SUHAKAM After 6 years:

Are We, Honestly, Making Any Headway?





Organised by

ERA CONSUMER MALAYSIA

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Education And Research Association For Consumers, Malaysia

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Contents

ERA Consumer Malaysia is a voluntary, non-political and non-profit organisation working towards a just and equitable society. ERA Consumer focuses on critical issues ranging from consumer, human and women's rights to the environment and food security.

Foreword

The Human Rights Commission of Malaysia, or SUHAKAM as it is widely known by its Bahasa Malaysia acronym, is today into its seventh year of existence. I am not here to say, "Well done!" but rather, to seek answers from Malaysians: How much has SUHAKAM achieved in the task entrusted to it? And how?

What we are here to do, this time around in our National Consultation on SUHAKAM After Six Years, is to take an even more critical look at the Commission and how it has served the people over the past year.

I say more critical because that is how we have to be, if we desire for SUHAKAM to serve the people effectively. If you recall our past consultations, our review reports on this august organisation and its work, I must say that they have not at all been flattering. Good work was acknowledged, but in many areas, even that of a basic task as Human Rights Education, we have found SUHAKAM to be quite wanting.

A look at just a few of the matters our speakers are raising today, as outlined in this report, will give a good picture of what I mean by saying that SUHAKAM has been wanting in its work.

Take criminal cases, for instance. Our National Consultations have pointed out that often, cases are prosecuted despite improper and ineffective investigations by the police; even without the presence of material witnesses and without forensic evidence or material exhibits to prove the charge. If you have been following the high profile trial about the horrific murder of a foreign woman now going on, then you will have a clear picture of what all this means. I rest my case.

Let us look at another issue, the eradication of poverty. This has been the goal of our government ever since independence. We needn't go back 50 years … let us just go back to the implementation of the New Economic Policy in 1970. How far have we succeeded in the eradication of poverty? And what has SUHAKAM undertaken on behalf of the deprived communities around the country?

To say that civil society activists have been consistently disappointed in the efforts, or the lack thereof, of SUKAHAM in the area of the freedom of religion would be an understatement, as Malik Imtiaz points out. The Commission's position

is perhaps best described as non-interventionist. Hear nothing, see nothing, do nothing?

This "keep away" role adopted by SUHAKAM has been criticised from as early as 2002 when, among others, the National Human Rights Society or HAKAM queried the Commission over its failure to make recommendations to the government on the question of apostasy in the context of a controversial draft law proposed in 1998.

The problem, I tend to believe, lies with many of our Commissioners themselves. Most have little or no background in human rights work or advocacy, nor do they seem to have adequate human rights knowledge or perspective. This may perhaps be why they do not push the government to include human rights education as an integral part of education in schools, teachers' training colleges, universities or other training institutions such as police and military academies. And not to forget too, many of these Commissioners were from government service …

Where is our right to freedom of assembly, despite Malaysians screaming for it to be honoured? Seven years of SUHAKAM and nothing has been done to get the government to respect Article 10 of the Federal Constitution, which makes it clear that we have the right to freedom of assembly. It is the government that blatantly abuses the Federal Constitution by using the unconstitutional Police Act 1967.

The "catch all" Section 27 of the Police Act is the biggest obstacle to Malaysians enjoying their right to freedom of assembly. The police interpret this section according to their whims and fancies, as another speaker Chang Lih Kang points out. Clause (5)(b) of the section says "Any assembly, meeting or procession in which three or more persons taking part neglect or refuse to obey any order … shall be deemed to be an unlawful assembly". And, all attendees shall be guilty of an offence.

And then, over the course of last year, we've had many complaints about the People's Volunteer Corps, or RELA, including excessive use of force, theft, extortion of money, corruption, physical abuse of undocumented immigrants and unlawful behaviour – all of which continued into this year as well. Besides undocumented migrants, RELA continued its arbitrary and indiscriminate arrests of refugees and asylum seekers holding UNHCR documents as well.

