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

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Citation

Setiawan, K. M. P. (2013, December 12). *Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia*. Meijers-reeks. Leiden University Pres, Leiden.
Retrieved from <https://hdl.handle.net/1887/22838>

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Title: Promoting human rights : National Human Rights Commissions in Indonesia and Malaysia

Issue Date: 2013-12-12

Summary

This doctoral thesis concerns the National Human Rights Commissions (NHRCs) of Indonesia and Malaysia (KOMNAS HAM and SUHAKAM). This research focuses on how both NHRCs have performed their tasks, and to what extent they have made a contribution to the realisation of human rights, as well as on the factors which have influenced these processes.

Chapter 1 starts with an introduction of National Human Rights Institutions (NHRIs), the wider category of organisations to which NHRCs belong. NHRIs are advisory bodies that have been established by their respective governments, but which operate independently. Their mandate includes human rights education, the study of (inter)national law, and investigation of human rights violations. Since the 1990s NHRIs have grown rapidly in number. The general assumption is that NHRIs, due to their unique position between state and society, can function as a bridge between the two. In so doing, they can play an important role in the embedment of international norms in national contexts, in turn contributing to the realisation of human rights. Inevitably, this raises the question of the extent to which NHRIs fulfil their promises.

The NHRCs of Indonesia and Malaysia are interesting case studies of NHRIs, as they operate in countries with a weak human rights record, and a history of authoritarian rule where human rights have often been contested both by the state and societal groups. As such, the experiences of KOMNAS HAM and SUHAKAM may generate insights into the role and potential of these organisations in general. For reasons of feasibility, the choice was made to look at how these NHRCs have addressed three rights in particular, i.e. the rights to freedom of religion, fair trial, and adequate housing.

The theoretical framework upon which this research is based comprises two parts. The first concerns human rights. Human rights are generally considered to be valid for everyone: they are universal. Although this idea has become hegemonic at the international level, these norms remain contested and their implementation is difficult. This means that if NHRIs are to be successful, they need to be mediated between conflicting groups. The goal of this mediation process is that human rights will be accepted and considered to be just, both at the level of the state as well as in society. Anthropological research on human rights has shown that the embedment of human rights norms can take place by translating them to national and local contexts by using frameworks based on culture, religion or local history.

The second part of the theoretical framework builds on the assumption that if NHRIs are to be successful in the promotion of human rights, they must be successful as an organisation. As such, it is important that NHRIs perform well, which means that they adequately translate their tasks into activities. This process is primarily influenced by internal factors, such as human, financial and material resources, but is also determined by internal behaviour and relations of staff, commissioners and the organisation's leadership. The better an NHRI performs, the more likely it is that it will be effective. Effectiveness is defined as the extent to which the organisation achieves its goals. In the case of NHRIs, this refers to their contribution to the realisation of human rights. Effectiveness is primarily determined by external factors, as the implementation of NHRIs' advice is dependent on other organisations and the more general socio-political context.

Chapter 2 describes the development of the Indonesian NHRC, KOMNAS HAM. At the time of its establishment (1993), there were few expectations of the Commission, as the Suharto regime was systematically abusing human rights. In addition, KOMNAS HAM was given a limited mandate and a weak legal status, and it was chaired by a retired general. Against all odds, KOMNAS HAM developed into a critical organisation and conducted a number of investigations into human rights violations involving the army. While Indonesia's human rights situation on the whole did not improve, KOMNAS HAM gained the trust of NGOs and the public at large.

The resignation of Suharto in 1998 saw the beginning of many reforms in Indonesia. The position of KOMNAS HAM was improved by the 1999 Human Rights Law, and its mandate was broadened by way of the 2000 Human Rights Courts Law. The improvements of the Commission's mandate, together with the positive changes in the socio-political environment, led to higher expectations of KOMNAS HAM's effectiveness.

In practice, however, KOMNAS HAM has not been able to meet these expectations. The functioning of the Commission has been influenced negatively through the politicisation of commissioners. The enactment of the Human Rights Law established a procedure by which commissioners are selected by parliament, a method preferred by international organisations. In practice, the selection process seems to be influenced by political considerations and personal preferences, rather than the quality of the candidates. As such, relationships have developed or deepened between commissioners and the groups that have voted them into KOMNAS HAM. This has led to situations in which some commissioners have been inclined to protect the interests of these groups – sometimes in direct contradiction to the protection of human rights.

