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Yap Swee Seng, coordinator of the NGO SUARAM, 14 November 2006; 18 December 2006.
Zaid Ibrahim, Member of Parliament and former Minister of Law, 21 January 2009.

Appendices

I | Recommendations

1. RECOMMENDATIONS FOR KOMNAS HAM

To establish action programmes based on -for instance- the National Action Plan on Human Rights (RANHAM) and the National Legislation Programme (PROLEGNAS)

In Chapters 3 it became evident that KOMNAS HAM's performance has been influenced positively by individual initiatives. It has been argued that the individual approach had many advantages: without it, KOMNAS HAM would not have addressed important yet controversial issues (interreligious marriage),¹ or those which were considered to be of a low priority (adequate housing and public order regulations).² While KOMNAS HAM's report on the National Civil Registry³ also came about due to personal initiative, the report also resonated with existing legislative concerns, which had a positive effect on the Commission's effectiveness. In order to increase its chances of success, KOMNAS HAM should continue to identify areas of opportunity. This can, for instance, be done by looking at priorities set out by the government, such as in the RANHAM or PROLEGNAS.

To increase its institutional cooperation with state agencies and civil society organisations

KOMNAS HAM's reliance on individual initiative is also reflected in its relationships with other organisations, which are dependent on personal ties. The use of personal networks has its advantages: in the past this has greatly facilitated KOMNAS HAM's access to high-ranking officers in the security forces.⁴ However, the dependency on personal connections also means that these relationships are often not sustained when the composition of the commission changes.⁵ Since 2007, this has been particularly noticeable in the Commission's relationship with the military, as this period has coincided with no former members of the security forces being elected to KOMNAS HAM. Institutional cooperation

1 See 3.2.2.

2 See 3.4.4.

3 See 3.2.3.

4 See 2.2.3 and 2.3.3.

5 See 2.5.2.

does not only need to be fostered with state agencies, but also with independent state bodies (in particular, KOMNAS Perempuan and KOMNAS Anak), and human rights NGOs.

To promote the establishment of regional offices in order to alleviate the workload

One of the challenges KOMNAS HAM faces is that it does not seem to have enough personnel or resources to deal with the vast and increasing number of cases.⁶ Rather than increasing personnel and resources (and thereby expenditures), it is recommended that the Commission takes advantage of the provision in the 1999 Human Rights Law, which provides for the establishment of regional offices.⁷ KOMNAS HAM is recommended to encourage the establishment of these offices by lobbying local governments, which play a key role in regional office formation. An increased number of regional offices – at least one per province – would also enhance access to the Commission, which is particularly necessary in areas outside Java and urban areas. In addition, the Commission can ease its workload by making a clear division between the cases addressed by the regional offices and those addressed by head office. This could, for instance, include a division whereby regional offices focus on the tasks included in the 1999 Human Rights Law, while head office could concentrate predominantly on investigations under the 2000 Human Rights Courts Law and matters with a national character, such as national legislation.

To strictly implement the provisions of the Ethical Code in order to minimise the negative effects of the politicisation of KOMNAS HAM's membership

In recent years, the performance of KOMNAS HAM has been negatively influenced by the politicisation of its membership, which has been a direct result of the Commission's election procedure.⁸ This research does not call for this procedure to be changed, as it is in accordance with international guidelines, provides for the participation of the public and civil society, enhances transparency of the election process, and ensures pluralist representation. Nevertheless, the negative influences of the politicisation of the Commission's membership⁹ can be limited when KOMNAS HAM's leadership takes on a more proactive role in demanding compliance with the Ethical Code. The Code stipulates that members who are in any way associated with a particular case must not take part in deliberations about the action to be taken on the matter.

⁶ See 2.4.3.

⁷ See 2.3.1.

⁸ See 2.4.1.

⁹ As in the Ahmadiyah case and the investigation into the 1997/1998 disappearance of activists, see 2.4.1.