What is important here, as Sharuna Verghis states, is for SUHAKAM to address the current culture of impunity that is practised in the country – before it is too late. As the institution with the mandate to advance human rights in the country, SUHAKAM has a very important role to play in bringing about a culture of accountability on the part of all enforcement agencies.

Tackling these issues alone will weigh down heavily on SUHAKAM. So, how then is the Commission going to take on all the other issues before it that are crying for attention? Advancing the Millennium Development Goals; protecting and promoting women's rights; or even to looking into undue delays in the hearing of court cases, for instance?

My own disappointment is over the speed with which SUHAKAM responds to human rights violations. It is too slow, and many a time the Commission has moved only when civil rights organisations kicked up a fuss.

Our National Consultations will surely go on for a long time to come. We have to continue to monitor the work of SUHAKAM, and also to push for the government to take up recommendations made by the Commission, some of which are very commendable and will surely, if implemented, go a long way towards the full enjoyment of human rights by all, even the migrant workers and people seeking temporary refuge.

The public at large will certainly benefit from a fearless and purposeful SUHAKAM.

The government, on its part, has to change its attitude. It has to be more respectful of SUHAKAM, and recognise the work it does. We also cannot continue to have Parliament ignoring SUHAKAM and its reports. And we certainly cannot have behaviour such as that displayed by Datuk Seri Utama Dr Rais Yatim. Rais, who was Minister in the Prime Minister's Department when the SUHAKAM report on the Kesas Highway incident was published, told Parliament: "The action taken by the police is correct … SUHAKAM's report on the incident does not portray the real situation, and is biased ..."

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Review of the Report on SUHAKAM's Working Group on Human Rights Education and Promotion

By K. Arumugam

Introduction

The Human Rights Commission of Malaysia or SUHAKAM's Annual Report 2005 details the report of its Human Rights Education and Promotion Working Group (EWG) in pages 41 to 64.

Section 21(1) of the Human Rights Commission of Malaysia Act 1999 requires that SUHAKAM submits an annual report to Parliament "of all its activities during the year which the report relates".

EWG, as the name suggests, is tasked with human rights education and promotion. The group comprises seven of SUHAKAM's 18 commissioners, which alone should signify the importance placed on education in human rights and the promotion of these rights.

This review seeks to assess the adequacy and impact of the Commission's role in the area of education and training.

Functions and Powers in respect of Education and Promotion

The responsibility to carry out education in and promotion of human rights is provided in Section 4 of the Act. The relevant section states:

> *Section 4(1): In furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be:*
>
> *(a) To promote awareness of and provide education relating to human rights;*

Section 4(2): For the purpose of discharging its functions, the Commission may exercise any or all of the following powers:

(a) To promote awareness of human rights and to undertake research by conducing programmes, seminars and workshops, and to disseminate and distribute the results of such research;

Limitations

The effectiveness of SUHAKAM in discharging this important function of education in and promotion of human rights is greatly impaired by the legislative formulation of the Act. The definition of human rights in Section 2 of the Act is restricted to those fundamental liberties enshrined in Part II of the Federal Constitution. This part contains "a very truncated list of rights". Not all the human rights conferred by the Constitution are included in Part II, for the other parts of the Constitution also confer important rights.

Judicial interpretations of Part II over the years have somewhat curtailed and circumscribed the ambit of these provisions. In addition, even though Section 4 provides that "regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with Federal Constitution", no provision is made for the incorporation of such rights in the Act.

Further, the quality and composition of the commissioners have a substantial impact on the effectiveness of SUHAKAM in discharging its functions as set out in Section 4(10)(a) of the Act.

Section 5(2)[1] empowers the Yang di-Pertuan Agong (the King) to appoint the members of the Commission upon the recommendation of the Prime Minister. There are no guidelines as to the qualification of the commissioners, except that they are

1 Section 5 states:
(1) The Commission shall consist of not more than 20 members.
(2) Members of the Commission shall be appointed by the Yang di-Pertuan Agong, on the recommendation of the Prime Minister.
(3) Members of the Commission shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds.
(4) Every member shall hold office for a period of two years and is eligible for reappointment.

appointed from among prominent personalities, including those from various religious and racial backgrounds [Section 5(3)]. They are to hold office for a period of two years and are eligible for reappointment [Section 5(4)]. It is evident that they enjoy no security of tenure and the short duration of their office acts as a dampening effect on their activities. It would indeed need much courage and strength of character for a commissioner to show any streak of independence, for this may attract official displeasure and snuff out any hope of reappointment. You can be sure that only harmless and lacklustre commissioners will be retained.