Despite the positive changes that have taken place in Indonesia since 1998, the external environment of KOMNAS HAM still poses many challenges. The Commission faces resistance from amongst others the security forces and the Attorney General's Office. In addition, many political parties remain reluctant to support human rights reforms. This means that the context in which KOMNAS

HAM operates remains challenging, and that the Commission struggles to translate its recommendations into tangible results.

Chapter 3 examines how KOMNAS HAM has approached certain civil and political rights, as well as social and economic rights. KOMNAS HAM has opened very few investigations into violations of the right to freedom of religion, as this is a highly controversial topic within the Commission. Nevertheless, some commissioners have been able to generate enough support to publish two reports related to this right: respectively concerning interreligious marriage and the civil registry. While the report on interreligious marriage was not effective, the report on the civil registry yielded results. The draft law included with that report was largely incorporated into the Law on the Administration of the Population (2006); meaning that there is now the possibility for interreligious marriages to be legally recognised.

With respect to the right to a fair trial, KOMNAS HAM has dealt indirectly with this right, by opening investigations into gross human rights violations in which the organisation focused on associated rights, such as the freedom from torture and enforced disappearance. However, KOMNAS HAM has paid little specific attention to the right to a fair trial. This can be explained partly by the Commission's stated opinion that fair trial is the responsibility of other organisations, such as parliament and the Judicial Commission. In addition the Commission has avoided the issue because it has been of the opinion that there is little chance of successfully addressing this right. Based on this argument, KOMNAS HAM chose not to participate in developing a proposal to amend the Code of Criminal Procedure.

Since its establishment, KOMNAS HAM has received many complaints regarding forced evictions in Jakarta. In general the Commission has responded to these complaints by opening investigations, and offering mediation between residents and the organisations demanding the eviction. Nevertheless, NGOs have criticised KOMNAS HAM for not dealing with the right to adequate housing in a more structured way. In 2008 KOMNAS HAM addressed this criticism by publishing a report about the Regional Regulation regarding Public Order (2007). The Commission recommended that the Regulation be abolished, but authorities did not comply. Nevertheless, forced evictions in Jakarta have since declined; and discussions have begun, including within the regional government, regarding abolishing the Regulation.

In the three areas of human rights discussed, KOMNAS HAM has consistently referred to international human rights norms and used these as a starting point for its recommendations. As such, the Commission complies with the expectations of NHRIs at the international level. In its work, the Commission has generally used a legal framework. This is a deliberate choice, as KOMNAS HAM is of the opinion that alternatives may evoke resistance from groups that do not identify with those other frameworks. The decisions made by KOMNAS HAM offer new insights into how human rights can be promoted, and highlight

questions about assumptions that alternative frameworks are usually well-suited to this end.

The performance of KOMNAS HAM has been strongly influenced by the initiatives of individual commissioners. Without these initiatives, the reports discussed in this research would not have been realised. This illustrates the important role that individual commissioners can play.

The performance of KOMNAS HAM has resulted into various degrees of effectiveness. The extent of effectiveness is influenced by both internal and external factors. As for the latter, effectiveness has depended in part on how other organisations have responded to KOMNAS HAM's reports. In particular, the positive results achieved by KOMNAS HAM with its report on the civil registry illustrate that likelihood of success is increased when the Commission (or an individual commissioner) can build on existing priorities of government and political institutions.

Chapter 4 describes the development of the Malaysian NHRC, SUHAKAM. The Commission's establishment (1999) was not transparent, and commissioners were chosen by the Prime Minister. Opposition parties and NGOs therefore had few expectations of SUHAKAM, but the Commission surprised observers by taking a critical stance towards the government on issues which are politically controversial, as well as those which relate to the relationship between the state and individual citizens, such as freedom of assembly and police violence.

However, the Commission has positioned itself differently in cases with a religious or ethnic character. In such cases, SUHAKAM has refused to start investigations. An important reason for SUHAKAM's reluctance to address more controversial cases is that commissioners have regarded the promotion of harmony between ethnic groups in Malaysia as a priority. Most commissioners are of the opinion that it is better to avoid controversial cases altogether. In addition, any action which fuel ethnic tensions, which could be triggered by a SUHAKAM investigation, is considered a criminal act in Malaysia.

