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

Setiawan, K.M.P

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

5.1 INTRODUCTION

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

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

As we have seen in the previous Chapter, the right to a fair trial is of special relevance in Malaysia because of several emergency laws, most notably the Internal Security Act (ISA), which have given far-reaching powers to the government to detain individuals without trial for an extended period of time. Prior to its abolition in 2012, the ISA was a primary target for Malaysian human rights NGOs which, together with the Malaysian Bar Council and opposition parties, had long campaigned for its abolition. Meanwhile, the Malaysian government insisted on the continued need for the ISA, to deal with terrorist threats. From early in its history, SUHAKAM received many complaints regarding detentions under the ISA, and consistently opposed it. In 2002 the Commission undertook a comprehensive review of the ISA, which will be evaluated in this Chapter.

The right to adequate housing derives its relevance from the large number of development projects which have been implemented in Malaysia over the

past 30 years. For this purpose, many poor people have been evicted from their homes. A substantial proportion of the individual complaints received by SUHAKAM have related to the eviction of squatters. This Chapter will look how SUHAKAM has addressed the right to adequate housing, with regard to the squatter settlements in the capital Kuala Lumpur and surrounding areas.

For each of the three rights discussed in this Chapter, I started by looking at SUHAKAM's annual reports. These reports are a rich source of information, not only because they reflect the Commission's opinion on the topic and the activities developed in response, but because they include the views of different stakeholders. In addition to its annual reports, SUHAKAM also published two relevant specialised reports: the review of the ISA, and the report on adequate housing. I also looked at SUHAKAM's response to individual cases involving these three rights. I examined relevant press statements by the Commission, interviewed (former) commissioners and staff members of SUHAKAM, as well as representatives of human rights NGOs. Media reports were used to establish how the general public and the Government reacted to SUHAKAM's actions and recommendations. Taken together, the results of these approaches provide us with a broad overview of how SUHAKAM operated and why it did so, making it possible to present an assessment of the Commission's performance and effectiveness.

5.2 SUHAKAM AND FREEDOM OF RELIGION

5.2.1 Freedom of Religion in Malaysia: a Source of Tension

The right to freedom of religion is entrenched in Article 18 of the UDHR:

> 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

Article 18 of the ICCPR also guarantees freedom of religion;[1] but, unlike Indonesia, Malaysia has yet to ratify this Covenant. As noted earlier, freedom of religion has not yet become the subject of a specific and legally binding treaty. The most important international human rights document regarding freedom of religion is the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. However,

1 Art 18 (1): 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

because freedom of religion is a contested issue, the Declaration has not yet received sufficient signatories to have entered into force. Particularly the specific right to change one's religion or belief, which implies the right to renounce a religion, attracts opposition from religious groups as well as national governments of countries with a state religion (Lerner 1996).

In Malaysia, freedom of religion is entrenched in Article 11 of the Federal Constitution: 'Every person has the right to profess and practice his religion, and, subject to Clause (4), to propagate it'. Clause 4 prohibits the proselytising of non-Islamic religions amongst Muslims. All jurisdictions – including Penang and Melaka, where Islam is not the state religion – have passed such laws. This has led Harding to argue that the provision has to do with preserving public order, rather than with prioritising one religion over another (Harding 1996: 201; Harding 2010: 511). However, others have considered Clause 4 to refer to the privileged status of Islam in the Constitution, with Thio arguing that the clause was designed to protect Islam from other religious influences, as well as from certain schools of thoughts and opinion within the Islamic religion itself (Thio 2006: xiii).

Further, Article 12(1) prevents discrimination on religious grounds in public education and the administration of scholarships, and Article 12(2) gives every religious group the right to establish and maintain educational institutions for children. Article 12(3) stipulates that no person is required to receive instruction in religion or to take part in any religious ceremony other than his own. Finally, legislation against subversion (Article 149) and during an emergency (Article 150) may not interfere with the freedom of religion.

Still, according to Article 3(1), Islam is the 'religion of the Federation' and in more recent years arguments have been put forward that Malaysia is an Islamic state (Adil 2007), even if in 1988 the Supreme Court ruled that this Article refers to a ceremonial role of Islam.[2] In addition to Prime Minister Mahathir's (2001) statements that Malaysia is an Islamic state, the 2000 High Court ruling in *Meor Atiqurahman bin Ishak & Anor v. Fatimah Bte Sihi & Anor* (2000) argued that Islam is the primary religion of the country and as such takes precedence over all other religions. At least such allegations indicate how freedom of religion and the equality of adherents of different religions are contested (Harding 1996: 201; Harding 2010: 510).[3]

In response to Islamic revivalism and increasing religious tensions during the 1990s and early 2000s (Harding 2010: 503-504), in 2005 several human rights NGOs and some members of the Malaysian Bar Council tried to establish an Interfaith Commission (IFC). The IFC was meant to be an advisory body to the government, with the authority to open investigations into complaints regarding freedom of religion, including disputes regarding a person's religious status

2 In *Che Omar bin Che Soh v. Public Prosecutor*.

3 Harding has argued that the designation of Islam as the religion of the Federation is not contrary to the principle of the freedom of religion, see Harding 1996: 201.

or conversion.[4] However, many Muslim groups objected to the establishment of the IFC, which they considered 'an attack on Islam' and in particular because the IFC would promote the right to renounce religion (Harakah 27 March 2005). Eventually the initiators abandoned their plans after the government publicly rejected the idea (New Straits Times 27 February 2005).

Another example of the sensitivities surrounding freedom of religion was the opposition to the so-called Article 11 Coalition. This Coalition, which comprised of members of the Malaysian Bar Council and NGO representatives, organised seminars to promote awareness of the Constitution, particularly with regard to freedom of religion. However, the Coalition was criticised for attacking Islam. Several seminars were disrupted by protestors, who forced the organisers to shorten or cancel the seminars (Malaysiakini 27 July 2006). Eventually Prime Minister Badawi told the organisers to 'stop talking', and prohibited the printed press, which is under control of the government,[5] from mentioning the Coalition (Malaysiakini 31 July 2006).

The courts have also been confronted with religious anxieties, in a number of well-publicised cases which have dealt with conversion.[6] Much public debate was provoked by the case of Lina Joy, who converted from Islam to Christianity and wanted to change the religion on her identity card.[7] The National Registration Department (NRD), however, held that Joy should first obtain permission of the Islamic court.[8] Joy then brought a case against the NRD to the High Court. The High Court ruled that Joy could not renounce Islam without permission from the Islamic courts. Moreover, the presiding judge stated that with respect to Article 11, the freedom of choice did not extend to the right to change religion – an argument contradictory to international human rights norms. The judge also made reference to Clause 4, and

4 In terms of the IFC's structure and mandate, the initiators drew from SUHAKAM's enabling act (personal conversations with Malik Imtiaz Sarwar and Sharmila Sekaran, both involved in the IFC).

5 Independent online newsportals (most notably *Malaysiakini*) and blogs are not subject to these restrictions.

6 Conversion is a particularly divisive issue in Malaysia, see for instance Harding 1996: 204 and Adil 2007.

7 Other cases include the Shamala case, in which a father converted his two underage children after his own conversion to Islam without informing the mother of the children. The Sharia Court then gave the father sole custody over the children. In the Rayappan case (2006) a disagreement emerged regarding a deceased person's religion. Despite Rayappan's claims during his life that he was a Catholic, Islamic authorities had obtained the permission of the Sharia High Court to bury him according to Muslim rites. Eventually the Islamic authorities dropped their claim, stating they did not have enough evidence. A similar case was that of Mount Everest climber M. Moorthy (2005), which will be discussed later in this Chapter.

8 Of concern here is the interpretation of Article 121(1A) of the Constitution, which states that the civil courts have no jurisdiction 'in respect of any matter within the jurisdiction of the Sharia Courts'. The precise scope of this Article is the subject of much debate. See for instance Thio 2006; Whiting 2008.

argued that a Muslim's choice to change religions affected public order. Thio (2006) has stated that the Lina Joy case 'significantly addresses the scope of religious freedom within the limiting terms in the structure of Article 11' (Thio 2006: x). This was particularly evident when the judge's invoked Article 3 of the Constitution – which determines that Islam is the religion of the Federation – and argued that the protection of Islam superseded individual religious liberty (Thio 2006: xxi). The High Court's decision was upheld by the Court of Appeal and the Federal Court.

While the Malaysian Constitution does not prohibit conversion out of Islam, the legal process surrounding conversion is shrouded with much uncertainty. As a consequence, Islamic courts are reluctant to allow conversions, particularly for Malays. There is some basis for such reluctance in Article 160(2) of the Constitution, which defines 'Malay' as someone who professes Islam. Adil (2007) notes that between 1999 and mid-2003, 750 persons applied at the National Registration Department to have their Muslim name changed to a non-Muslim name, which is an indicator for conversion. Adil states that sharia courts or religious departments issued permissions in 220 cases, but this usually concerned Muslims by conversion rather than Muslims by birth (Adil 2007: 27-28).

In many Malaysian states, conversion from Islam has been made into a sharia criminal offence and is subject to a monetary fine, jail sentence or caning. These examples illustrate that although freedom of religion is guaranteed in the Constitution, practices may differ, and the scope of the right is contested. Further, the practices surrounding conversion from Islam illustrate that other rights, such as the right to equality and the freedom from cruel punishment, are also involved. This seems to make it into a relevant topic for an NHRI.

5.2.2 SUHAKAM and Freedom of Religion

Issues related to freedom of religion have been the subject of individual complaints to SUHAKAM, but since the Commission does not usually include this number in its annual reports,[9] it is unclear how many complaints it receives. Between 2003 and 2006, SUHAKAM also received eleven memoranda on destructions of places of worship (SUHAKAM 2007c).