Thus, only candidates considered "safe" to the government, who can be expected to act "responsibly", are likely to be appointed. A cursory examination of previous and current commissioners will reveal that many are former bureaucrats, including a former Attorney General and others linked to the government, with a token representation from NGOs. Many have little or no background in human rights work or advocacy. Neither do they seem to have any perspective on human rights. Also, a frequent change to the composition of the commissioners curtails continuity.

As expected, such safe representation is a recipe only for mild activism in the pursuit of human rights education and promotion. Any bold or proactive decisions of an independent-minded commissioner, such always being in the minority, may be thwarted by the debilitating effect of Section 7(4)[2] of the Act that requires decisions by consensus, failing which by a two-thirds majority of the members present at a meeting.

The other limitations seem to be self-imposed.

SUHAKAM has failed to leverage on its advantageous position due to the lack of will and imagination. Despite severe restrictions on its powers, it has resources, machinery and most important, the legislative mandate. However, it has happily relegated itself to a subservient role vis-à-vis the State.

SUHAKAM is mandated to educate the citizenry at large. Informed members of the public will act as a bulwark against any human rights transgression by the government and hold it accountable. SUHAKAM should be reaching out and educating the public, organising public debates and talks in the mass media, print

2 Section 7(4) states; 'The members of the Commission shall use their best endeavours to arrive at all decisions of the meeting by consensus, failing which the decision by a two-thirds majority of the members present shall be required.'

and electronic, in order to engage and interest the general public in human rights issues.

Human rights education cannot be seen as a panacea for rectifying injustice. Without public support for its activities, SUHAKAM cannot bring about effective human rights legislation and protection. Education can serve as an effective instrument for popular empowerment, but SUHAKAM has failed to adequately enlist the support of other functionaries, including the citizens and NGOs.

It does not seem to realise that it can complement its role through lobbying and advocacy. Self-imposed isolation has severely limited its reach and effectiveness in human rights education and promotion.

Activities in 2005

During the year 2005, the EWG focused its attention on the needs of some selected groups of children, students, teachers, trainers, indigenous people, persons with disabilities and enforcement officers. EWG activities included talks, discussions, seminars and workshops. Prominence was given to the Convention on the Rights of the Child (CRC), one of the two international human rights instruments ratified by Malaysia, albeit with important reservations, and to a lesser extent the Universal Declaration of Human Rights (UDHR). SUHAKAM declared it carries out its tasks "with responsibility", but this is just another way of saying it will be less confrontational, and not embarrass or cause discomfort to the government.

The EWG report merely enumerates its activities, is bereft of any self-evaluation or self-criticism, and lacks reflection. Such reporting does not speak well of SUHAKAM as an august body entrusted by Parliament to carry out important functions. Position papers on important issues are published infrequently, and even then, not widely disseminated.

The activities of EWG reveal that it does not have a structured, long-term vision with in-built self-evaluation in carrying out its activities. It would seem that SUHAKAM is under the grand illusion that it is just another NGO. *See pages 41 to 64 of the EWG Report.*

Children

Children are our country's most valuable resource. No effort can be more appropriate than to help children develop an awareness of their rights and the human rights of others. However, the programmes initiated by SUHAKAM have been ad hoc and tentative in nature. It appears to be smug and satisfied with the few programmes it organised.

For the whole of 2005, EWG conducted human rights programmes in six primary schools for 900 students. This figure is most insignificant, considering that we have 3,044,977 pupils in primary schools, 1,330,229 in lower secondary, 763,618 in upper secondary, 199,636 in post-secondary and 34,672 in teacher education institutions.