To continue efforts to call for the amendment of the 2000 Human Rights Courts Law

External factors have played a major role in limiting the effectiveness of KOMNAS HAM. Despite the many positive changes in the field of human rights which have taken place in Indonesia since 1998, KOMNAS HAM's recommendations are rarely followed. This can be attributed to ongoing resistance to human rights implementation and reform at the political level, where remnants of the New Order regime remain dominant influences.¹⁰ This has led to recurring calls to give KOMNAS HAM implementation or prosecuting powers; however, this would be in contradiction to the very nature of NHRIs, which are meant to be advisory bodies, and would also create conflicts of jurisdiction with other agencies, both in the executive branches of government and in the Attorney General's office. Improvements to KOMNAS HAM's performance, and therefore potentially its effectiveness, can be made by amending the 2000 Human Rights Courts Law. KOMNAS HAM's performance and effectiveness in its investigations into gross violations of human rights has been compromised by a lack of clarity in this law.¹¹ It is therefore recommended that KOMNAS HAM, in coordination with NGOs, lobby the government and parliament to amend this Law as soon as possible; at the very least to include the power of summons for KOMNAS HAM in a comparable manner to the provision on the power of summons in the 1999 Human Rights Law.

2. RECOMMENDATIONS FOR SUHAKAM

To further develop structural and long-term approaches towards human rights issues

SUHAKAM's key concerns have generally reflected those that are dominant in Malaysia's civil society and attract relatively little societal controversy.¹² In these matters, SUHAKAM has used a structural and long-term approach, which in the case of fair trial and the Internal Security Act has been successful.¹³ Moreover, through its work SUHAKAM has given valuable support to the Malaysian human rights movement, which is commendable in the country's political climate. This strategy of identifying opportunities is therefore one that the Commission should maintain and develop as much as it can, including in areas that are more controversial, in order to enhance its performance.¹⁴

¹⁰ See 2.6.

¹¹ See 2.4.2 and 2.5.2.

¹² See 5.5.

¹³ See 5.3.2 and 5.3.3.

¹⁴ For instance freedom of religion (see 5.2.3) as well as the right to adequate housing (see 5.4.3).

To allow individual commissioners to conduct preliminary research into matters of personal interest

SUHAKAM's reluctance to address the freedom of religion has attracted criticism from Malaysian human rights NGOs.¹⁵ While there is some merit in the Commission's reasoning that addressing such cases might jeopardise SUHAKAM's position, it would be better if some action is taken. Some commissioners have expressed their concern for these issues, and have appeared willing to address them, only to be held back by the opinion of the majority.¹⁶ SUHAKAM could consider giving these commissioners the opportunity to conduct preliminary research in these areas. This would mean SUHAKAM's work processes would allow for both a structural approach, and individual initiative. This would serve several purposes. First, SUHAKAM would answer to pressing issues within society and among human rights organisations, which may contribute to the Commission's legitimacy. Second, it is particularly in more sensitive areas that SUHAKAM may be able to fulfil a bridging function between state and society, as well as between various societal groups.

To continue efforts to amend the Human Rights Commission of Malaysia Act, in order to comply fully with international guidelines

The effectiveness of SUHAKAM is influenced strongly by its external environment. Human rights reforms in Malaysia, including the implementation of the Commission's recommendations, remain minimal. Nevertheless, some important concessions have been made, most notably in the government's announcement to repeal the ISA. Similarly it is promising that some state governments, particularly those controlled by the Pakatan Rakyat coalition, appear to be becoming more responsive towards human rights issues and SUHAKAM.¹⁷ While such external factors cannot be directly influenced by SUHAKAM, the Commission can continue to contribute to human rights awareness and support the domestic human rights movement. Together, these can place increasing pressure on the government to continue reforms. Part of these reforms is also the strengthening of SUHAKAM, which can be done through further amendment of the Human Rights Commission of Malaysia Act.¹⁸ This review should take into account the fact that international standards for NHRIs require an appointment procedure that is transparent and one that ensures pluralism.

¹⁵ See 5.2.3.

¹⁶ See 5.2.2.

¹⁷ See 4.3.3.

¹⁸ See 4.3.4.

