum Warga Kota Jakarta*, Jakarta City Residents Forum) and ISJ (*Institut Sosial Jakarta*, Jakarta Social Institute) reported that between 2001 and 2003, 86 evictions took place in Jakarta, resulting in the destruction of more than 18,000 houses, thousands losing their jobs, and many children dropping out of school. The organisation of the evictions was reported to have cost 35 to 52 billion Rupiah for personnel and equipment, or around US\$ 3.5 to 5.7 million (FAKTA 2006: 5-6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4.3 KOMNAS HAM and Residential Evictions

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

In its first years, KOMNAS HAM lacked a formal operating procedure for dealing with eviction cases. From the annual reports, however, several policies can be distilled. In some cases, commissioners would visit the eviction site to meet with the residents and to verify information. In most cases however, especially when it concerned a case outside of Java, KOMNAS HAM would send a letter to the local government, most often the District Head (*Bupati*). If the latter was involved in the eviction himself, KOMNAS HAM would send a letter to a higher official, for instance the Governor. In these letters the Commission would encourage settlement of the disputes through *musyawarah mufakat* (negotiation) and *secara kekeluargaan* (as a family). Although in most cases the residents had no legal rights over the land they occupied, KOMNAS HAM supported compensation in the form of replacement of land, with some success (KOMNAS HAM 1995: 26-7; 1996: 13-6; 1997: 36-41; 1998: 38-43; 1999: 70). In addition, KOMNAS HAM has paid attention to the right to adequate housing as part of their workshops on economic, social and cultural rights for civil servants, as conducted by the Sub-Commission for Education between 2002 and 2004.¹¹³

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

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

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

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

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

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

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

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

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

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

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

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

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

116 Art 1365.

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

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

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

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

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

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

119 Interview with Azas Tigor Nainggolan, 19 May 2008.

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

121 See 3.4.1.

122 It is often referred to as PERDA Tibum; 'tibus' is an acronym of *ketertiban umum*.

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

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

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

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

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

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

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

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

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

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

With regard to the right to housing,¹²⁶ the Commission refers to the provisions prohibiting people from living or building in green zones, parks and other public spaces,¹²⁷ as well as from building houses near rivers, railway tracks and bridges.¹²⁸ While the report acknowledges that some areas are unsuitable for housing, it is concerned that the provisions in the regulation may lead to the eviction of urban poor¹²⁹ who often have no choice but to build their housing in unsuitable areas. Here KOMNAS HAM's concerns lie with the likely consequences of the Regulation's provisions rather than its substance. The Commission argues that forced evictions contradict international and national human rights standards, and will moreover not resolve the issue of poverty in Jakarta; and as such are not proportional to the aim of promoting 'discipline'. The Regulation's provisions contradict the Indonesian government's commitment to reduce poverty as laid down in the *Rencana Pembangunan Jangka Menengah Nasional* (Medium Term National Development Plan). The Commission also argues that the Jakarta government, as 'one of the most developed regional governments must take the responsibility to improve the capacity of government in Indonesia so that it can fulfil its obligations in providing basic services to society' (KOMNAS HAM 2009: 51). KOMNAS HAM then states that the Regulation's provisions may not be applied until the government has provided everyone who lives in unsuitable areas with replacement housing, while taking into account human rights standards (KOMNAS HAM 2009: 46-51).

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

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

127 Art 12.

128 Arts 13, 20, 36.

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

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

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

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

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

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

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

131 Ibid.

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

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

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

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

3.4.5 Performance and Effectiveness

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

133 Interview with Tubagus Haryo Karbyanto, 19 May 2008.

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

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

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

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

'SA: We go to KOMNAS HAM because the President and the Governor do not receive us. KOMNAS HAM does. And KOMNAS HAM is an institution that protects the law, protects human rights.

KS: What do you mean by protection? And do you feel protected there?

SA: I mean that we are safe there. We feel protected there. They [staff and commissioners] are friendly when we come. They give us tea, biscuits, and they really listen to us.¹³⁷

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

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

137 16 May 2008.

This illustrates that in addition to the functions outlined in its mandate, KOMNAS HAM has a moral role¹³⁸ to play, and the way in which it fulfils this role is an important part of how individuals assess the organisation and eventually its legitimacy.

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

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

3.5 CONCLUSION

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

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

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

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

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

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

¹³⁹ See 3.4.3.

¹⁴⁰ See 1.2.3.

¹⁴¹ See Chapter 2, note 74.

¹⁴² See 1.1.1 and 1.1.3.

The varying degrees of effectiveness for KOMNAS HAM in the three areas illustrates that good performance does not necessarily lead to a situation where the organisation will reach its goals. This supports the argument put forward earlier¹⁴³ that performance and effectiveness should be considered independently from each other. Effectiveness, after all, strongly depends on external factors; as for instance KOMNAS HAM's report on the National Civil Registry has shown us. Looking at effectiveness alone does not tell us enough about how a particular issue was perceived and addressed by an NHRI. This can only be achieved by looking at the preceding stage – by looking at an organisation's functioning or performance with respect to that issue. In other words, separating the concepts of performance and effectiveness, and evaluating them independently, will generate a more complete picture of NHRIs.

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

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

143 See 1.2.3.

144 See 1.1.1.

145 See Chapter 1.2.2.

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

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

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

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