It is therefore pertinent to question the efficacy of SUHAKAM's training programmes for vulnerable groups, given the limitations of its resources, both financial and manpower. It will be more fruitful for SUHAKAM to concentrate its efforts on persuading, lobbying and pressuring the government to integrate human rights education as an essential component of the school curriculum and teacher training courses. In fact, SUHAKAM should develop a model course content for this.

It must be noted that government allocation for education and training under the Ninth Malaysia Plan[3] (9MP, 2006-2010) is RM45.149 billon, of which RM 4,792.6 million is allocated for training. The intention of the government as stated in the 9MP[4] is: " … Greater focus will be given to holistic human capital development encompassing knowledge and skills, progressive attitude as well as strong moral and ethical values". It is imperative that SUHAKAM recognises its duties and responsibilities in nation building by way of securing a bigger allocation of resources so that a comprehensive human rights education plan can be implemented.

Minorities

Suhakam can and should give due attention to the human rights of some of the most vulnerable groups in Malaysia, the minorities. Minority groups abound in

3 Ninth Malaysia Plan, Table 11-8 on page 260

4 Ninth Malaysia Plan, page 261

Malaysia. EWG has ignored groups as Indians, the Thai Muslims in the north, the Portuguese and Chetty communities of Malacca and the indigenous peoples of Sabah and Sarawak. These ethnic minorities are struggling for their identity and justice, and access to the public delivery system. Most of these minorities are increasingly being driven away from the mainstream of social life, as the majority pushes harder for greater control and its urge to dominate becomes more intense.

The minorities too desire to gain recognition of their identity and dignity as a people, including their rights to resources, language and culture, right to mother tongue education and so on. Without a deep knowledge of their own history and traditions, the minorities will lose their culture, identity and pride in themselves. Formal education systems, based on the cultural values of the majority cannot provide this knowledge.

EWG must provide human rights education to these disadvantaged groups as a specific category, so that their voices can be heard. This will enable them to preserve and foster their identity, history, language, heritage and dignity.

Other aspects of human rights

EWG has paid scant attention and resources to education in and promotion of other important human rights such as the right to decent education, the right to a safe environment, adequate access to healthcare, housing rights, the rights of the elderly and the like. Its focus is on less sensitive issues, which by themselves are also important. Nevertheless, basic education on civil and political rights must be emphasised as any lack of progress on these rights negates and proves illusory the improvement of other aspects of human rights. Such apparent lack of interest suggests that the EWG is belabouring under a very restricted meaning of human rights.

Access to justice

Mere provision of education and training is insufficient. Disadvantaged groups should be encouraged and assisted to organise and educate themselves so as to become conscious of their rights and the injustices inflicted on them.

EWG's training programme is passive and limited to listing the human rights provisions. An action-oriented study, discussions and a research task force should be set up to deal with various acts of denial or violation of human rights.

The culture of silence that permeates many aspects of Malaysian society must be shattered. People must be taught to organise themselves so that they can find redress for their grievances. Such training must be incorporated in any human rights education.

Recommendations

The following recommendations are suggested in order to strengthen the effectiveness of SUHAKAM's human rights education and promotion programmes:

1. Formulate and implement a long-term human rights education programme that benefits all sectors of society, with particular focus on disadvantaged and vulnerable groups such as children and minorities. Planning a detailed programme means deciding why, what, when, where, how and for whom. Effective planning is one way to make human rights education more meaningful, concrete, sustainable and inclusive.

2. SUHAKAM should vigorously pressure the government to include human rights education as an integral part of education in schools, teacher training colleges and other training institutions, police and military academies as well as in public institutions of higher learning.

3. It should not act like an NGO, but should be vigorous and bold in pursuing its training goals. SUHAKAM has to prepare and provide cost-effective and adequate resource and training materials that can be used by activists, trade unions, lawyers, campaign movements, NGOs, grassroots groups, academicians and even elected officials in furthering human rights education and advocacy.