To enhance the relationship with civil society, in particular human rights NGOs

While there is much contact between SUHAKAM and civil society organisations, the Commission's relationship with human rights NGOs has been tense at times, due in part to the often contrasting backgrounds between commissioners and NGO representatives.¹⁹ Structural cooperation between SUHAKAM and civil society is, however, crucial for both parties. It is therefore recommended that SUHAKAM continues to develop these relationships. This would strengthen ties between SUHAKAM and civil society, which in turn will have a positive impact on the Malaysian human rights movement.

3. RECOMMENDATIONS FOR NATIONAL STAKEHOLDERS, IN PARTICULAR GOVERNMENTS AND NGOS

For NGOs to work structurally with and monitor NHRIs

Both NHRIs and NGOs are important organisations in the process of human rights realisation. Whereas NGOs often have specialised knowledge on a particular human right or issue and have relatively easy access to communities, NHRIs often have more financial and human resources, as well as invaluable access to the state apparatus.²⁰ The characteristics and roles of NGOs and NHRIs thus complement each other, and both can benefit from continuing structural cooperation and engagement. NGOs should also continue to play an important role in monitoring NHRIs and therefore their accountability, which in turn is important for an NHRI's legitimacy.

For governments to ensure the independence of NHRIs

Both the Malaysian and Indonesian Governments have an important role to play in ensuring that SUHAKAM and KOMNAS HAM can operate freely and without constraints. This includes providing NHRIs with sufficient financial means to operate; the freedom to consider any questions within their jurisdiction; and sufficient access to individuals and other organisations, at both state and societal levels.²¹ It can be expected that NHRIs which have a high degree of independence will be better able to perform their tasks.

¹⁹ See 4.3.3.

²⁰ For examples of the roles of NGOs and NHRIs and how they complement each other see 3.2.2. (KOMNAS HAM report on Interreligious Marriage and the role of the NGO ICRP), 3.4.3 (KOMNAS HAM and the Kemayoran case and the role of the NGO FAKTA), and 5.3.3 (SUHAKAM's report on the ISA and the wider Malaysian movement against the Act).

²¹ See 1.1.3 and 1.1.4.

For governments to consider and comply with the recommendations of NHRIs

Both SUHAKAM and KOMNAS HAM struggle to have their recommendations considered, let alone followed, by their respective governments. The consideration of the NHRIs recommendations would not only have a positive impact on the organisation, but also enhance the government's credibility in terms of human rights, including at the international level.

For the Indonesian and Malaysian governments to amend legislation affecting KOMNAS HAM and SUHAKAM

In order to enhance the performance of KOMNAS HAM and SUHAKAM, the Indonesian and Malaysian governments should consider amending the laws affecting the NHRIs. In the case of KOMNAS HAM this is the Human Rights Courts Law; and in the case of SUHAKAM, the Human Rights Commission of Malaysia Act. This will allow for greater transparency in the appointment procedure, and active participation for members of civil society.²²

4. RECOMMENDATIONS FOR INTERNATIONAL STAKEHOLDERS

For international guidelines – most notably the Paris Principles – to give more consideration to the specific circumstances in which NHRIs operate

This research has shown that the performance and effectiveness of NHRIs do not depend on factors related to mandate and composition alone. The performance of an NHRI is also determined by the personal views of its members regarding a particular human rights issue and what the role of their organisation should be,²³ as well as strategic opportunities in response to its socio-political environment, and the relationship of other state bodies to the organisation.²⁴ These findings indicate that international stakeholders should be sensitive to these specific circumstances in which NHRIs operate, which should be given more prominence in the assessment of NHRIs.

For international stakeholders to provide NHRIs with specific assistance

In addition, this research has shown that both the performance and effectiveness of NHRIs can differ depending on the particular human right at issue.

²² Also see above recommendations to KOMNAS HAM and SUHAKAM.

²³ For example, see both SUHAKAM and KOMNAS HAM's approaches to freedom of religion and adequate housing (3.2, 3.4, 5.2, 5.4).

²⁴ For example, see how both Commissions have approached the right to a fair trial (3.3 and 5.3).