A notable case among these concerned the Sky Kingdom (*Kerajaan Langit*) commune. In July 2005 the Commission received complaints regarding its demolition in the state of Terengganu, 400 kilometres north of Kuala Lumpur, by the Terengganu Islamic Affairs Department. Sky Kingdom was founded

9 An exception is the 2007 Annual Report, which states SUHAKAM received three complaints regarding the right to religious freedom (SUHAKAM 2008: 64). However, media reports indicate that issues concerning freedom of religion have been brought to the Commission's attention regularly.

in the 1980s by Ariffin Muhammad, who claimed to be the reincarnation of Buddha, Siva, Jesus and the Prophet Muhammad. Called Ayah Pin by his followers, Ariffin emphasised ecumenical dialogue and inter-religious harmony. In 1997, the Terengganu Fatwa Council issued a *fatwa* (religious instruction) against the group, which banned Sky Kingdom for being a deviant cult. This decision was given state support in 2001 by the Terengganu Islamic Affairs Department. Ayah Pin was sentenced to a jail term of 11 months and a monetary fine for 'insulting Islam'. Nonetheless, Sky Kingdom continued to grow and attracted widespread attention by the giant structures it built on its compound, such as an umbrella and a teapot; respectively representing shelter beneath God, and the purity of water. These conspicuous edifices probably led to the July 2005 raids, when the police arrested 75 Sky Kingdom followers and demolished the buildings on the compound. The local authorities stated that Sky Kingdom had violated the National Land Code, which determined that the land concerned had been designated for agricultural purposes (Mohamad 2008: 169-170).

Shortly after these incidents, followers of Sky Kingdom in Kuala Lumpur lodged a complaint at SUHAKAM (Malaysiakini 27 July 2005). Commissioner Hamdan Adnan, who received them, promised to visit the site, but this plan was cancelled two days later (Malaysiakini 29 July 2005). The plaintiffs visited the Commission again, but this time were confronted by staff who made critical remarks about Sky Kingdom's religious practices, and referred them to the Islamic courts. One day later, Hamdan apologised to the complainants. He claimed the Commission had 'spent at least 30 minutes on the issue […] and that is a lot of time for a particular matter' (Malaysiakini 9 August 2005). However, SUHAKAM did not open an investigation when the Sky Kingdom followers who had been arrested during the July raid were tried in court. The Commission also remained silent when the followers were sentenced to jail terms and monetary fines, and when the commune itself was demolished in August 2005.

Another example concerned the death of Mount Everest climber M. Moorthy. This case was brought to SUHAKAM's attention in December 2005 when, after Moorthy's decease, his family became embroiled in a conflict with the Federal Territory Islamic Affairs Council about the body. On the basis of a ruling by the Kuala Lumpur Islamic Court that Moorthy had become a Muslim, the Council claimed Moorthy had converted to Islam and thus had to be buried according to Muslim rites. His wife claimed to know nothing about this conversion (Malaysiakini 4 January 2006). The High Court rejected her appeal, arguing that Islamic matters were the sole jurisdiction of the Islamic courts – which did not want to hear her because she was not a Muslim. The Islamic Affairs Council buried Moorthy's body in accordance with Islamic practices, while his family held a Hindu funeral without it. SUHAKAM refused to get involved; stating that the case was pending in court (Malaysiakini 29 December 2005).

The Commission could not hide behind the court, however, in the cases of complaints about the demolition, by local governments, of places of worship; mainly Hindu temples allegedly built without building permits (SUHAKAM 2007c: 87). In June 2006, caretakers of six such temples asked for an investigation by SUHAKAM (Malaysiakini 7 June 2006). The Commission did not do this, but convened a meeting 'with members of several religious organisations to consider their views' on the matter (SUHAKAM 2007c: 87), as it had done previously in 2002 (SUHAKAM 2003a: 79). After the meeting, the Commission recommended to the Minister of Housing and Local Government and the Minister of the Federal Territories that the government should make sure that religious groups are consulted in such cases; that it should be sensitive to objects and traditions held sacred by the relevant group; that it should preserve places that have historical relevance; and that it should offer alternative sites if necessary. SUHAKAM referred to the freedom of religion as guaranteed in the UDHR and the Federal Constitution, and a provision in the Penal Code which prohibits damaging places of worship.[10] The Commission added that it 'strongly believes that the issue of demolition should be viewed from a wider perspective, rather than being limited to a question of legitimacy of land occupancy' (SUHAKAM 2007c: 87). In August 2007, SUHAKAM issued another press statement reiterating its concerns about temple demolitions, 'as it is a fact that places of worship [...] are regarded as sacred' (SUHAKAM 2007b). Subsequent complaints about similar demolitions have been given some attention through press statements, but have not been further acted upon by the Commission.

In January 2010, SUHAKAM did address another type of violation of the right to freedom of religion. This concerned attacks on several churches and a *surau* (Muslim prayer building), with the Commission stating that it was 'very concerned' (SUHAKAM 2010a). Again referring to the freedom of religion as guaranteed in the Federal Constitution and the UDHR, the Commission underlined the importance of this right for ensuring harmony in the country: 'there is a need for more respect on the sensitivities of places of worship in Malaysia in order to maintain harmony and unity [...]' (SUHAKAM 2007b). This is similar to SUHAKAM's calls for dialogue between religious organisations and authorities to 'help maintain peace and goodwill', and its recommendation that 'leaders [of religious groups] will refrain from making statements [...] detrimental to religious understanding and harmony in the country' (SUHAKAM 2010a).

10 Section 295: 'Whomever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons, or, with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both'.

In all these instances of infringements on the right to freedom of religion, SUHAKAM only took action in the case of the demolition of places of worship, and then apparently only half-heartedly. While the Commission rejected jurisdiction over the Sky Kingdom and Moorthy cases on formal grounds, this reason was not entirely convincing; as in the past SUHAKAM has effectively addressed cases that were pending in court, by focusing its investigation on an aspect outside of the scope of court review.[11] By focusing on demolition, SUHAKAM could have done the same in the Sky Kingdom case. This indicates strongly that SUHAKAM's behaviour is related directly to the sensitivity of a matter in Malaysia. Freedom of religion is a sensitive matter to begin with, and the treatment of religious minority groups and conversion are extremely delicate – far more so than demolition of places of worship. The 'Islamic' factor further complicated the Sky Kingdom and Moorthy cases, in which Islamic authorities were at the heart of the matter. Islam being the official religion and the state having a strong Islamic character, SUHAKAM would have attracted strong criticism not only from Islamic groups but also from the government. Such inquiries could easily be construed as a criticism or even attack on Islam, which could potentially jeopardise the Commission's organisational survival. It seems, as will become apparent in the next section, that this has led to the Commission choosing to avoid such cases as much as possible.

5.2.3 Performance and Effectiveness

As mentioned in the previous section, SUHAKAM has received several complaints related to freedom of religion. While there is widespread public interest in the matter, the Commission has held such cases at arms' length. Although the Commission has issued recommendations against the demolition of places of worship, these statements have not become starting points from which to develop other relevant activities, such as education programmes or research into relevant laws and regulations. SUHAKAM has only reported a few occasions where it organised a dialogue between representatives of religious groups. In line with the Commission's general avoidance of issues related to freedom of religion, it has not made many references to international human rights norms on this topic; which is in stark contrast with how SUHAKAM has approached the right to a fair trial.[12] Moreover, SUHAKAM has been unwilling to open investigations into individual complaints. Human rights NGOs and individual complainants have lamented the Commission's approach and attitude in this area, in which it seems that for the sake of its survival, the Commission has decided to turn a blind eye to the issue of freedom of religion.

11 For instance in the Kundasang Public Inquiry, see 5.4.2.
12 This will be discussed in 5.3.

My own observations confirm that attention to the right to religious freedom makes staff and commissioners nervous. When asked, staff members would quickly reply 'we don't get those cases here' or 'we don't do those'. Commissioner Khoo Kay Kim said that freedom of religion is 'a very difficult subject […] we cannot deal with it directly'.[13] This anxiety causes SUHAKAM to address freedom of religion highly selectively. The Commission certainly does not advocate causes for controversial religious minorities.

To justify this response, the Commission tends to argue that religious freedom is beyond its mandate, and insists that religious matters should be dealt with by a separate government department.[14] Commissioner Khoo Kay Kim commented that religious issues 'should not be thrown out into the public' but should be dealt with and decided by the ruling coalition.[15] These arguments have no basis in the HRCMA, which stipulates in Article 4(4) that 'regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution' – and the freedom of religion is firmly entrenched in both.

An important reason for SUHAKAM not to investigate cases regarding freedom of religion is the fear of attracting opposition from more conservative Islamic groups, which consider the human right to freedom of religion as a threat to Islam and its special position in Malaysia (Mohamad 2008:182, Malaysiakini 23 January 2006). Therefore SUHAKAM has tended to ignore these cases, rather than contributing to an open discussion about freedom of religion.

A typical complexity is that in Malaysia, religion and ethnicity (usually referred to as race) are closely connected. As discussed earlier, Islam has been linked with Malays in the Constitution.[16] Similar provisions are not in place for other religions or ethnicities, but Christianity and Buddhism on one hand, and Hinduism on the other, are associated with Chinese and Indians respectively.[17] While Malaysia has known relatively few political or social upheavals, ethnic tensions have erupted several times, and have been coloured by religion. In the lead-up to the 1969 elections, Malays questioned their economic position relative to the prosperity enjoyed by the Chinese ,and expressed dissatisfaction with the main Malay party UMNO, partly for failing to represent their concerns. Many Chinese were equally dissatisfied with their party, the MCA (Malayan (later Malaysian) Chinese Association), regarding its inability to improve their political and cultural position. As a result, many who commonly voted for the 'Alliance' – the coalition of UMNO, MCA and MIC (Malayan (later Malaysian) Indian Congress) – cast their vote in favour of opposition parties; Malays mainly voting for PAS, and non-Malays for DAP. When the Chinese population

13 Interview, 20 December 2006.
14 Interview with Siva Subramaniam, commissioner, 21 November 2006.
15 Interview, 20 December 2006.
16 Article 160 (2), see 5.2.1.
17 See also 1.1.5.

celebrated DAP's success in Kuala Lumpur, Malays' retaliated; which culminated in the ethnic rioting known as the 13 May Incident (Case 2004:31).