4. SUHAKAM should not engage in grassroots activities for which it is ill suited, for it lacks sufficient resources, the acumen and temperament. Instead it should work closely with existing grassroots organisations to promote

and encourage such programmes. Emphasis should be on building capacities of human rights functionaries in the areas of training, providing support in qualitative research, networking and participatory evaluation. EWG should co-ordinate a broad-based human rights education and promotion programme as an integral part of the Malaysian experience, and implement this using a variety of media and local languages. Its report does not allude to any Website specifically allocated for this purpose. This is a great drawback, and shows lack of foresight in harnessing such a powerful media as the Internet in the achievement of its goals.

5. Training programmes should enable affected groups to organise themselves to articulate their demand so that their grievances be attended to. They should impart basic skills of data gathering, interviewing and report writing. Training of trainers should be ongoing, and trainees must be taught how to use the existing laws to apply pressure on the government to respect and protect the rights of the people.

6. Important international human rights instruments should be translated into Bahasa Malaysia and other local languages and distributed at all levels of society in an effort to achieve wider public recognition and awareness of these important documents and the rights and obligations they contain.

7. EWG should continuously develop, review, examine and evaluate its human rights education and promotion policies, services and practices in relation to their impact and effectiveness. Such critical evaluation should enable it to develop strategies and commit resources to policies, programmes and services that will promote its objectives.

8. There is an urgent need to review the appointment of commissioners to have a more representative and inclusive selection process. SUHAKAM should have regional offices in Sabah and Sarawak so that human rights education does not suffer because of geographical disadvantages.

9. Human Rights Day, which falls on December 10th of every year, should be celebrated with a month-long campaign. This year marks the 60th anniversary of the Universal Declaration of Human Rights, and SUHAKAM should

give prominence to the event, and mark it jointly with other stakeholders to achieve meaningful changes in policies and laws of Malaysia that impinge on human rights. It should also actively participate in international and regional level activities that can impact positively on government policies.

Conclusion

The purpose of human rights education and promotion should be to empower the affected groups in their struggle to seek justice. The pursuit of justice entails not only bringing about changes that will result in material benefits to these groups but also involves the empowerment of people to shape their future and decisions that affect their lives.

In line with this, SUHAKAM and EWG should exploit the legal provisions of the Human Rights Commission of Malaysia Act to the fullest extent to achieve the goals and purposes of ensuring human rights for all Malaysians.

Arumugam is an engineer-turned-lawyer. He has been active in community work since his school days, a period that formed the grounding for his activism today. He writes regularly for a rights-based Tamil monthly magazine and works with NGOs in the field of education. He is also involved in inter-ethnic and intra-ethnic discussions over rights of Indian Malaysians. His present involvement in NGO work includes being a secretariat member of SUARAM, coordinator of a lobby group called Group of Concerned Citizens, and a partner of Child Development Initiative.

Review and Analysis of SUHAKAM's 2005 Annual Report: Law Enforcement and Human Rights

Tricia Yeoh Su-Wern and Edmund Bon Tai Soon***

This paper[1] seeks to evaluate the work of the Human Rights Commission of Malaysia (SUHAKAM) with respect to the enforcement of the laws of Malaysia, based on its Annual Report 2005. It is divided it into three sections: The first traces notable violations perpetrated by law enforcement agencies and their officers; the second highlights corresponding action by SUHAKAM in addressing these issues and areas for improvement; and the final section outlines challenges facing SUHAKAM and society at large, with key recommendations for consideration.

I. Human Rights Violations

(a) The police

The Police Act and Criminal Procedure Code form the legal basis for police to use "reasonable force" in self-defence or in relation to suspects resisting arrest or attempting to escape. There is no explicit prohibition of torture, cruel, inhuman or degrading treatment by law enforcers in our statute books. Malaysia has yet to ratify the International Covenant of Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

This has prevented official and international monitoring of our country's centres of detention. The United Nations Code of Conduct for Law Enforcement Officials (CCLEO)[2], which sets basic human rights standards for these officials, has also

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1 *Commissioned by and written for the Education and Research Association for Consumers, Malaysia (ERA Consumer, Malaysia).*

2 Adopted by General Assembly Resolution 34/169, Dec 17, 1979.

not been translated into law.

The Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police was established by the King on Feb 4, 2004[3]. Its report culminated in 125 recommendations to the government (1st RC Report). It highlighted the current lack of public confidence and trust in the police force, and stated that 80 people died while in police custody between 2000 and 2004 and of these, only eight cases have been investigated. More recently, in a written reply to Parliament, the Prime Minister and Internal Security Minister revealed that 108 deaths occurred in police custody between 2000 and 2006.[4] While the number of inquiries held over custodial deaths was not disclosed, the causes of the deaths were cited as heart attacks, suicide by hanging, fights between detainees, slipping in the lock-up toilet and asthma.

SUHAKAM had previously raised its concern with the government over deaths in police custody. In response to SUHAKAM's Annual Report 2003, the Ministry of Internal Security stated that there were 38 deaths in police custody between 2002 and 2003, but that the police caused none of these.[5] While the Criminal Procedure Code makes it mandatory for inquests to be conducted in custodial death cases, it is not done in practice. There is an urgent need for SUHAKAM to increase its vigilance of such cases, and call for relevant documents for scrutiny. This will step up the pressure on the authorities to ensure that there is no impropriety in such deaths.

A key recommendation of the 1st RC Report is that police must submit all sudden-death reports to a magistrate within a week, and that inquests be held a month from the time of death. Another was for the formation of an Independent Police Complaints and Misconduct Commission (IPCMC). This independent commission would be a huge step towards curbing police abuses, and increasing accountability to the public. It may probe allegations of rights abuses by the police force and discipline offenders. Unfortunately, the government has not followed through with these recommendations. As the statutory human rights body, SUHAKAM is in a position to seek information on the status of this matter, and this should be done.

3 The Royal Commission was tasked to investigate the roles and responsibilities of the force in law enforcement, including its organisational structure, operating procedures, distribution and development of human resources, work ethics and issues of human rights compliance.

4 Malaysiakini.com, *108 police custody deaths in six years*, April 24, 2007.

5 Annual Report 2005, Appendix VII, p. 228.

Police misdemeanour and abuse of power continued to make headlines after a one-minute video clip, showing a naked female detainee doing "ear squats"' while being observed by a policewoman, was circulated in November 2005. The police defended this as "standard operating procedure". Another Royal Commission was established. The Commission of Inquiry into the Standard Operating Procedures, Approaches or Regulations in the handling of Body Search in Connection with Arrest and Detention by the Police examined the practice of body searches and made recommendations that were passed as law in July 2006. New procedures have been introduced to uphold the dignity of suspects while empowering the police to carry out the necessary searches.

The government continues to react to issues on an *ad hoc* basis, lacking a systematic process of deciphering recommendations made by civil society or SUHAKAM. It proceeds to act only where its public image is affected. A programmatic consultation and feedback mechanism needs to be effected, and SUHAKAM should lead this initiative.

(b) Other law enforcement agencies

The law enforcement agency established under our emergency laws, People's Volunteer Corps or RELA[6], regularly assists the police in conducting arrest and detention operations of undocumented migrant workers. According to the government, RELA's role is necessary to maintain security and the well being of the people. In 2005, RELA was given greater powers to stop any person suspected to be a terrorist, undesirable person, or illegal immigrant.

This has allowed RELA to become a law unto itself. RELA members have been arrested over allegations of robbery, use of excessive force and breaking and entering migrant housing areas. Undocumented foreigners have been arrested despite being officially recognised as refugees or persons of concern by the Office of the United Nations High Commissioner for Refugees (UNHCR). After a spate of complaints regarding RELA raids, which included theft, extortion and physical abuse of detainees, Human Rights Watch called for its immediate disbandment.[7] It is time

6 Known also as *'Ikatan Relawan Rakyat Malaysia'*. It is a voluntary programme established in 1972 under the Home Affairs Ministry to provide assistance to the security forces.

7 Malaysiakini.com, *Global rights watchdog: Disband Rela*, May 10, 2007.

SUHAKAM takes a public stand in calling for the repeal of all emergency laws, including the deployment of RELA members. Trained law enforcement professionals should carry out this task.