For international stakeholders, this means that before providing assistance (whether financial or material) to an NHRI, the stakeholder must consider what they hope to achieve by providing this support, and relate this to the specific circumstances of the NHRI, to consider the extent to which the organisation may be successful in the matter at hand. International stakeholders may wish to consider directing their assistance to a particular task or human rights issue, depending on the result they hope to attain. Once again, this calls for greater sensitivity towards and knowledge about the socio-political environment of a particular NHRI.

To encourage the establishment and strengthening of NHRIs

This research into KOMNAS HAM and SUHAKAM has demonstrated that while both organisations face many challenges, they have been able to perform reasonably well, and in some areas have made important contributions to the realisation of human rights.²⁵ As such, international organisations should continue to encourage the establishment and strengthening of NHRIs, including in authoritarian regimes; as these organisations can play an important role in strengthening the domestic human rights movement.

25 See the conclusions of Chapters 2, 3, 4, 5 and 6.

II | Suggestions for Future Research

Existing research on NHRIs focuses predominantly on the assessment of these organisations based on features of their mandate and composition, often using the Paris Principles as a benchmark. However, such research tells us very little about how NHRIs actually operate and why. This can only be achieved by observing NHRIs in their day-to-day operations, and by relating these to their respective socio-political contexts. By combining an assessment of mandate and composition with actual functioning, a more complete and nuanced image of the NHRI will emerge, which will generate a better understanding about the organisation's (potential) success and challenges.

Further nuance in research on NHRIs can be achieved by considering performance and effectiveness as two different concepts. This research has shown that in most cases, good performance does not mean that an NHRI has been effective. Separating the two concepts creates a more accurate view of an NHRI, and allows for a more complete and precise analysis of the factors that encourage or obstruct the organisation's performance and/or effectiveness, which in turn provides us with more information about the NHRI as an organisation.

This research has shown that the extent to which an NHRI addresses an issue (and therefore its effectiveness) is dependent on how a particular right is perceived within the Commission, often reflecting dominant views on the matter in society. This means that to be able to assess the performance (and effectiveness) of an NHRI adequately, it is necessary to include an analysis of that particular right; including both a legal analysis and an analysis of societal perceptions. Similarly, the effectiveness of NHRIs can only be understood by taking into account the socio-political environment and the various factors that affect the organisation.

Current assessments of NHRI performance and effectiveness are increasingly based on lists of indicators. While these are a useful starting point, the appraisal of NHRIs should include the specific characteristics and historical background of a country, particularly with regard to human rights. This includes an analysis of how different human rights or issues are perceived within society, and to what extent this influences an NHRI. NHRIs should thus be considered as organisations which are constantly in motion, and which respond to human rights issues in ways which can only be understood through an analysis of context. This approach to NHRIs will enrich existing research and inevitably tell us more about how these organisations actually work, and

the extent to which they are able to make a substantial contribution to the realisation of human rights.

Index

A

Abolish ISA Movement (GMI) | 154-155
Angkatan Bersenjata Republik Indonesia (ABRI) | 52
Angkatan Belia Islam Malaysia | 155
Accountability | 7-8, 66, 184
Adequate housing | 18, 28, 72, 93-95, 98-99, 109-112, 141-142, 161-174, 175, 178, 180, 182
Abas, Salleh | 12, 132
Abidin, Anuar Zainal | 122, 131
Aceh | 11, 87
Adnan, Hamdan | 131, 146
Agam, Hasmy | 113, 137
Ahmadiyah | 28, 55-56, 64, 178-179, 181
Alas Tlogo | 65
Alatas, Ali | 35, 37
Albar, Syed Hamid | 116
Aliansi Tolak PERDA Tibum | 103
Amidhan | 55
Annan, Kofi | 1
Anwar, Zainah | 119, 124
Asia Pacific Forum on NHRIs | 5
Appropriation | 19-20, 130, 173, 176
Asian Values | 34, 37, 116, 133
Aswidah, Roichatul | 44, 53
Ayah Pin | 146
Aziz, Mohd Nazri Abdul | 131, 136, 140
Azizah, Wan | 121-122