The 1969 riots have profoundly influenced political, economic and social policies in Malaysia, and are often used as a warning against emphasising racial differences. Prevention of communal tensions has been a priority for the Malaysian government ever since (Crouch 1996: 241), and in the same vein, SUHAKAM will not consider cases concerning topics or involving groups that are regarded as posing a risk in this respect. Referring to the Sky Kingdom case, SUHAKAM Chairman Abu Talib Othman spoke of 'deviant religious teachings [that] are a threat to multiracial and multireligious Malaysia. They can disrupt harmony'.[18] Human rights NGOs criticising SUHAKAM's attitude claim that it sides with mainstream Islamic groups in Malaysia. However, the Commission instead thinks of itself as serving the country by remaining neutral,[19] and thereby contributing to a peaceful society.

With regard to the freedom of religion, SUHAKAM's position is characterised by an emphasis on national legislation to the detriment of international law. Commissioners argue that national law is just and fair, and that everybody should abide by it at all times. A good illustration is Commissioner Siva Subramaniam's reaction to the Moorthy case, when he declared that

> 'We must understand and respect the law of the nation. As far as religion is concerned, Islam is the official religion and the highest authority is the Sharia Court. […] Whatever that has been said or done, the laws of the nation are important, everybody must follow the law, and there is a need for us to live together as a multi-racial society.' (Malaysiakini 29 December 2005)

In an interview he further explained: 'religious freedom in Malaysia is bound by law. Malaysia has also accepted Islamic Law. Although conversion is allowed by international human rights standards, in Islam it is not'.[20]

This emphasis on national law has been described as a 'limited statist' interpretation of freedom of religion, which is dominant in Malaysia (Mohamad 2008: 170). SUHAKAM's approach here is in direct contrast with the way it addresses other issues such as fair trial, as will be discussed later in the next section of this Chapter.

Finally, freedom of religion is a controversial and potentially disruptive issue within SUHAKAM itself. In early 2006, SUHAKAM commissioners held a special meeting on religious conversions (Malaysiakini 23 January 2006). During the meeting, the question arose whether SUHAKAM should recommend the amendment of Article 121 (1A) of the Constitution. This article stipulates

18 Interview, 3 January 2007.

19 The controversy surrounding the IFC was, according to commissioner Siva Subramaniam, a reason for SUHAKAM not to cooperate: 'it is important for SUHAKAM to remain neutral'. Interview, 21 November 2006.

20 Ibid.

that the High Courts in Malaysia have jurisdiction over civil and criminal matters, but not over any issue that falls within the jurisdiction of the sharia courts. Some human rights NGOs and lawyers[21] called for the Article to be repealed, as on this basis civil courts have refused repeatedly to address cases involving non-Muslim plaintiffs in an Islamic matter,[22] such as the aforementioned alleged conversion of Moorthy. Representatives of human rights NGOs have added that when civil courts cannot review cases decided by the sharia court, non-Muslims involved are without any avenue for redress.[23] In the end the commissioners were not able to reach an agreement on the issue of religious conversion, with only a minority in favour of amending Article 121 (1A) (Malaysiakini 27 February 2006). Following the meeting, staff members were instructed by commissioners not to accept complaints relating to religious freedom:

> 'We have been told to advise them [complainants] to go somewhere else. The Sharia Courts, for instance. This of course does not help them. But they have understood the hint and the number of complaints has decreased'.[24]

The Commission has thus relegated issues of conversion and minority rights to the periphery of freedom of religion, which stands in stark contrast with how the right is conceived of at an international level.[25] This selective approach means that SUHAKAM's performance and ultimate contribution to the realisation of the right to freedom of religion is limited, and has negatively affected the Commission's legitimacy among human rights NGOs and lawyers. SUHAKAM's position on the freedom to religion can be explained by various reasons, ranging from the interpretation of its mandate and its conception of national law in relation to international law, to its desire to avoid conflict both within and outside its organisation.

---

21 Human rights NGOs and lawyers also appear to be divided on the issue, with some rejecting a repeal or amendment of Article 121 (1A) and arguing for a judicial interpretation instead (Malaysiakini 20 January 2006).

22 This appears to be a relatively new interpretation of Art 121(1A). Harding (1996) notes that in the 1990s, civil courts have reviewed decisions of sharia courts (p. 137). To some extent, both Thio (2006) and Whiting (2008) discuss the debate regarding the jurisdiction of sharia vis-à-vis civil courts.

23 Interview with Chin Oy Sim, representative of the NGO Women's Aid Organisation, 27 November 2006.

24 Interview with SUHAKAM staff member, December 2006.

25 General Comment no. 22 of the Human Rights Committee on Article 18 of the ICCPR states that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief' (para 2) and '[…] the freedom to 'have or adopt' a religion or belief necessarily entails the freedom to choose a religion of belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief' (para 5).

5.3 SUHAKAM AND FAIR TRIAL

5.3.1 The Internal Security Act

Until its abolition in 2012, the Internal Security Act (ISA) was one of Malaysia's most controversial laws. It allowed for preventive detention up to two years,[26] a period which could be renewed and extended indefinitely. Preventive detention encompasses several human rights issues, for example freedom from arbitrary arrest, and rights during detention, such as the rights to legal counsel as well as freedom from torture and ill-treatment – which are all part of the right to a fair trial.

The right to a fair trial has been firmly entrenched in international human rights documents. The UDHR includes the right to liberty;[27] freedom from torture;[28] freedom from arbitrary arrest;[29] and the right to a fair trial.[30] Article 9 of the ICCPR provides for the freedom from arbitrary arrest and the right to liberty, as well as the right of detainees to be informed of the charges held against them, the right to be brought before a magistrate, and the right to judicial review. Article 14(1) of the same Covenant refers to the right to a fair trial, and Article 7 guarantees the freedom from torture, which is a non-derogable right. Another relevant human rights convention with regard to the right to a fair trial is the CAT, as detainees are often vulnerable to torture and other forms of ill-treatment.

At a national level, legal guarantees to the right to a fair trial include Article 5(1) of the Malaysian Constitution, which states that 'no person shall be deprived of his life or personal liberty save in accordance with law'. Likewise, Article 5 provides for the right to judicial review,[31] the right of arrested persons to be informed of the grounds of their arrest and to have access to and be represented by a counsel of their choice,[32] as well as the right to be produced before a magistrate within 24 hours of the arrest.[33] The right to be informed of the grounds for arrest is also guaranteed by Article 151(1) (a) of the Constitution. The Criminal Procedure Code (Act 593) moreover provides for open and public courts,[34] the stipulation that arrested persons should be brought before a magistrate without unnecessary delays,[35] the right of the

26 This applied to detention orders made by the Minister under Section 8. When detention is ordered by the Police, it may not exceed sixty days (Section 73(3)), unless an order of detention has been made by the Minister.
27 Art 3.
28 Art 5.
29 Art 9.
30 Art 10.
31 Art 5(2).
32 Art 5(3).
33 Art 5(4).
34 Section 7.
35 Section 42.

accused to be defended,[36] protection against double jeopardy,[37] and the right to appeal.[38] Taken together, these provisions mean that the right to a fair trial is legally guaranteed.

The ISA was enacted in 1960[39] and was one of several preventive detention laws in Malaysia that were passed pursuant to Articles 149 and 150 of the Federal Constitution (Harding 1996: 215).[40] The ISA conferred upon both the Minister of Home Affairs[41] and the Police[42] the power to detain persons preventively, amongst others when they act 'prejudicial to the security of Malaysia'. Detention under the ISA was governed by the 1953 Lockup Rules in those cases where detention was ordered by the police, and the 1960 Internal Security (Detained Persons) Rules, where detention was ordered by the minister. Both include human rights provisions, such as detainees' rights to communicate with family members and have access to legal counsel,[43] as well as rules relating to the treatment of detainees, such as the prohibition of use of physical force against them.[44]

While the ISA was defended by the Malaysian government in the interest of national security, in fact, the Act was used against a wide variety of offences. These were not limited to terrorism, and included drug trafficking, money laundering and being a member of a religious minority. Similarly, climbing expeditions were construed by the authorities as military training. Former

36 Section 255.
37 Section 302.
38 Section 303a.
39 The ISA was enacted following the Emergency (1948-1960) which was declared by the British Government in response to the insurgency by the Communist Party of Malaya (CPM). During the reading of the Bill the then Deputy Prime Minister, Abdul Razak, stated that while the Emergency had come to an end, 'the Government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he has failed by force of arms' (Parliamentary Debates, 21 June 1960, as quoted in SUHAKAM 2003b: 3).
40 Harding argues that the provisions in the Constitution allowing for the enactment of preventive detention laws were influenced by the 1948-1960 Emergency. This caused the Constitutional Commission (the Reid Commission, 1957) to recommend the insertion of special powers against subversion into the Constitution (Harding 1996: 153-4).
41 Section 8(1): 'If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years'.
42 Section 73(1) 'Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe – (a) that there are ground which would justify his detention under section 8; and (b) that he had acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof'.
43 1953 Lockup Rules, rule 22 and 1960 Internal Security (Detained Persons) Rules, rule 81.
44 1953 Lockup Rules, rules 42 to 47 and the 1960 Internal Security (Detained Persons) Rules, rule 42(i).

detainees stated that they were interrogated on their political views, rather than their supposed participation in militant activities. Conditions during detention were described as dirty, congested and degrading, with many detainees confined in small cells without windows or bedding. In addition, many detainees were not informed where they were held and were denied access to family members as well as legal counsel. Physical maltreatment, including beatings, as well as intimidation, lengthy interrogations and verbal abuse were also often reported (Yatim 1995: 264, 298; SUHAKAM 2003b: 34, 39, 40, 43, 50; HRW 2004b: 30; SUARAM 2007: 24).