SUHAKAM's most prominent challenge is its external environment. Since the establishment of SUHAKAM, this issue has barely changed: the government is still in the hands of the same dominant political group, and it is reluctant to further human rights reforms and generally ignores SUHAKAM's recommendations. In addition the government has tried to influence the functioning of the Commission through its appointment procedure – as the tenure of outspoken commissioners has not, in general, been renewed. While in 2009 the appointment procedure has been somewhat improved following amendments to the Human Rights Commission of Malaysia Act, the process still lacks transparency, and doubts remain regarding the Commission's independence.

Chapter 5 discusses how SUHAKAM has approached the rights of freedom of religion, fair trial and adequate housing. While SUHAKAM has regularly received complaints regarding religious freedom, the Commission's response to such cases has been very limited. A decisive factor in the response to these

cases is how they relate to the position of Islam, which is the religion of the majority in Malaysia. An additional complication is that religion is closely associated with ethnicity, and as such SUHAKAM prefers to ignore such cases. Within the Commission most commissioners are of the opinion that national laws regarding religion are just – even when they contravene international human rights norms.

While the right to freedom of religion is controversial, the right to a fair trial is not. In 2002 SUHAKAM started research into the Internal Security Act (ISA). The ISA was one of Malaysia's most controversial laws. The Commission issued a highly critical report in which it argued that the ISA does not comply with international human rights standards. The recommendation by SUHAKAM to replace the ISA with another security law was initially ignored by the government. Nevertheless, SUHAKAM reiterated its concerns regarding the ISA, together with many NGOs, lawyers and opposition parties. In 2012 the government conceded and repealed the ISA.

SUHAKAM also receives many complaints regarding forced evictions. In 2004 the Commission published a report on the right to adequate housing. The report indicated that SUHAKAM has little sympathy for people faced with forced eviction. The report argued that slum residents who complained about eviction affected the image of Malaysia negatively, and it linked such evictees with crime and infectious diseases. In addition, SUHAKAM has conducted few investigations into forced evictions. SUHAKAM's limited actions with regard to the right to adequate housing can be explained by the backgrounds and individual opinions of commissioners, who often perceive that the urban poor are illegal occupiers of land, and therefore do not have the right to exert any claims on that land or the houses that they occupy.

SUHAKAM thus takes quite different positions with respect to rights, depending on the right in question. These different approaches are linked to the natures of the different rights: for example SUHAKAM does not have any problems when it comes to fair trial rights, which mainly impose requirements on the state. In contrast, the right to freedom of religion is closely associated with the relationships between different societal groups, and SUHAKAM has demonstrated more reluctance to become involved in this area.

A second factor which influences whether and in what way SUHAKAM takes action about a particular right, is the extent to which that right is accepted by Malaysian society. The right to freedom of religion, for example, is highly controversial. The right to adequate housing is also not generally accepted by commissioners. As a consequence, SUHAKAM has developed few activities in either of these cases. In contrast, the societal disapproval of the Internal Security Act helps explain the Commission's detailed research into and criticism of the Act. The extent to which a particular right is accepted by society also influences the extent to which the international human rights discourse is used and referenced by the Commission, during its efforts to address that right. This was especially remarkable in the context of the right to fair trial,

when SUHAKAM's report on the ISA referenced international norms which are not actually applicable in Malaysia. In contrast, when rights are less accepted by society, international norms are not cited by SUHAKAM.

SUHAKAM has primarily used a legal discourse. Cultural and religious frameworks have been avoided, as the Commission is concerned not to raise societal resistance. In addition, SUHAKAM has preferred the use of legal frameworks because they apply to all Malaysians, irrespective of their ethnic or religious background.

Chapter 6 compares the performances of KOMNAS HAM and SUHAKAM, their effectiveness, and the conclusions that can be drawn from the findings of this research to apply to NHRIS in general. When the performances of SUHAKAM and KOMNAS HAM are compared, it is evident that both Commissions have addressed different human rights in different ways. The most important factor influencing the Commissions' decisions about whether to address a particular right appears to be the extent to which a right evokes controversy in society. Strong societal resistance to a particular right is more likely to discourage the Commissions from addressing that right, than when the right is being strongly resisted politically. This illustrates that human rights are often contested even within the organisations that are supposed to promote these norms.

Although human rights remain contested within the Commissions, both Commissions have also cited international norms a part of their work, and have based many of their recommendations upon these norms. This suggests that the international human rights system is important for such cases, even in authoritarian countries.