Connected with this issue is the role of the UNHCR, which carries out its mandate to document, register and intervene on behalf of refugees or persons of concern. The government has voiced its displeasure at this by implying that UNHCR is "getting in the way" of law enforcement by RELA and the Immigration Department.

The reality is that the UNHCR was invited by Malaysia in 1975 to assist both refugees/persons of concern and the government in documentation and intelligence gathering, which are essential for national and regional security. At the highest level, UNHCR has been assured of support but there now seems to be a mismatch between the promises given and actual implementation.

To effectively advocate human rights, SUHAKAM needs to conduct thorough research and investigation into the operations of RELA, and at the same time, be unwavering in its position that our emergency laws must go. SUHAKAM also needs to be the "bridge" to work out the conflicting positions of the Immigration Department, RELA and UNHCR.

Moral policing by Islamic religious authorities is a human rights issue. However, SUHAKAM has not taken a public position on this issue. Article 18 of the International Covenant on Civil and Political Rights clearly states that everybody shall have the right to freedom of thought, conscience and religion. What does this entail? How do Islamic laws impact on the lives of Muslims? Are religious laws that impact the lives of its adherents free from scrutiny based on rights values?

The raid by the Federal Territory Religious Department (JAWI) on a nightclub in Kuala Lumpur in which numerous Muslim patrons were subjected to harsh and degrading treatment caused an outcry. In 2006, JAWI defied the Cabinet by seeking to establish a "snoop squad" to spy on immoral activities by Muslims. The Putrajaya Islamic Council Volunteer Squad was formed to help religious enforcement officers tackle *khalwat* or close proximity cases. It would relay the information obtained to JAWI for its enforcement officers to act.[8] New guidelines of the Federal Islamic Development Department now authorise officials to enter private premises without

8 The Star, *FT Religious Department wants to go ahead with its snoop squad*, Jan 20, 2006.

a warrant to conduct raids on Muslims suspected of gambling or consuming alcohol.[9] In matters of faith that are part of the *forum internum*, the use of Syariah courts to chastise, punish or coerce Muslims in matters of their religion is increasingly common. The *Ayah Pin* and *Haji Kahar* cases are examples. These developments are a worrying trend for human rights in Malaysia, where issues of public/private space and the imposition of regulated morality need to be urgently addressed. SUHAKAM has to weigh-in on this debate.

II. SUHAKAM's Responses and Areas for Improvement

SUHAKAM conducted human rights workshops for law enforcers, focusing mainly on the Prisons Department and the police. These workshops were held with the objective of raising rights awareness, enabling discussions on violations and abuse of powers, and developing the officers' abilities to prepare orders or guidelines in line with human rights principles. Efforts in human rights education as outlined are commendable. This initiative should continue with a wider spread of officers involved as participants. The next step is to formulate concrete resolutions or pledges to be agreed on at the workshops. This should be re-visited after a specific period of time. Actionable steps need to be taken to integrate human rights principles into the police code of conduct. Guidance must come from SUHAKAM. Further, a review of the effectiveness of training programmes held by SUHAKAM should be undertaken.

The Complaints and Inquiries Working Group (CIWG) maintained its regular visits to police lock-ups, prisons and detention camps to monitor conditions. A total of 22 detention centres were visited, but few details are given in the Annual Report. No further explanation was given, or follow-up plans made, to investigate persistent problems. It is suggested that future visits be conducted as "surprise spot checks". Written reports of all visits, with photos where necessary and including detailed observations, findings and recommendations, should be published. Where possible, and subject to the rights to privacy of detainees and confidentiality, the visits should be video-recorded and uploaded on the SUHAKAM website for public access. Verified physical abuse should be reported without naming the detainee. Recommendations should be monitored for implementation and noted in the

9 US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices - 2006*, March 6, 2007.

visitation reports. As SUHAKAM is the only independent body empowered to visit places of detention, information from and monitoring by SUHAKAM is vital.