B

Badan Penelitian dan Pengembangan Nasional (Balitbang) | 106
Badawi, Abdullah | 130, 139, 144
Bahar, Saafroedin | 44, 53
Bangkok Declaration | 34

Barisan Alternatif | 114

Barisan Nasional | 119, 124-125, 133, 172

Baso, Ahmad | 84

Billah, M.M. | 55

Bowo, Fauzi | 106-107

C

Catholicism | 78-79

Cengkareng Timur | 99-100

Choo Siew Kioh | 124

Christianity | 75, 77, 79, 114, 141, 144, 149, 156

Cold War | 3, 11, 34

Confucianism | 78

Constitutional Court | 11, 88

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) | 28, 46, 152, 156

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) | 13, 17, 28, 46, 161, 165

Convention on the Rights of Migrant Workers (CMW) | 46

Convention on the Elimination of Racial Discrimination (CERD) | 46

Convention of the Rights of Persons with Disabilities | 17

Convention on the Rights of the Child (CRC) | 13, 17, 28, 46, 161, 165

Criminal Procedure Code | 152

D

Democratic Action Party | 114, 116, 149-150, 154-155, 158

Directorate General for Human Rights | 11, 46

Directorate for the Managing of the
Development of the Kemayoran
Complex (DP3KK) | 102
Disappearance of activists 1997/1998
| 56, 61-62, 89, 178
Dwifungsi | 46

E

East Timor | 11, 34, 42, 45, 50-53, 87,
89
ECOSOC Committee | 165
Effectiveness | 23-27
Effendy, Wahyu | 86
Efficiency | 25
Essential (Clearance of Squatters)
Regulation | 162
ERA Consumer | 135
European Court of Human Rights
(ECHR) | 104, 156, 159
Evictions
- in Indonesia | 99-102
- in Malaysia | 164-170

F

Fair trial | 18, 28, 70-72, 87-93, 110,
112, 148, 152-153, 159, 172-178, 183
FAKTA | 96, 100-102, 106-107
Fatwa | 55, 77, 146
Federal Territory Islamic Affairs
Council | 146

G

Gore, Al | 116

H

Habibie, Baharuddin Jusuf | 45-46
HAKAM | 123
Hasanah, Nurul | 133
Hasibuan, Albert | 50
Hendry, S. | 129
High Court | 119, 124, 143-146, 151
Hindu Rights Action Front
(HINDRAF) | 155
Hinduism | 20, 28, 75, 78, 79, 141,
146-147, 149, 155

Hitam, Musa | 113, 115, 119, 121, 124,
132
Human Rights (concept) | 14-20, 187-
188
Human Rights Commission of
Malaysia Act (HRCMA) | 118-119,
137-138
Human Rights Courts Law
(HRCL) | 11, 48-50, 54-55, 60-63,
65-67, 186
Human Rights Law (HRL) | 11, 28,
47-50, 54, 57-58, 62, 65, 67, 101
Hussein, Hishamuddin | 160

I

Ibrahim, Anwar | 13, 113-115, 117,
121-122, 138, 155
Ikatan Relawan Rakyat Malaysia *see*
RELA
Indonesian Conference on Religion
and Peace (ICRP) | 77-80, 84
Interfaith Commission (IFC) | 143-144
Internal Security Act (ISA)
- Advisory Board | 154
- application | 154-155
- conditions of detention | 154
- detaining authorities | 153
- historical background | 152
- SUHAKAM report | 155-158
International Coordinating Committee
(ICC) | 6, 48, 135-137
International Covenant on Civil and
Political Rights (ICCPR) | 11, 27-
28, 71, 76, 87, 103, 129, 142, 152,
256
International Covenant on Economic,
Social and Cultural Rights
(ICESCR) | 12, 28, 93, 95, 98, 103,
161, 165
Inputs | 21, 23, 25, 26, 177
Indonesia
- Constitution | 11, 27-28, 47, 70-
72, 80-82, 87, 94-95, 105-106
- cultural background | 9
- history | 9-11
- legal system | 9
Interreligious marriage | 73-77