As said above, in promoting international human rights, both KOMNAS HAM and SUHAKAM have avoided using alternative frameworks. This choice appears to have been made by both organisations due to their concern that the use of alternative frameworks could lead to alienation of groups which do not identify themselves with those particular frameworks or ideas. Both KOMNAS HAM and SUHAKAM want to be regarded as national organisations which do not associate themselves with a particular ethnicity or religion. As a consequence, they have chosen legal discourses rather than other approaches. This indicates that the use of alternative frameworks may be less suitable for NHRIS in pluralistic countries. The use of international human rights norms by both Commissions indicates that these norms are accepted voluntarily and have not been imposed by external organisations.

There are also important differences between the performances of the two Commissions. The performance of KOMNAS HAM is strongly dependent on individual initiative, whereas SUHAKAM's is not. This can be explained by the different organisational structures of the two Commissions. In particular, KOMNAS HAM allows individual members to develop activities to address rights issues, while this has not been permitted for members of SUHAKAM.

A second difference is that the direct, external influence on KOMNAS HAM is larger than that exerted on SUHAKAM. External influence refers to the extent

to which other individuals or groups try to influence the operations of a NHRI. The differences in external influences between KOMNAS HAM and SUHAKAM can be explained by the appointment procedures in place, which in the case of KOMNAS HAM have become politicised. In the case of SUHAKAM, the external influence is smaller. While the Prime Minister has a considerable influence in the appointment procedure, there are no indications that he has directly influenced the functioning of SUHAKAM.

A third difference is that SUHAKAM operates more cautious and selectively than KOMNAS HAM. SUHAKAM has opened investigations into the ISA and freedom of assembly, but has avoided cases with a religious or ethnic dimension. While religion is also sensitive within KOMNAS HAM, the Commission has developed more activities in this field than has its Malaysian counterpart. This difference can mainly be explained by the socio-political contexts in which the two Commissions operate: freedom of religion is socially and politically more controversial in Malaysia than Indonesia, as in the former it is more closely associated with ethnicity and social upheavals in the past (1969).

The fourth difference is that SUHAKAM deploys a more legal approach – focusing on the amendment of existing legislation – in its work than does KOMNAS HAM. This can be explained by the relatively high number of lawyers in SUHAKAM's membership, but it also reflects the different legal cultures of Indonesia and Malaysia. When compared to Indonesia, Malaysia has a stronger constitutional tradition, including respect for the judicial process and a relatively independent judiciary.

When the effectiveness of KOMNAS HAM and SUHAKAM is compared, it is evident that both have made strategic decisions in order to increase their chances of success. SUHAKAM's response in the case of the ISA was made based largely on the assumption that the government could be forced to make concessions. Similarly, with its report on the civil registry, KOMNAS HAM successfully played into existing discussions and priorities at the level of the legislature.

In order to be effective, NHRIs must ensure that they have sufficient support from other organisations: the more support, the more likely it is that their recommendations are followed. Both KOMNAS HAM and SUHAKAM face challenges in this area. It is evident that there is significant resistance to these institutions in both countries, even though Indonesia has now ratified all major international human rights treaties.

In general, KOMNAS HAM faces broader and more diverse resistance to its operations than does SUHAKAM. This is due largely to the different environments in which the two Commissions operate. During the New Order, KOMNAS HAM faced resistance from both the government and the army. After 1998, the Commission faced resistance from the Attorney General and political parties as well. NGOs have also become stronger, and have to some extent usurped the monopoly on human rights that KOMNAS HAM had claimed before. This demonstrates that a more democratic environment does not necessarily

mean a more successful NHRI. In contrast, Malaysia is still an authoritarian state, and therefore SUHAKAM predominantly experiences resistance from a single source: the government.

The analysis of SUHAKAM and KOMNAS HAM shows that in general, both these organisations meet the expectations of NHRIs at the international level. However when the performances of these organisations are studied, it becomes apparent that the ways in which they operate, including how they promote international human rights, is dependent on internal factors as well as factors associated with their socio-political contexts.

This research has shown that while NHRIs often perform reasonably well, their effectiveness often lags behind. Nevertheless, both KOMNAS HAM and SUHAKAM have made important contributions to the realisation of human rights. They have played important roles in legitimising human rights and created a space for human rights within their countries. These are considerable achievements in states where legal protections for human rights are limited (Malaysia) or where their implementation leaves much to be desired (Indonesia). This suggests that there is an important role to play by NHRIs, especially in the context of an authoritarian regime or during a nation's transition to more democratic ways of governance.