Due to the often arbitrary use of the Act and the treatment of detainees, the ISA became 'the most feared and despised piece of legislation in the country' (Yatim 1995: 244) and the target of much criticism. It was argued that the ISA violated the right to freedom from torture and other forms of ill-treatment (Yatim 1995: 263-4; HRW 2004b: 11; SUARAM 2008: 5). Concerns were also raised about the limited avenues for judicial review of detentions under the ISA. For detentions ordered by the minister, there was no independent body allowed to review the order. The only possibility for review was by making an application to the Advisory Board.[45] This Board, however, had discretionary powers not to consider the application of a detainee and its recommendations were not binding. According to former detainees the Board was no more than a 'sounding board for the executive' (Yatim 1995: 271).

Detentions under the ISA ordered by the police could be challenged in court. However, the courts were unwilling to review the grounds for arrest, and claimed that the executive was the only judge of what was in the interest of national security. In addition, reviews of detention orders were made difficult by denying detainees' access to legal counsel for the first 60 days of their detention (HRW 2004b: 30). Nonetheless, the courts sometimes struck down detention orders on procedural grounds, for instance when only one copy of a detention order was given whereas two were required by the Act (Harding 1996: 217-23).

Human rights NGOs and opposition parties have long argued that there was no longer a place for the ISA in contemporary Malaysia, as its initial objective (to counter communism) had become irrelevant. As mentioned above, the Act was used in a wide variety of cases. In addition, the ISA was used as a tool to curb political opposition (Yatim 1995: 298). In 1987, 106 people were arrested during *Operasi Lalang* (Weeding Operation), including MPs of the opposition parties DAP and PAS, as well as critical members from coalition party UMNO. In 1998 the ISA was also used to detain former Deputy Prime Minister

45 The Advisory Board was provided for in Sections 11 and 16 of the ISA, as well as Article 151 of the Constitution. The Board consisted of three members, appointed by the King, with the Chairperson being a (former) judge of the Federal Court, Court of Appeal or High Court.

Anwar Ibrahim[46] and in 2001 ten *Reformasi* activists suffered the same fate. In 2007, five leaders of the Hindu Rights Action Front (HINDRAF) were arrested under the ISA, after the group had organised a protest attended by 30,000 people in Kuala Lumpur. According to the human rights NGO SUARAM, 70 people were held under the ISA by the end of 2007. None of the detainees had been charged and more than twenty of them were serving their fifth or sixth year in detention (SUARAM 2008: 8).

5.3.2 SUHAKAM's Review of the ISA

The ISA has understandably been a key concern of human rights NGOs, lawyers and politicians critical of the government. In April 2001, NGOs, student groups and political activists formed the coalition *Gerakan Musnahkan ISA* (Abolish ISA Movement, GMI). GMI brought together some 60 organisations representing a variety of societal groups and concerns, and included not only secular human rights NGOs but also Islamic NGOs such as *Angkatan Belia Islam Malaysia* (ABIM, Islamic Youth Movement Malaysia), political opposition parties DAP, PAS and PKR,[47] as well as Malaysian-Chinese and Malaysian-Indian organisations. GMI's composition illustrated that resistance against the ISA transcended divisions of race or religion, which was unique for Malaysia. This was also evident following the arrest of Anwar Ibrahim, when Malaysians of all ethnicities and religions spoke out against the arrest and the Act.

While the government was adamant that the continued existence and use of the ISA was justified in the light of national security, the strong sentiments within society against the Act made it a relatively easy target for SUHAKAM, especially when compared to the right to freedom of religion. In 2002 the Commission opened two inquiries; the first concerning conditions of detention under the ISA and the second being a review of the Act itself. This Chapter focuses on the latter, as many of the Commission's findings related to conditions of detention were integrated into the review, which was released in April 2003. The Commission considered such a review necessary because of the high number of complaints about the ISA, and because of the government's argument that the Act was needed to counter terrorist threats following September 11th 2001. From the outset, SUHAKAM made it clear that concerns over security should be balanced with 'upholding, rigorously, international human rights standards' (SUHAKAM 2003b: 5-8). The review was based on memoranda and complaints from ISA detainees, their family members and NGOs, and discussed international human rights provisions, case law on preventive detention, academic work and media reports. The Commission held a two months-public inquiry and made several visits to the Kamunting Detention

46 See 4.2.1.
47 See 4.2.1.

Centre, where the majority of ISA detainees were held. Dialogue sessions with the Bar Council, NGO representatives, former detainees and the Police added further information (SUHAKAM 2003b: 8-9).

The report comprised four sections: a discussion of preventive detention within the international human rights framework; a review of preventive detention under Sections 8 and 73 of the ISA; conclusions; and recommendations. The first section referred to the UDHR, but also to several international human rights treaties not ratified yet by Malaysia, such as the provisions in the ICCPR and CAT. In addition to these international human rights treaties, the report included a discussion of two international guidelines applicable to the detention of a person: the Standard Minimum Rules for the Treatment of Prisoners (SMR); and the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (BOP). Throughout the report, SUHAKAM also referred to the European Convention on Human Rights (ECHR), and to rulings of the European Court on Human Rights. This inclusion of European legislation and precedents was unexpected, given that these were not applicable in Malaysia; although Malaysia's membership of the Commonwealth brought their relevance somewhat closer. In explanation, SUHAKAM argued that 'the case law developed by the European Court of Human Rights is an internationally respected source of guidance for the interpretation and implementation of the UDHR' (SUHAKAM 2003b: 15).

SUHAKAM's review of the ISA was very critical. The Commission took a particular interest in Sections 8 and 73, which were considered to be the most problematic. Although the two Sections referred to different detaining authorities – the Minister for Home Affairs (Section 8), and the Police (Section 73) – most of the provisions in the two Sections were similar. The Commission's report identified five main areas of concern.

The first concern was the grounds for detention. People could be detained under the ISA when the police or the minister had reason to believe that he or she acted, or could act, in a way that was 'prejudicial to the security of Malaysia'.[48] This phrase was not elaborated in any way, and therefore SUHAKAM regarded it as 'at best, very vague' (SUHAKAM 2003b: 33, 64). During the public inquiry, the Commission also paid attention to the various issues that were regarded as a threat to national security. Political dissent, falsification of coins and documents, and alleged conversion of Malays to Christianity had all been brought under this heading. The lack of clear criteria on what constituted a threat to security gave 'rise to the violation of the right not to be arbitrarily arrested and detained' (SUHAKAM 2003b: 34, 64). In addition, as avenues for judicial review of detention were limited, there was hardly any case law to elaborate this.

48 Section 8(1); Section 73(1) (b).

Second, the Commission scrutinised the rules and practice of detention under the ISA.[49] Both fell short of international human rights standards (SUHAKAM 2003b: 49, 76). While SUHAKAM noted that it had not encountered any 'serious violations of the right not to be subjected to torture [...] there have been instances where detainees [...] appear to have been subjected to some form of inhumane or degrading treatment or punishment' (SUHAKAM 2003b: 76).

The third concern was the lack of contact between detainees and the outside world. The general practice was not to disclose the location of detention to detainees, their families or lawyers. SUHAKAM concluded that these practices increase the risk of *incommunicado* detention, which posed 'an inherent danger of abuse of power, particularly in terms of torture'. Furthermore, the 'lack of access to counsel denies [a] person access to justice' (SUHAKAM 2003b: 39, 44).

Fourth, SUHAKAM criticised the length of detention under the ISA. Section 73 allowed for an initial detention period up to 60 days, which the Commission found 'disproportional' (SUHAKAM 2003b: 36) to the aims of the law. Section 8 allowed for detention up to two years – a period which could be renewed indefinitely. The Commission regarded this as 'unreasonable and excessive' (SUHAKAM 2003b: 67) and called for the length of detention to be reduced. The Commission suggested that detention should never exceed six months in the case of Section 8, which it based on national security legislation in the USA, the United Kingdom and Canada (SUHAKAM 2003b: 67).

Finally, the Commission criticised the limited possibilities for judicial review of detainment under the ISA. Those detained under Section 73, on the orders of the police, were able to lodge a *habeas corpus* application, but without legal counsel they could not prepare their case very well. Also, detainees were often not allowed to be present during the proceedings in court. This made it difficult for lawyers to verify information and obtain instructions from their clients (SUHAKAM 2003b: 57-8).

Judicial review of detention under Section 8 was even more problematic, as following a 1989 amendment the decision of the Minister to detain a person cannot be challenged in court. SUHAKAM commented that 'there must be some form of independent check and balance on the exercise of powers by the Executive. [...] judicial review of detention orders made under Section 8 of the ISA ought not to be ousted or restricted' (SUHAKAM 2003b: 81-2).

SUHAKAM concluded that the principle of detention without trial 'goes against human rights principles in that the person detained, is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proven guilty. These rights are enshrined in articles 3, 10 and 11(1) of the UDHR' (SUHAKAM 2003b: 83-4). The application, particularly of Sections 8 and 73 of the ISA, had led to the infringement of human rights, by subjecting people to arbitrary arrest and to inhuman or degrading treatment or punish-

49 Detention under Section 8 was governed by the Internal Security (Detained Persons) Rules 1960; detention under Section 73 is governed by the Lockup Rules 1953.

ment whilst in detention, thus violating articles 5 and 9 of the UDHR (SUHAKAM 2003b: 84-5).

The Commission identified three root causes for the violations. First, the power to detain an individual was not accompanied by the right of a detainee to a fair and public trial. Second, there was a lack of safeguards built in the law to identify potential abuse of the power to detain without trial. Finally, detainees were not given the 'basic fundamental rights that are contained within the framework of the Constitution' (SUHAKAM 2003b: 85-8).

