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

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4 | Searching for a Space

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

4.1 INTRODUCTION

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

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

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

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

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

4.2 1999-2002: GENESIS OF SUHAKAM

4.2.1 Rationale for establishing an NHRI in Malaysia

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

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

1 This will be elaborated further in Chapter 5.

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

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

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

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

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

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

4 Interview, 13 January 2009.

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

6 Interview, 13 January 2009.

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

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

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

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

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

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

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

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

According to Lim (1999), observers were worried that SUHAKAM would be ineffective for three main reasons. First, the government had not conformed to the Paris Principles by its lack of public consultation and the appointment procedure for SUHAKAM members (discussed below). Second, an NHRI would make little sense as long as the four Proclamations of Emergency¹¹ and other repressive laws remained in place.¹² Third, serious human rights violations by the government took place in the lead-up to SUHAKAM's establishment. These included the Lim Guan Eng affair,¹³ displays of excessive police force,¹⁴ the Sungai Gombak pollution scandal,¹⁵ and the arrests of various people under the ISA (including Anwar Ibrahim). The context surrounding SUHAKAM's establishment gave the impression that the Malaysian Commission - similar to its Indonesian counterpart in 1993- was nothing more than a sham, an attempt of the Malaysian government to improve its image (Lim 1999: 112-3, 117). In spite of the critique, in September 1999 the Bill was passed without

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

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

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

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

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

amendments as the Human Rights Commission of Malaysia Act (597/1999), henceforth HRCMA 1999.¹⁶

4.2.2 The Human Rights Commission of Malaysia Act 1999

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

By contrast, the provisions concerning SUHAKAM's composition were *not* in accordance with the Paris Principles. Whereas the latter states that members should be appointed by way of an election which guarantees pluralist representation, the HRCMA 1999 made appointments the prerogative of the Prime Minister.²² Guidelines regarding the qualifications of members were minimal, and only required that they should be chosen from 'amongst prominent personalities including those from various religious and racial backgrounds'.²³ Likewise, the tenure of commissioners – set at two years²⁴ – was controversial, as it appeared too short, even if it was renewable without limitation.²⁵

16 The Act was amended in 2009, see section 4.3.4.

17 Art 4 (1).

18 Art 14(1).

19 Art 4(2) (d).

20 SUHAKAM's funding is to be provided by the government, and while foreign funding is generally not allowed, it may be accepted for educational activities (Art 19).

21 Art 12 (2).

22 Art 5(2). While the Prime Minister selects the members, formal appointment is done by the King.

23 Art 5 (3).

24 Art 5 (4).

25 The Paris Principles do not explicitly stipulate how long the tenure of members should be, and the UN Handbook on NHRIs also does not give a precise number of years, stating only that commissioners 'should be granted guaranteed, fixed-term appointments which are not of short duration' (Centre for Human Rights 1995: 11). In comparison, terms of office are three years in Sri Lanka and South Korea; five years in India, Indonesia and Nepal; six years in Thailand; seven years in the Philippines; and three (chairperson) and six (commissioner) years in Mongolia (FORUM-ASIA 2006).

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

4.2.3 Organisational Structure

According to the HRCMA 1999, SUHAKAM was allowed to have up to 20 members. They were not required to work full-time for the Commission. In 2000, thirteen commissioners were installed and Musa Hitam was appointed as SUHAKAM's first Chairman. Nine commissioners were of Malay origin,²⁶ two were of Indian descent and two others Chinese, which reflected political practice in Malaysia. Four out of thirteen commissioners came from the civil service and were closely associated with political parties belonging to the ruling coalition, Barisan Nasional (BN).²⁷ However, the line-up also included some who had been critical of the Malaysian government. Among the latter were well-respected judges, one of them the retired Harun Hashim, who as High Court Judge declared UMNO an illegal organisation²⁸ and in 1988 ruled that the Printing Presses and Publications Act (PPPA) could be subjected to judicial review²⁹ (Yatim 1995: 175).³⁰ One human rights activist was appointed as well: Zainah Anwar, a representative of the NGO Sisters In Islam (SIS). This suggested that Mahathir took public concerns about the impartiality of SUHAKAM seriously.

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

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

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

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

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

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

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

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

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

31 Conversation with Yap Swee Seng, 29 November 2006.

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

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

34 Interview, 15 November 2006.

4.2.4 Challenges and Achievements

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

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

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

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

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

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

³⁵ Interview, 13 January 2009.

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

³⁷ Interview, 18 December 2006.

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

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

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

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

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

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

Whatever the grounds for the riots, they were the worst outbreak of inter-communal violence since 1969; and therefore became an extremely sensitive issue. The police warned that criticism of the government's handling of the case could be subjected to the Sedition Act³⁹ (Whiting 2003: 92-94), and this made SUHAKAM cautious about addressing the case, even though it received many complaints regarding Kampung Medan. In the end, the Commission said there was no need for an inquiry, because police protection for the community had increased – and because it had no jurisdiction, as the case had become subject to court proceedings.⁴⁰ However, in fact the case was never addressed in court, and therefore the reasons given by SUHAKAM were invalid.

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

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

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

40 Interview with Musa Hitam, 13 January 2009.

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

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

4.3 2002-2010: BETWEEN STATE AND SOCIETY

4.3.1 Organisational Development

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

⁴¹ This will be addressed in more detail in Chapter 5.

⁴² Also see 4.2.3.

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

SUHAKAM commissioners are not required to work for the organisation full-time,⁴⁵ and most of the workload is therefore borne by the staff. After 2002, SUHAKAM rapidly increased the number of its staff members in order to be able to deal with an increasing workload; from around 40 at the end of 2001 to over 70 in early 2009.⁴⁶ Most staff members have a degree in law or international relations and often started their employment at the Commission directly after graduation from university. Although many of them seem quite happy, some of those who have served longer have expressed their interest to leave. Indeed over the years, a considerable number of staff members who were well-regarded by colleagues and commissioners have left the Commission to find employment in other government departments or international organisations.