Irsan, Koesparmono | 53
 Isbat nikah | 82-83
 Islam | 9, 13, 28, 36, 55, 74-75, 77, 78-79, 82-83, 103, 114, 119, 137, 141, 143-146, 148-151, 155
 Islamic Courts | 74, 82, 144-146
 Islamic law *see* Sharia

J

Jakarta | 34, 45, 51, 62, 72, 75, 94-103, 105-109
 Jaringan Rakyat Tertindas (JERIT) | 163, 167, 172
 Jayasooriya, Denison | 125
 Joy, Lina | 144-145
 Judicial Commission | 88, 92

K

Karunagaram, Simon | 128
 Kampung Berembang | 167-169, 171
 Kampung Chubadak | 169-171
 Kampung Medan | 123-124, 139
 Kantor Catatan Sipil (KCS) | 74-76, 78-80
 Kantor Urusan Agama (KUA) | 74, 78-79
 Kasim, Ifdhal | 64-65
 Kemayoran | 99, 101-102, 109
 Kesas Highway | 121, 128, 130-131, 138
 Keterbukaan | 35
 Kompilasi Hukum Islam (KHI) | 74, 79-80, 82-83
 Khoo Kay Kim | 134, 149
 Kitab Undang-Undang Hukum Acara Pidana (KUHP) | 71, 87, 88
 KLCC Indicent | 129-130, 135
 KOMNAS Anak | 11
 KOMNAS HAM

- Complaint Handling Unit (CHU) | 57
- division within | 44, 55
- effectiveness of | 44, 66-68, 81-83, 90-93, 107-112, 177-187
- establishment | 34-38
- funding | 39, 48
- general secretary | 40, 58, 64

- investigations | 41, 50-53, 61
- leadership | 42-43, 53, 60, 64
- mandate | 38, 47, 48-49
- membership | 39, 48, 54
- performance of | 40-42, 66-68, 81-83, 90-93, 107-112, 177-187
- politicisation of | 55
- relationship with
 - attorney general | 49, 60-63
 - NGOs | 38, 41, 44, 63, 77-78, 81, 100-101
 - parliamentary committee | 48, 63
 - security forces | 50, 65-66
- restructurisation | 57
- staff | 58-59
- subcommissions | 40, 57
- tasks | 38, 47, 49

KOMNAS Perempuan | 11, 46

KORPRI | 59

Kua Kia Soong | 158

Kuala Lumpur | 12, 28, 120, 123-124, 129, 142, 145-146, 150, 155, 163-164, 167, 169

Kundasang | 168, 170

L

Land Acquisition Act (LAA) | 162
 Law on the Administration of the Population | 85, 110
 Legitimacy | 7-8, 18, 36, 42, 45, 48, 109, 121, 151, 160, 175, 184
 Lembaga Bantuan Hukum (LBH) | 36, 39, 41, 89, 91
 Lim Guan Eng | 117
 Lim Kit Siang | 116-117
 Liquisa | 41
 Liu, John | 135, 137
 Liu, Ronnie | 172
 Lopa, Baharuddin | 43-44
 Lubis, Todung Mulya | 34, 37

M

Mahathir | 13, 113-116, 119, 122-123, 130-131, 135, 139, 143
 Majelis Ulama Indonesia (MUI) | 55-56, 77

Malaysia

- Constitution | 13, 27-28, 133, 138, 141, 143-145, 147, 149-150, 152-153, 161
- cultural background | 9
- history | 9-12
- legal system | 9
- Malaysian Bar Council | 123, 133, 141, 143-144, 156, 159
- Malaysian Chinese Association (MCA) | 149
- Malaysian Indian Congress (MIC) | 149
- Malaysian Judicial Crisis | 12
- Marriage Law | 70, 73-77, 79, 82-84, 112
- Marsinah | 33, 41, 91
- May 13 (1969) Incident | 12, 123, 149-150
- May 1998 | 11, 45, 61, 178
- Melaka | 127-128, 143
- Ministry of Foreign Affairs
 - Indonesia | 35
 - Malaysia | 113, 120
- Ministry of Home Affairs
 - Indonesia | 74, 79, 81, 83, 105-107
 - Malaysia | 153, 156
- Ministry of Justice and Human Rights | 11, 46, 79, 85, 90, 105-106
- Ministry of Religion | 74, 79
- Moerdani | 52
- Mohamad, Goenawan | 37
- Moluccas | 52
- Moorthy, M. | 146, 148, 150-151
- Mysticism | 70, 78-79, 103