SUHAKAM therefore recommended that the government review the ISA and all other laws related to national security. The Commission proposed 'that the ISA be repealed and in its place, a new comprehensive legislation' should be enacted. This law should only be in force for a maximum of one year and its renewal has to be subject to parliamentary approval. Furthermore, the new law should 'take a tough stand on threats to national security (including terrorism) [while being in conformity] with international human rights principles' (SUHAKAM 2003b: 88).

5.3.3 Performance and Effectiveness

Malaysian human rights NGOs and lawyers praised SUHAKAM's review of the ISA, some calling it an 'incredible report'.[50] Former DAP MP and activist Kua Kia Soong stated that the review was a 'breakthrough in the long struggle by Malaysian human rights activists' (Malaysiakini 22 May 2003). SUHAKAM's review was indeed comprehensive, thorough and very critical. Moreover, the review paid attention to how Malaysian courts have interpreted the ISA, and SUHAKAM's analysis was informed by experiences of (former) detainees. SUHAKAM's recommendation for the enactment of another law providing for preventive detention was not to the liking of most NGOs, but it should be noted that many countries have such laws and that they do not necessarily contravene human rights.

The Commission rarely opened investigations into individual cases pertaining to preventive detention.[51] This was not, however, due to a different attitude towards actual than hypothetical cases; but because the Commission had no jurisdiction, as the grounds for detention were already subject to judicial review. In fact, the ISA and preventive detention remained a priority for SUHAKAM. With regard to cases involving the ISA, the Commission con-

50 Interviews with Malik Imtiaz Sarwar, 20 March 2006; Yap Swee Seng, 14 November 2006; Josef Roy Benedict, 16 November 2006. See also Malaysiakini, 10 April 2003; 11 April 2003; 12 April 2003.

51 Exceptions were two cases in 2008, which concerned the health of ISA detainees and their access to medical treatment. In one of these cases, SUHAKAM urged the authorities to review the detention order, as the detainee was paralysed and as such 'could not possibly pose a threat to national security' (SUHAKAM 2009: 38).

tinued to make visits to prisons where people were held, sometimes following a complaint from human rights NGOs but also at its own initiative (SUHAKAM 2002a: 19). SUHAKAM's general procedure with regard to ISA detentions was to interview detainees where possible, and generate publicity for the case by issuing a press statement (SUHAKAM 2002a: 66). In 2003, the Commission started examining other laws that allowed for preventive detention, such as the Dangerous Drugs (Special Preventive Measures) Act (1985) and the Prevention of Crime Act (1959) (SUHAKAM 2004a: 47). In 2005 and 2006, SUHAKAM organised a forum on the Right to an Expeditious and Fair Trial, which included representatives from government agencies, the judiciary, and the Malaysian Bar Council. Many of the recommendations concerning civil and criminal courts touched upon issues also addressed in the ISA report, such as compulsory legal aid and the right to counsel (SUHAKAM 2007c: 99-103).

Hence, there is a sharp contrast between the Commission's efforts when dealing with freedom of religion, and its efforts when dealing with the right to a fair trial. To evaluate SUHAKAM's performance with regard to the ISA, its efforts can be are checked against the three indicators of performance identified in section 1.2.3, namely: efficiency; quantity; and the perceptions of the groups which SUHAKAM is meant to serve. By these indicators, the Commission was efficient; as it produced a strong report in the face of minimal resources. Similarly, the Commission performed well in terms of quantity. In addition to the specific report on the ISA, the Commission also called continuously for the repeal of the ISA, and paid significant attention to the broader issue of preventive detention and human rights through other activities. Finally, many organisations and individuals were satisfied with the ISA review; indicating that SUHAKAM also performed well according to the third indicator of performance.

SUHAKAM's report on the ISA was not confined to the area of freedom of religion; it also included a far more comprehensive discussion of international human rights norms. Even human rights norms which did not apply to Malaysia, such as from the ECHR, were included. By contrast, when dealing with the right to freedom of religion, the Commission made only minimal reference to the UDHR. This suggests that the more an issue is accepted, both within the Commission and at a societal level, the Commission will reference international law. In such cases, the international human rights regime is an important resource to support SUHAKAM's argument.

The manner in which SUHAKAM presented and promoted the international human rights framework was very straightforward. The Commission did not use alternative frameworks to show the validity of the international norms in the Malaysian context. Rather, SUHAKAM seemed to suggest in its report that the validity of these norms was apparent in the Malaysian context. Once again, this indicates the extent to which the report on the ISA, as well as the wider issue of fair trial, was supported within the Commission.

The main reason for SUHAKAM's good performance in this area is that the review was conducted by knowledgeable and motivated staff and commissioners. Several of these were retired judges who, during their tenure, had come to know the ISA quite well, and had always been critical of the statute. The Commission knew it would increase its popular legitimacy by addressing this issue; and that opposition to its report would most likely only come from the government. Addressing the ISA was therefore a relatively safe choice. Conversely, not to have addressed the ISA would most likely have had a negative influence on the Commission's stature.

The next question is to what extent the Commission was effective. The main recommendation of the review was for the government to repeal the ISA and to enact another law in its place, which included adequate human rights provisions (SUHAKAM 2003b: 88-89). In September 2003, Rais Yatim of the Prime Minister's Department announced that the government was reviewing SUHAKAM's recommendations (Malaysiakini 9 September 2003). However, several months later Defence Minister Najib Abdul Razak said that the government had no intention of repealing the ISA, and defended its use – stating that 'prevention is better than cure'. Najib added that the government was open to reviewing certain procedural parts of the law, and that it had made amendments to the Penal Code based on SUHAKAM's review of the ISA (Malaysiakini 19 December 2003). The amendment concerned the inclusion of a chapter on offences relating to terrorism, so the government appeared to have picked up SUHAKAM's recommendation to enact specific legislation for terrorist issues. However, this made no sense as long as the ISA was still in place; leading simply to redundancy rather than legal certainty. The amendments had nothing to do with the primary recommendations of the Commission's report. Despite this, SUHAKAM welcomed the amendments as a potential step towards repealing of the ISA. The Commission did, however, express its concern about the absence of clear definitions, and the increase of life sentences from 20 to 30 years, which it regarded as 'excessive and without justification' (SUHAKAM 2004a: 167-9). So in the short run nothing seemed to have happened at all.

Malaysian civil society, however, remained strongly focused on the ISA and detention without trial, and used the Commission's report to put pressure on the government. A 2009 poll by the Home Ministry revealed that 93 percent of respondents wanted the ISA to be repealed. Later that year, Home Minister Hishamuddin Hussein announced that the government would propose amendments to the ISA, including the detention powers of the minister, the duration of detention, and the rights and treatment of detainees, as well as detention without trial in general. Hussein also said that the government's revision would take into account the strong public opposition to the law (Malaysiakini 24 December 2009). The Home Ministry organised a number of meetings at a governmental level to discuss the revisions to the ISA. SUHAKAM did not participate in these meetings. When SUHAKAM attempted, in 2008, to organise a 'closed-door discussion' about the ISA with the relevant government agencies,

including the Home Ministry, the invitees declined to attend (SUHAKAM 2009: 38).

SUHAKAM's review of the ISA clearly illustrates the temporal dimension of effectiveness.[52] In April 2012, Prime Minister Najib Abdul Razak finally announced the repeal of the ISA and, in line with SUHAKAM' s recommendations, presented its successor – the Security Offences (Special Measures) Bill. This Bill reduces the maximum investigative detention period from two years to 28 days (The Malaysian Insider 16 April 2012). SUHAKAM was not involved in the drafting of the Bill, however; and the Commission was only briefed on it two days before it was tabled in parliament (The Star 22 April 2012). In a press statement, SUHAKAM said it considered the repeal of the ISA a 'positive move towards the improvement of human rights in the country'. However, the Commission also expressed its concerns about some provisions in the Bill, including a lack of judicial oversight on extending a detention to 28 days; the provision that the police may deny a detainee access to legal representation for up to 48 hours; and that permits for the interception of communication may infringe on the right to personal liberty and the right to privacy.

It is unclear to what extent SUHAKAM contributed to the government's decision to take this step. It is certain that from a human rights perspective, the replacement of the ISA is an important step forward. The Commission's role has been one of being a partner in a larger and concerted effort by Malaysian civil society, which has pressured the government for several decades to abolish the law. Through its authoritative 2003 review, SUHAKAM has investigated and supported these claims, and legitimised them. Particularly in the Malaysian context of a relatively authoritarian government, SUHAKAM's role has therefore been quite significant.

5.4 SUHAKAM AND ADEQUATE HOUSING

5.4.1 The Right to Adequate Housing in Malaysia

The right to adequate housing is entrenched in several international human rights instruments, most notably the UDHR[53] and ICESCR;[54] as well as in other treaties, including CEDAW and CRC,[55] which Malaysia has ratified. At a national level, provisions regarding the right to adequate housing are limited. The Malaysian Constitution guarantees the right to property, which includes

52 See 1.2.3.
53 Art 25(1).
54 Art 11(1).
55 CEDAW Art 14(2) (h) and CRC Art 27 (3). Also see 1.3.

a provision on adequate compensation when land is acquired,[56] but does not refer to the right to housing.

There are three laws relevant for residential evictions in Malaysia. These are the National Land Code (NLC, 1965), the Essential (Clearance of Squatters) Regulations (1969), and the Land Acquisition Act (LAA, 1960, amended 1992). The NLC stipulates that ownership of land is established through registration, and that occupying land or buildings without permission is an offence.[57] Further, the NLC determines that squatters can be arrested without warrant, and contains no requirement for authorities to give residents notice before an eviction.[58] The NLC, together with the 1969 Essential (Clearance of Squatters) Regulations,[59] provides for the involvement of security forces during evictions.[60] Compensation – for the owners of the land, not for those using it – is provided for in the LAA.[61] However, this statute does not elaborate on what is understood by compensation.