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

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

43 Interview with Ahmad Yusuf Ngah, SUHAKAM Secretary, 20 November 2006.

44 This will be further elaborated upon in Chapter 5.

45 Interview with Siva Subramaniam, commissioner, 28 January 2009. Siva argued that the lack of fulltime available commissioners is a key constraint for the Commission.

46 Within SUHAKAM, a division is made between staff employed within the various Working Groups, called officers, and staff who work for supporting divisions (e.g. finance, administration), who are referred to as staff.

47 Other reasons were workplace tensions, monotony of the work, and a desire for new challenges.

48 Interviews with Simon Sipaun, vice-chairperson, 15 November 2006; and Siva Subramaniam, 21 November 2006.

49 Interview with Ahmad Yusuf Ngah, 20 November 2006.

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

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

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

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

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

50 Interview with staff member, January 2009.

51 Interview with Nurul Hasanah, 8 January 2009.

52 Interview with Ramon Navaratnam, former commissioner, 22 January 2009.

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

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

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

4.3.2 Main Achievements

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

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

53 Interview with Nurul Hasanah, 14 December 2006.

54 Interview with Nurul Hasanah, 23 November 2006.

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

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

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

55 As of 2011. See http://www.rela.gov.my/index.php?option=com_content&view=article&id=115&Itemid=152&lang=ms, last accessed March 2012.

56 Interview, 29 November 2006.

57 Personal observation, 22 November 2006.

58 This report will be discussed in more detail in Chapter 5.

human rights problems or into cases which have attracted wide public attention. Among the latter was the inquiry into the death in custody of S. Hendry. Death in custody is a recurring problem in Malaysia.⁵⁹ S. Hendry was arrested by the police in September 2005 for his alleged involvement in two murder cases and an armed robbery. In November, he was transferred from one prison to another, where he was found dead in his cell the following day. The police said he had committed suicide, but his family refused to believe this. They referred to bruises on Hendry's head, face and body and said that he appeared to be in good spirits a day before he died. After its inquiry SUHAKAM found that Hendry's death had indeed most likely been suicide, but that his detention had been too lengthy and that both police and prison officials had been negligent in complying with the regulations in place. SUHAKAM here referred to Malaysian law, the 1953 Lock-up Rules and the 1970 Emergency Ordinance (Public Order and Prevention of Crime) (Detained Persons) Rules. In addition, SUHAKAM referred to international human rights standards, urging for compliance with Art 10(3) of the ICCPR⁶⁰ (SUHAKAM 2006: 82-4).

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

The discourse SUHAKAM has used in its work has been based consistently on a wide range of legal sources: not only national laws and regulations, but also international human rights standards, including case law from Commonwealth countries and the European Court of Human Rights. This illustrates that SUHAKAM has interpreted the notion of human rights broadly, going beyond the definition in the HRCMA 1999.⁶¹ In many instances, SUHAKAM has combined this comprehensive interpretation of human rights with a discourse

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

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

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

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

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

In socialising human rights, SUHAKAM has mainly engaged in the appropriation⁶² or replication of international human rights norms into a Malaysian setting. It has promoted human rights awareness (through education) and urged for the advancement of human rights in legislation (through research). In addition, the Commission has held perpetrators of human rights abuses to account through its investigations and public inquiries. Through its activities SUHAKAM has brought attention to topical rights issues in Malaysia, and therefore contributed to larger debates on and awareness of human rights. The question that follows is, of course, what the effects of SUHAKAM's activities have been. The next section will address the question of SUHAKAM's effectiveness, by looking at some of the challenges with which the Commission has had to deal.

4.3.3 Main Challenges

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

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

62 Cf. Merry 2006, see 1.2.2.

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

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

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

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

65 Interview, 3 January 2007.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

74 Interview, 8 January 2009.

75 Interview with Asiah Abu Samah, commissioner, 4 January 2007.

76 Interview, 20 March 2006.

77 Ibid.

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

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

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

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

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

78 Interview, 3 January 2007.

79 Ibid.

80 Rukunegara, or National Principle, was proclaimed in 1970, in a reaction to the 1969 race riots in Kuala Lumpur. The text refers to fostering unity and democracy.

81 Interview, 20 December 2006.

82 Enalini Elumalai, SUARAM coordinator for the Abolish ISA Movement (Gerakan Mansuhkan ISA, or GMI, a coalition of 83 NGOs), stated that some commissioners were happy to give their personal mobile phone numbers, enabling NGOs to contact them directly (interview, 22 January 2009).

83 Interviews with Yap Swee Seng, 14 November 2006 and Josef Roy Benedict, 16 November 2006.

84 Interview with Colin Nicholas, Centre for Orang Asli Concerns (COAC), 22 December 2006.

85 Interview with Yap Swee Seng, 18 December 2006.

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

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

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

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

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

88 Ibid.

4.3.4 Amendments to the HRCMA 1999

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

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

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

89 See [http://www.nhri.net/2009/SCA%20Mar09%20-%20Malaysia%20\(SR\).pdf](http://www.nhri.net/2009/SCA%20Mar09%20-%20Malaysia%20(SR).pdf), accessed July 2009.

90 Two amendments were passed, Act A1353/2009 and A1357/2009.

91 Art 5(4).

92 Art 5(2).

93 Art 11A(c).

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

4.3.5 Developments in 2010

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

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

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

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

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

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

4.4 CONCLUSION

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

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

⁹⁶ See 1.1.5.

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

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

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

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

97 This view was widely shared among NGO representatives.

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

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

98 See 1.2.3.