N

- Nababan, Asmara | 37, 40, 52-53
- National Civil Registry | 81-87, 110-112, 178-179, 185
- National Human Rights Institutions (NHRIs)
 - accountability | 7-8, 184
 - historical background | 3-4
 - independence | 7
 - legitimacy | 7-8, 184

- mandate | 2
- position | 2
- research on | 6-8
- types of | 4

National Human Rights Society of Malaysia *see* HAKAM

National Land Code (NLC) | 162

Navaratnam, Ramon | 131

New Economic Policy (NEP) | 163

New Order | 11, 33, 35-36, 40, 42, 44, 45, 46, 49, 59, 67, 71, 83, 88, 90, 106, 182-183, 186

Non-discrimination | 3, 27

Non-governmental Organisations (NGOs) | 16, 20, 24, 29

- in Indonesia | 40, 49, 51, 55, 63-65, 67, 68, 78, 84, 94, 96, 100, 102-104, 106-107, 109-110, 186, 188
- in Malaysia | 115-116, 118, 120-123, 127, 133-135, 137-139, 141-143, 148, 150-151, 154-155, 158-159, 163-165, 168, 171-173, 188
- in relation to NHRIs | 2, 6-7, 186, 188

Nor, Salleh Mohd | 131

Nusantara, Abdul Hakim Garuda | 39, 60, 90, 92

O

Office of the High Commissioner for Human Rights (OHCHR) | 14

Omar, Noh | 122, 130

Ombudsman | 11, 47

Operasi Lalang | 154

Organisational tasks |

Organisational goals |

Othman, Abu Talib | 113, 124, 131-132, 134-135, 137, 150

Outcomes | 23-24, 67, 71, 110, 140, 182

Outputs | 22-26, 177

P

Pancasila | 37

Papua | 42, 87

Pakatan Rakyat (PR) | 132-133, 172

- Paris Principles | 5-6, 22, 38-39, 47, 117-118, 120, 135, 184
- Parti Keadilan Nasional (PKN) | 115, 122
- Parti Keadilan Rakyat (PKR) | 138, 155
- Parti Se-Islam Malaysia (PAS) | 114, 138, 154-155
- Parti Sosialis Malaysia (PSM) | 167
- Paul, Augustine | 122
- PDI Affair | 41-42
- Penal Code | 147, 160
- PERDA *see* Regional Regulation
- Pengadilan Tata Usaha Negara (PTUN) | 36
- Performance | 22-27
- PNSisasi | 59
- Prasetyo, Stanley | 103, 106
- Presidential Decree 50/1993 | 38-40
- Princen, Poncke | 42
- Printing Presses and Publication Act (PPPA) | 119
- Priyono, Gembong | 58
- Program Legislasi Nasional (PROLEGNAS) | 110
- Public order | 94-98, 100, 102-104, 109, 112, 129, 143, 145
- R**
- Razak, Najib Abdul | 139, 160-161
- Reformasi*
- Indonesia | 9, 45, 83, 90, 185
 - Malaysia | 9, 114, 121-122, 139, 155, 185
- Regional Regulation (PERDA) 11/1988 | 94, 98, 100
- Regional Regulation (PERDA) 1/1996 | 95, 98, 100
- Regional Regulation (PERDA) 18/2002 | 95, 98, 100
- Regional Regulation (PERDA) 8/2007 | 94, 98, 105, 107, 108-109, 112
- KOMNAS HAM report on | 102-107
- Regulation on Mixed Marriages (GHR) | 73-74
- RELA | 127-128, 168
- Rencana Aksi Nasional Hak Asasi Manusia (RANHAM) | 46, 105-106, 110
- Rukunegara | 134
- Rus, Nazihah Tunku Mohamed | 124
- S**
- Sabah | 9, 120, 124, 169, 170, 171
- Said, Ali | 38-39, 42-43
- Samad, Iskandar Abdul | 172
- Samah, Asiah Abu | 124
- Sarawak | 9, 120, 124, 138, 171
- Sarwar, Malik Imtiaz | 133
- SATPOL Pamong Praja | 96, 105
- Sedition Act | 123-124
- Selangor | 133, 163-164, 167-168, 170, 172
- Sense of mission | 24, 176
- Setiadi, Wicipto | 85
- Setiawan, Chandra | 77, 81, 85-86, 110
- Sharia | 13, 137, 145, 151
- Sihombing, Uli Parulian | 91
- Singh, Karpal | 12
- Sipaun, Simon | 120, 166
- Siracusa Principles | 104
- Siraj, Mehrun | 131
- Sky Kingdom | 145-146, 148, 150, 181
- Soegianto, Djoko | 53
- Soegondo, Soelistyowati | 76, 81, 83, 86, 91, 110
- Suara Rakyat Malaysia (SUARAM) | 121, 134-135, 137, 154-155
- Subramaniam, Arutchelvan | 163
- Subramaniam, Siva | 124, 150, 168-169, 171
- Sudarsono, Juwono | 65-66
- SUHAKAM
- effectiveness of | 130, 139-140, 148-152, 158-161, 170-174, 184-187
 - establishment of | 114-118
 - funding | 120
 - inquiries | 121-124, 128-129
 - leadership | 113, 119, 124, 132, 137
 - mandate | 118, 136-137