As in so many other countries, housing is a major challenge in Malaysia. This is particularly true for low-income earners, who often cannot afford to rent or buy a house, and therefore build houses on land to which they hold no title. Such squatters are found mainly in urban areas, and by some estimates, numbered over half a million people in 1999 (SUHAKAM 2004b: 6), with some NGO representatives claiming the figures were as high as one to two million people (Ali 1998).[62] There is significant variation in squatter settlements. Some, particularly those whose residents have supported ruling political parties, are well-developed and having access to good infrastructure including water and electricity; while other settlements are marginal (Harding and Sharom 2007: 145-6).

The Malaysian government commonly regards squatter settlements as 'eyesores and a hindrance to development' (Abdul Kader 2011: 8). Since the 1990s, urban development has been actively pursued by the government; and as part of that process, squatter settlements have been targeted for clearance. Hence these communities have become increasingly subjected to evictions. In the lead-up to and during the evictions, squatters have often been subject to intimidation, threats and physical violence. Compensation received by squatters following an eviction is generally inadequate to cover the costs of relocation.

---

56 Art 13.
57 Section 425.
58 Section 426A (1) (c).
59 The Regulation was enacted during the 1969 Emergency, which was proclaimed following the race riots. After the end of the Emergency, the statute had been widely used to evict squatters.
60 NLC, Section 426(2) and Essential (Clearance of Squatters) Regulations, regulation 15.
61 Art 20 (b).
62 More recent academic work unfortunately does not include an estimate of the total number of squatters in present-day Malaysia (see also Hassan 2004: 114).

This section will look at how SUHAKAM has addressed the issue of the right to housing, specifically in cases of eviction within the Federal Territory of Kuala Lumpur[63] and surrounding areas (the state of Selangor). Squatter settlements in Selangor grew rapidly in the three decades from the 1970s, particularly after the introduction of the New Economic Policy (NEP).[64] Those who left their villages to live in urban areas were usually poor, landless, and with little education. In the absence of a government policy to provide them with housing, they had little choice but to use unoccupied land for building shelter (Sufian and Mohamad 2009: 112). During the tenure of Chief Minister Mohd Khir Toyo (2000-2008), the Selangor state government implemented a so-called Zero Squatter Policy, as part of the Vision 2020 (*Wawasan 2020*) Policy, which aims for Malaysia to be a fully developed and industrialised nation by 2020. The Zero Squatter Policy reduced the number of squatter households in Selangor from around 49,000 in 2005 to only 1,500 two years later (Sufian and Mohamad 2009: 109), by relocation of those concerned to rural areas, as well as by providing low-cost housing schemes.

According to some human rights activists, people who have occupied a plot of land for a long period can obtain rights to that land;[65] however the common law concept of adverse possession is not a part of Malaysian law. Malaysian courts have generally ruled that squatters hold no property rights, but are entitled nonetheless to reasonable compensation, and must be given proper notice to vacate the land (Sufian and Mohamad 2009: 118).

Squatters who vacate land voluntarily often receive little compensation. Only when they resist eviction and initiate legal proceedings are they able to claim some payment, either in cash or kind. Further, compensation in the form of rehousing usually occurs only when the squatters have been supporting the government (Harding and Sharom 2007: 146).

Although the state government has claimed that the Zero Squatter Policy was necessary for the development of the state (Bernama News 16 February 2005; Malaysiakini 20 December 2007), human rights NGOs have criticised the violence accompanying evictions (cf. Harding and Sharom 2007: 147), and denounced the lack of financial compensation for evictees. Arutchelvan Subramaniam, coordinator of NGO coalition JERIT, also commented that replacement housing is mostly inadequate:

> 'Often people have gardens, many squatter communities have livestock, and they cultivate vegetables. Then they are allocated a flat, but that [vegetable gardens;

63 In the Federal Territory, in addition to the three laws mentioned previously, the Federal Capital (Clearance of Squatters) By Laws 1963 and the Municipal Act 1963 also apply to the eviction of squatters.

64 The NEP was announced in 1970 and was a reaction to the 1969 riots. The goal of the NEP was the eradication of poverty, irrespective of race, through economic reforms. These reforms focused primarily on increasing the share of businesses owned by Malay.

65 Interview with Arutchelvan Subramaniam, 23 November 2006.

raising livestock] you cannot do in a flat. Some of them do fishing. They asked when they saw the flat: where do I tie my boat?'[66]

People are moreover often relocated to places far from where they used to live,[67] which makes going to work or school more difficult – or even impossible. This contradicts the definition of 'adequate shelter' in the 1996 Habitat Agenda, which holds that people should have easy access to work and basic facilities, including by public transportation, 'all which should be available at an affordable cost'.[68] Given these issues, evictions are clearly linked not only to the right to housing, but to several other human rights, including the right to freedom from fear, and the rights to work, healthcare and education. These concerns have often been raised by people threatened with eviction, as well as by representatives of human rights NGOs, who have frequently lodged complaints with SUHAKAM.

5.4.2 SUHAKAM and the Right to Adequate Housing in Kuala Lumpur

It is difficult to determine exactly how many complaints SUHAKAM receives annually regarding the right to housing in general, and eviction of squatter communities in particular. This is because SUHAKAM does not usually classify complaints within the category of housing.[69] Around 25 to 50 percent of complaints to SUHAKAM relate to land issues,[70] but only a small proportion of them concern evictions. Eviction cases are also often classified under 'complaints about government authorities' and 'police misconduct'. More than 30 percent of complaints per year fall within one of these categories, and a substantial number of them concern eviction. In June 2006, several NGOs submitted a memorandum to SUHAKAM regarding threatened eviction of sixteen squatter settlements in Selangor,[71] but the Commission did not respond.

The number of complaints about evictions did, however, prompt SUHAKAM to publish a special report on the issue, titled 'Adequate Housing: A Human Right', which developed from a 2004 seminar series concerning basic housing needs. This seminar series on adequate housing, and the subsequent report, brought together the experiences and suggestions of representatives from

66 Ibid.
67 As in the Kampung Berembang case, where relocation was offered 30 kilometres from the original site, see below.
68 Paragraph 60.
69 An exception was in 2004, when 19 out of 614 complaints were classified under this heading (SUHAKAM 2005: 126).
70 For instance in 2005, 396 out of 721 complaints related to land; and in 2006, the figure was 94 out of 412.
71 Interview with Arutchelvan Subramaniam, 23 November 2006.

government departments, NGOs, academics, and members of the Housing Developers' Association and the National House Buyers' Association.

The report started by summarising the relevant international human rights provisions regarding the right to adequate housing, including those mentioned in the UDHR, ICESCR, CEDAW and CRC; as well as General Comment No. 4 of the ECOSOC Committee and the Habitat Agenda. In the report, SUHAKAM emphasised Malaysia's obligation as a state party to CEDAW and CRC, and argued that while Malaysia has not ratified the ICESCR, the Commission

> 'is of the view that the provisions of the ICESCR, together with the jurisprudence developed by the UN Committee on Economic, Social and Cultural Rights through its general comments may be used as a guideline in determining the standards that Malaysia could aspire to achieve' (SUHAKAM 2004b: 2).

The report then examined Malaysia's National Housing Policy, which incorporated many of the core components of the right to adequate housing. These include affordability and maintenance of existing housing, as well as special attention to housing for low-income earners. SUHAKAM argued that while progress had been made in terms of access to affordable and quality housing, several concerns remained. These included the high degree of regulation of the housing market, which increases the cost of housing; the problems faced by house buyers, such as poor workmanship and abandoned housing projects; inefficiency in the distribution of low-cost housing; lack of accessibility to adequate housing by disadvantaged groups, including squatters;[72] and the need for a national housing policy drafted in cooperation with all stakeholders (SUHAKAM 2004b: 5-6).

According to SUHAKAM, the responsibility for the fulfilment of the right to adequate housing lies primarily with the state. This does not mean that the state has to build houses for everyone, or that houses have to be provided for free, but that the state has a duty to provide its citizens – and specifically, its disadvantaged citizens – with ways to access housing. In addition, SUHAKAM argued that the realisation of the right to adequate housing is a process, which means that in any case the state should refrain from 'certain practices which violate the right' and that the state should always allocate the maximum available resources to housing, even in times of economic recession (SUHAKAM 2004b: 37-9). Here, SUHAKAM seemed to allude to a duty to allocate a specific percentage of the yearly budget to housing.

In its report SUHAKAM repeatedly acknowledged the efforts of the state, including the existence of a national housing policy, the availability of services

72 Disadvantaged groups identified in the report are the disabled, indigenous peoples, children, elderly, plantation workers, urban settlers including squatters, new villagers (people from isolated villages relocated to designated new areas or 'New Villages' during the 1948-1960 Emergency) , transit-home communities (former squatters sent to live in long houses while waiting for completion of their permanent homes), migrant workers and single mothers.

and infrastructure, and the financial measures introduced by the government to assist people to purchase a house. However, the government's efforts have not always been successful, given delays and even abandonment of housing projects, inadequate supply of water and electricity, delays in the issuance of land titles, insufficient attention to open spaces and recreational facilities, and a lack of safety including high incidences of crime in some areas. Moreover, housing remains generally too expensive for low and middle-income groups, even with the financial support which the government provides. A specific point of critique is the lack of legal enforceability of the Universal Guidelines on Planning and Development (*Garis Panduan Perancangan dan Pembangunan Sejagat*), which include provisions regarding low-cost public housing as well as housing for the disabled and elderly (SUHAKAM 2004b: 49-55).

Whenever SUHAKAM's seminars and written report mentioned squatters' settlements, these were typically referred to in a dismissive manner. This was most evident in the opening speech of the seminar series by Vice Chairman Simon Sipaun, who said the following:

> 'There are 1,032 squatter settlements in Malaysia. This creates a bad image for Malaysia […] High-density areas and poorly constructed houses are not only ugly to the eye, but bring about various problems such as crime, infectious diseases and so on. Therefore the efforts of the State to relocate this group to housing areas that are more comfortable through the Zero Squatter Policy are highly commended.' (SUHAKAM 2004b: 72)

Elsewhere in its report, SUHAKAM stated that the Zero Squatter Policy is 'well-intended' (SUHAKAM 2004b: 50). The Commission noted, however, that in practice the policy has been misused and has led to abuses; thus differentiating between the Policy itself and its implementation. Nonetheless, the Commission conceded that eviction of squatters threatens the 'legal security of tenure of their *homes*' (SUHAKAM 2004b: 54, emphasis added). This interpretation is in line with the judicial opinion that squatters cannot exert claims on the land they occupy, but do have a right to adequate compensation or alternative housing. At the seminar, representatives of the government and academia shared this opinion.[73]

While SUHAKAM's report regarding adequate housing covered a wide range of issues, it was not a strong response to the challenges in this field of human rights. A substantial component of the report discussed problems faced by house buyers, such as delays during construction, poor-quality building materials and crime prevention; or issues affecting specific groups such as

73 Mutallib bin Jelani, Director General of the Peninsular Malaysia Department of Town and Country Planning (SUHAKAM 2004b: 21), and Razali Agus, Deputy Vice Chancellor, University of Malaya (SUHAKAM 2004b: 34).

the disabled and elderly. While these are legitimate problems, they are not at the core of the right to adequate housing. Conversely, the report paid very little attention to the challenges faced by squatter communities, and only one of the presentations during the seminars focused on this issue.[74] A presentation about the accessibility of housing for disadvantaged groups did not even mention squatters, and nowhere in the written report did SUHAKAM call for adequate compensation, nor comment on the often violent ways in which evictions are conducted. Rather, the report indicated that SUHAKAM considered squatter communities to be impeding Malaysia's development. In no way did the report address the needs of squatters, nor did it address any of the key issues raised in cases of forced eviction brought to the Commission's attention.

These shortcomings of SUHAKAM with regard to forced evictions were evident when I conducted fieldwork in Kuala Lumpur in 2006 and observed the lodging of complaints to SUHAKAM. Analysis of the cases below reveals not only how SUHAKAM dealt with eviction issues, but also how SUHAKAM's written report on housing helped determine its behaviour.

On 21 November 2006, SUHAKAM received a complaint from residents and NGO representatives about the eviction of Kampung Berembang. Home to approximately 500 residents, including some who had lived in the settlement for more than thirty years, this *kampung* was situated in the Ampang district, about ten kilometres from the centre of Kuala Lumpur. In 2005, residents had been notified of the local government's intention to clear the land and build high-rise flats. As compensation, residents were offered temporary accommodation in Puchong, approximately 30 kilometres from Kampung Berembang. Residents attempted to negotiate with the local government and developer, assisted by representatives from NGO coalition JERIT (*Jaringan Rakyat Tertindas*, Oppressed People Network) and the Socialist Party of Malaysia (*Parti Sosialis Malaysia*, PSM). Eventually this led to a lawsuit against the developer, regarding ownership of the land.[75] The residents appealed to the local authorities to postpone eviction until the court decision had been announced and permanent houses had become available. They also appealed to the Prime Minister's department, which issued a letter requesting the Selangor Chief Minister to postpone the eviction. The latter, however, overruled the letter; and the eviction remained scheduled for 20 November 2006. On the day of the eviction, residents and NGO representatives called on SUHAKAM for assistance, and

74 Arutchelvan Subramaniam, Housing Rights and Vulnerable Groups – the NGO Viewpoint (SUHAKAM 2004b: 197-210).

75 In December 2007, the court ruled that the developer did not have ownership of the land and therefore was not authorised to demolish the settlement. The court then ordered the developer to pay damages and other costs (such as relocation costs) to the residents. According to NGO representatives this outcome was influenced by the persistence of the residents of Kampung Berembang (Malaysiakini 14 December 2007). Elsewhere (Ali 1998; Harding and Sharom 2007) it has also been argued that in general compensation is only given to people who are willing to put up a fight.

commissioner Siva Subramaniam came to Kampung Berembang to ask the authorities to delay the eviction – to no avail. The eviction, conducted on the basis of the 1969 Emergency (Clearance of Squatters) Regulation, led to the arrests of 23 activists and residents, many of whom sustained injuries inflicted by the police and RELA.[76] Reporters were harassed, and ordered to delete pictures from their cameras. Commissioner Subramaniam then invited the residents to lodge a formal complaint to SUHAKAM the following day, in the presence of the media.

When the residents and NGO representatives brought their case to SUHAKAM, Subramaniam spoke on behalf of the commission and condemned the violence used by the authorities, stating that they had 'abused their powers'. He promised to discuss the matter with the Selangor State Minister of Housing and Local Government. Moreover, he acknowledged that the eviction of urban settlers was an issue of concern for SUHAKAM; but also that the Commission had to remain neutral: 'we cannot choose sides'.[77]

In this particular case, the resistance to the eviction was well-organised. Residents cooperated with representatives of NGOs and political parties to challenge the eviction, by appealing directly to the authorities, initiating court-proceedings, attracting media attention,[78] and by involving SUHAKAM. Calling for help from the Commission was part of a wider strategy, rather a single attempt to address the plight of the residents. The presence of a SUHAKAM commissioner at the site of eviction served to demonstrate that the residents had support from an independent state body. While Subramaniam could not prevent or delay the eviction, his invitation to lodge a formal complaint gave residents and NGOs the opportunity to present their case to a wider audience. During the subsequent meeting, Subramaniam emphasised the use of force by the police and RELA during the eviction, and suggested that this might lead to a public inquiry; however, for this purpose more evidence was required, such as photos and video recordings. Later, SUHAKAM decided not to open an investigation into the Kampung Berembang case, because it would have no jurisdiction pending court proceedings.[79] This argument was used rather selectively, for in the Kundasang Public Inquiry[80] SUHAKAM had addressed

76 The Association of Volunteers of the Malaysian People. See 4.3.2.

77 Interview, 21 November 2006.

78 The case of Kampung Berembang was also well-documented by independent online news portal Malaysiakini.

79 Interviews with Siva Subramaniam, 21 November 2006; and Nurul Hasanah, 14 December 2006.

80 In May 2003, villagers from Desa Monteiki, Kundasang (Sabah) were evicted from agricultural land that they had occupied and cultivated since 1985. They had done so with the approval of the head of the local government. The villagers were evicted by police officers to make way for a company which had claimed ownership. A few days later, eighteen villagers were arrested. SUHAKAM opened an inquiry into the case in December. The Panel appointed to conduct the inquiry was of the opinion that it could not address the issue of which party (the villagers or the company) was entitled to the land. Rather,

excessive use of force by the authorities in a similar situation.[81] That this was not done in the case of Kampung Berembang is likely to be related to the negative perception of urban squatters held by the majority of commissioners, as well as the existence of legislation allowing for customary land claims in Sabah.[82]

On 22 November 2006, one day after SUHAKAM received the complaint about the eviction of Kampung Berembang, another eviction case was brought to the Commission. Referred to as Kampung Chubadak, the case actually included four settlements in the Kelang Valley outside Kuala Lumpur – Kampung Chubadak; Rumah Panjang Jinjang; Rumah Panjang Rawang; and Ampang Mewah – which were to be cleared during construction of a highway. The eviction would affect around 3,000 families, some of whom held title to the land they occupied, but most of whom held only Temporary Occupation Licences. In April 2006, residents had been notified of the eviction and local authorities had promised to help with relocation. However, by July the Kuala Lumpur City Council had done nothing, so residents initiated court proceedings against the Council, in which they claimed 'reasonable and just' compensation. Their claims referred to promises by the local government to give land titles to some residents 40 years ago. On November 15th 2006, although the case had not yet appeared before the judge, authorities started demolishing the settlements – which was when residents appealed to SUHAKAM. Their memorandum was received by Siva Subramaniam, who said the Commission would 'study' the complaint and address the issues with the relevant authorities. Subramaniam criticised the use of the term 'squatter' by the authorities, which in his opinion only applied to people who had been occupying the land for less than six months; he claimed that after six months' occupation, people should be regarded as permanent residents (*penduduk kekal*). He also urged residents to deal with the authorities collectively, rather than individually. SUHAKAM then contacted the authorities, but took no further action when the eviction was carried out two weeks later.

There is a difference in the way SUHAKAM addressed the cases of Kampung Berembang and Kampung Chubadak. The former seemed to be taken far more seriously, as indicated by the two visits paid by SUHAKAM representatives to the site, and their attempt to negotiate directly with authorities. In contrast, the Kampung Chubadak residents received much less attention. The reason lies most likely with the high degree of self-organisation of the Kampung Berembang residents, who from early on had cooperated with NGO represent-

---

it focused on the treatment of the villagers in detention. In its inquiry, SUHAKAM found that conditions under which the villagers had been detained 'infringed human rights provisions providing for the humane treatment for detained persons' (SUHAKAM 2004: 40-8).

81 According to senior officer Nurul Hasanah, this was considered by the Commission. Interview, 14 December 2006.

82 Such legislation is also available in Sarawak. See 5.4.3.

atives, and whose appeal to SUHAKAM was part of a broader strategy. The Kampung Chubadak residents did bring a case to court, but on the whole could not muster similar resources: few attended the lodging of their memorandum, and their case attracted far less media coverage. Nonetheless, the basic approach to these cases was similar. SUHAKAM generated media attention during the lodging of complaints,[83] emphasised the need for the authorities to refrain from the use of force, and emphasised the need for compensation, replacement housing, and the right to adequate housing in general. It did not open investigations, allegedly because both cases were still subject to court proceedings. As already noted, SUHAKAM took a different approach in an eviction case in Sabah. The Kundasang inquiry suggests that SUHAKAM could have looked into elements relating to the eviction which were not subject to court proceedings, such as the excessive use of force by the authorities. That this was not done demonstrates that the Commission deals with the right to adequate housing selectively, and has been reluctant to comprehensively address forced evictions of squatters in Selangor.