- membership | 118-119, 124-127, 131, 136-137
- performance of | 130, 139-140, 148-152, 158-161, 170-174, 177-184
- relationship with
 - federal government | 130-132, 139
 - judiciary | 123
 - NGOs | 133-135
 - state governments | 132-133
- general secretary | 120
- staff | 120, 125-127
- tasks | 118
- working groups | 119, 128, 131, 133-134

Suharto | 10-11, 35-36, 39-40, 43, 45, 65, 67, 74, 115-116, 178

Supreme Court

- of Indonesia | 43, 74, 79, 80, 88, 143
- of Malaysia | 12, 119, 143

Sutiyoso | 95, 98, 100, 107

Sutrisno, Try | 35, 52

Sutoyo | 59, 64

T

Talangsari | 64-65

Tanjung Priok | 52, 89

Teluk Gong | 99

Terengganu | 145

Terengganu Fatwa Council | 146

Terengganu Islamic Affairs

Department | 145-146

Tikamdas, Ramdas | 123

Timika | 41

Toyo, Mohd Khir | 163

Tramtib | 106

Translation | 19-21, 78, 80, 176, 183

Trisakti, Semanggi I and II (TSS) | 45, 61, 89

U

United Malays National Organisation (UMNO) | 13, 114, 119, 149, 154

United Nations (UN) | 1, 3-5, 14, 34, 37, 115

United Nations Commission on Human Rights (UNCHR) | 34, 115

United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief | 142

United Nations Declaration on the Rights of Indigenous Peoples | 17

United Nations Habitat Agenda | 164-165

United Nations Human Rights Council (UNHRC) | 6, 34, 66

United Nations Working Group on Arbitrary Detentions | 138

Universal Declaration of Human Rights (UDHR) | 15, 27, 47, 71, 79, 80, 87, 93, 128, 142, 147, 152, 156, 157, 158, 159, 161, 165

Urban Poor Consortium (UPC) | 108

Uripno, Teguh | 89

V

Vernacularisation | 19-20, 176

Vienna Declaration | 3, 82

Vienna World Conference on Human Rights | 3, 37

W

Wahid, Abdurrahman | 46, 48, 51

Wawasan 2020 | 163

Wignjosoebroto, Soetandyo | 37, 43-44

Wijaya, Firman | 101

Wiranto | 50-51, 56, 65

Wirayuda, Hassan | 35

Y

Yap Swee Seng | 121

Yatim, Rais | 160

Z

Zero Squatter Policy | 163, 166

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