5.4.3 Performance and Effectiveness

While SUHAKAM's report on the right to adequate housing included a discussion of relevant international human rights norms, it paid little attention to disadvantaged groups. The report also did not include a review on the legislation relevant to housing or the lack thereof – such as a constitutional provision of the right – but rather, presented squatter settlements as a problem that needs to be solved, without providing guidelines on how to achieve this from a human rights perspective. SUHAKAM commissioners themselves have also been critical of squatters, some even going so far as to claim that squatters create a bad image for Malaysia. Taking these perspectives into account, it is of little surprise that the Commission is not inclined to forcefully promote the right to adequate housing for the benefit of squatters.

Likewise, SUHAKAM's approach in individual eviction cases does little to support human rights. While SUHAKAM has generated media and public attention for these cases, the Commission has not opened any related investigations. Neither has SUHAKAM paid much attention to the eviction laws violating human rights principles, such as the 1969 Emergency (Clearance of Squatters) Regulation. Only in October 2007 did SUHAKAM call for a repeal of this Regulation – more than three years after the publication of the report on adequate housing.

The manner in which SUHAKAM has positioned itself with regard to adequate housing contrasts starkly with the actions taken by the Commission

83 In the case of Kampung Berembang more attention was generated as the residents and NGOs had done this beforehand and several journalists were present at the eviction.

with regard to the provisions of the ISA and associated issues.[84] While the ISA was addressed comprehensively, the right to adequate housing was not. Such disparity can be explained by considering the strong support for the ISA inquiry from individual SUHAKAM members; support that was not apparent in the case of adequate housing. As discussed earlier in this Chapter,[85] a majority of commissioners regarded squatter settlements as undesirable, and as an impediment towards Malaysia's development. Even Commissioner Siva Subramaniam, who regularly addressed eviction cases and was generally regarded by NGOs as a more progressive member of SUHAKAM, stated that 'squatters are illegal occupants and therefore cannot claim any right to land'.[86] This position contradicts General Comment no.4 on the right to adequate housing, which includes legal security of tenure as an essential component of the right, and argues that 'states parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection'. Given that statement, SUHAKAM would be expected to consider the security of tenure of squatters as a priority.

Evictions, at least where they concern urban squatters, receive little attention from SUHAKAM. In the 2006 Annual Report, no reference was made to either Kampung Berembang or Kampung Chubadak. This is in contrast to cases involving customary land rights, such as the eviction in Bintulu, Sarawak, in which SUHAKAM visited the area, negotiated with the authorities, and managed not only to delay the eviction for six months, but obtained a commitment from the authorities to provide interim accommodation for residents (SUHAKAM 2008: 209-10). A reason for these different approaches can be found in the existence of state legislation in Sabah and Sarawak which allows for customary land claims. SUHAKAM commissioners heading the Sabah and Sarawak offices argued that these legal bases make it easier for SUHAKAM to address such cases.[87] This also means that the lack of legal provisions regarding the rights of squatters, and tenure security in general, has significantly limited SUHAKAM's operations in this area.

In sum, SUHAKAM's performance in this field has been largely inadequate. The few efforts made by the Commission have been half-hearted, falling short in terms of efficiency and quantity, and leaving NGO representatives and individual complainants unsatisfied. In the field of adequate housing, SUHAKAM's actions – or lack thereof – appear to be driven largely by the personal beliefs of commissioners (which was also apparent with respect to freedom of religion). In the case of housing, the dominant perception among commissioners – that squatters do not hold title to the land, and cannot exert

84 See 5.3.3.
85 See 5.4.2.
86 Interview with Siva Subramaniam, 21 November 2006.
87 Interviews with Simon Sipaun, 5 November 2006; and Hirman Ritom Abdullah, 21 November 2006.

any claims over it – is not in accordance with international human rights norms regarding the legal security of tenure. As such, SUHAKAM has not been effective in furthering the realisation of the right to adequate housing.

In 2008, several developments occurred which were favourable to squatters in Selangor. The State Government announced it would grant land titles to long-term urban settlers (Malaysiakini 7 April 2008), and during a meeting with NGO coalition JERIT, the state government member for Housing, Building Management and Urban Pioneers, Iskandar Abdul Samad, announced that all evictions would be halted and eviction notices would be withdrawn. The state government member for Local Government, Ronnie Liu, added that all court cases against settlers would be withdrawn, and the government would not use the 1969 Emergency (Clearance of Squatters) Regulation (Aliran 11 April 2008). Since the announcement, there have been no reports regarding evictions in Selangor. These developments were a direct result of the election of the Pakatan Rakyat (PR) as the government of Selangor; a party which tends to be more responsive towards human rights issues than Barisan Nasional (BN).[88] Further, members of PR had been actively involved in eviction cases, usually in their capacity as representatives of NGOs. PR's election win meant that those concerned with squatter settlements had more direct access to their new state government, which made lobbying for changes to policies and practices easier. This means also that SUHAKAM has been overtaken by new political realities not of its own making.

5.5 Conclusion

This Chapter has demonstrated how SUHAKAM deals with different fields of human rights in dissimilar ways. Regarding freedom of religion, SUHAKAM has avoided the issue as much as possible. Regarding the right to adequate housing, the Commission published only a superficial report; while on the right to a fair trial and the ISA, it published a thorough report based on extensive research and two public inquiries. These marked differences are also evident in the extent to which SUHAKAM has promoted international human rights provisions more generally. In the area of fair trial, the Commission has gone so far as to make reference to provisions that do not apply to Malaysia; whereas on the issue of adequate housing it has explained the right in ways which differ from internationally argued human rights interpretations; and on freedom of religious it has kept completely silent.

The differences in SUHAKAM's behaviour are related in part to characteristics of the three rights concerned. The right to a fair trial distinguishes itself from the rights to adequate housing and freedom of religion in having a strong vertical dimension, meaning that it is concerned primarily with the relation

88 See 4.3.3.

between the state and individual, and demands first and foremost that the state abstains from certain acts. The freedom of religion, on the other hand, requires a more active approach from the government, and is related closely to the behaviour of citizens of different religious denominations towards one another. The right to adequate housing implies a similar combination of action and abstinence on the part of the state. Also, the right to a fair trial is relatively uncontested, whereas the right to adequate housing (where it concerns squatters) is controversial in the eyes of 'development' oriented elites – including most of SUHAKAM's members – and freedom of religion is extremely sensitive. In the specific context of Malaysia, the right to a fair trial in general, and the ISA in particular, has moreover been a long-term concern of human rights NGOs and political parties, which provided SUHAKAM with influential allies.

In their attempts to close the gap between international human rights provisions and national norms and practices, NHRIs are supposed to combine support for international guidelines with an understanding of local and cultural differences. SUHAKAM has done so by replicating international human rights norms in the Malaysian social-political space. Mediation between international and national norms then happens primarily – in the terminology of Merry (2006) – through appropriation. However, the differing degrees to which SUHAKAM refers to international human rights frameworks illustrates clearly the balancing act many NHRIs have to perform. The more a field is accepted as a human rights concern domestically, the more freedom an NHRI has to refer to international human rights norms, even those which do not legally apply to the country. It can be assumed that referring to, and promoting, international norms in sensitive areas would put SUHAKAM at risk of alienating stakeholders, which would be detrimental for its long-term goals, as it would close avenues for dialogues with those groups. Conversely, SUHAKAM's willingness to take this risk in the case of the ISA can be explained by the relative acceptance of the issue as a human rights concern, by a cross-section of Malaysian society and parts of the political elite.

In the three areas of rights discussed in this Chapter, SUHAKAM does not translate international human rights norms in the sense that they are rephrased within local and cultural frameworks. SUHAKAM staff and commissioners are very much aware of the difficulty of this in a plural society such as Malaysia. As in Indonesia,[89] choosing a particular cultural framework in the Malaysian context would at best alienate certain 'cultural groups', and at worst make them hostile to the Commission. Moreover, promoting human rights based on laws that apply to everyone, irrespective of ethnicity, also resonates with the Commission's goal to contribute to national unity and harmony.

The extent to which a particular field of human rights is addressed, and the way in which this is done, therefore depends on the dominant interpreta-

89 See 3.5.

tion of a right amongst commissioners; which tends to be a reflection of how an issue is perceived at the level of the political elite.[90] Hence SUHAKAM has been willing to address the violent nature of eviction of squatter settlements, but not their lack of tenure security. Similarly, widespread aversion to police violence explains SUHAKAM's thorough review of the ISA. SUHAKAM's reluctance to address issues pertaining to the freedom of religion is related to the views of individual commissioners on this issue, and also to their preference to avoid conflict, which is expressed as the requirement of 'neutrality'. This illustrates that human rights are indeed a contested concept, even within an organisation which is assumed to support international interpretations of those norms unequivocally.

The different ways in which SUHAKAM has dealt with human rights has had far-reaching consequences for the Commission's performance. In the field of the right to a fair trial, performance has been good; but with regard to adequate housing it has been unsatisfactory. In the area of freedom of religion it has been almost non-existent. This varying quality of performance means also that on the whole, the Commission has only been partially effective.

However, the limitations of SUHAKAM's performance and effectiveness do not mean that the Commission is irrelevant. Even in cases where SUHAKAM has been unwilling to open an investigation (as in the case of religious freedom), it remains available to accept complaints. This opportunity is usually helpful to complainants and their representatives, as it encourages media attention and therefore public support for their problem. While SUHAKAM's performance to date remains well below its potential, in providing a platform for activism the Commission has contributed to human rights awareness and provided a social space for debate.

90 See 4.3.1.