Out of the 721 complaints received by SUHAKAM in 2005, 217 were made against government agencies, of which 138 were against the police. The highest number of complaints concerned delays in police investigation, followed by police inaction. More importantly, 50 complaints were on abuse of power and police violence. Police matters in East Malaysia received relatively fewer complaints, wavering around six per cent of the total complaints, largely due to predominant focus on land rights issues.

The CIWG acted on complaints against law enforcement officers by organising meetings with the police and immigration personnel. These sessions purportedly achieved greater rights awareness, enhanced partnerships and exposure to the promotion of human rights. While these are valid objectives to work towards a long-term structural rights paradigm, the solutions do not constitute "acting on complaints". The fact that almost 20 per cent of the complaints received were made against the police accounts for the gravity of violations by the force. What exactly happened with these complaints? Did the complainants get appropriate redress? More details should be given about these cases in SUHAKAM's annual reports.

SUHAKAM's various visits, workshops and meetings with government departments around the country have been standard procedure for a number of years now. Have the implications of these initiatives upon enforcement agencies been translated into principles of action, given that SUHAKAM continues to receive increasing numbers of complaints yearly? An assessment needs to be carried out.

It is encouraging to note that in the exercise of its power under Section 12(1) of the Human Rights Commission of Malaysia Act, SUHAKAM has conducted various public inquiries into allegations of violation by law enforcement agencies. It has accordingly conducted inquiries into the Kesas Highway Incident, the "Bloody Sunday" at KLCC, the custodial death of S. Hendry and the inhuman treatment meted out by the police in Kundasang, Sabah.

This practice of conducting public inquiries should be continued, and SUHAKAM would do well to take up the challenge of conducting public inquiries into every

serious or consistent patterns of law enforcement abuse. Where civil society and non-governmental organisations may have little traction with the government, SUHAKAM is in an influential position. In addition, resources available to SUHAKAM are immense, if compared with other human rights organisations in Malaysia.

III. Challenges and Recommendations

It is noted that the Annual Report 2005 does not contain the usual catalogue of observations on human rights issues and the government's responses, as in SUHAKAM's Annual Report 2004. The practice of listing SUHAKAM's concerns and feedback from the government on the same should be continued, and pressure mounted on the government to submit its responses within a stated timeframe. On-going engagement with the government through this process is vital. As much as SUHAKAM's annual reports need to be read by government leaders, it is disheartening that not one report has ever been debated in Parliament. SUHAKAM must decide on a radical course of action for the reports to be tabled and debated in the relevant parliamentary session.

Criticised by many as a "toothless tiger", SUHAKAM's problem lies in the absence of enforcement power, having been defined merely as an advisory body, the recommendations of which are not binding on the government. A holistic approach towards seeking greater enforcement powers has to be made, and a legal policy paper to this effect must be formulated. Reading the founding statute of SUHAKAM in a more liberal way would also be of assistance.

With the vast amount of resources at its disposal, SUHAKAM is the envy of non-governmental rights organisations. Yet, a great deal of its good work is wasted on a government that does not take human rights seriously. The response given by the Ministry of Internal Security to the charge of police inaction is an example. It was met with a statement that the police are continuing to increase efficiency in "investigation, prosecution and prevention of crime", among other efforts, as opposed to providing a clear stand on actions taken or to be implemented.[10] Similar apathetic answers pepper the rest of the document in *Appendix VII*.

10 Annual Report 2005, Appendix VII, p. 215.

With regard to the IPCMC, the Attorney General's Chambers is still studying the matter, and there's no deadline in sight.[11] SUHAKAM should take on a greater responsibility to expedite the process by lobbying the Prime Minister's Office and the relevant authorities.

SUHAKAM needs to continue its discourse with the government to enshrine the CCLEO as standard practice for all enforcement agencies. A policy manual needs to be adopted, incorporating "human rights policing values" to guide them. The CCLEO includes eight articles that impose upon law enforcers the need to respect and protect human dignity and uphold the basic rights of all persons. This would go some way towards eliminating problems of abuse and misconduct on the part of law enforcers.

The deployment of the police or RELA in commercial disputes to evict undocumented land settlers or the Orang Asli is yet another troubling issue. SUHAKAM commissioners should be physically present on these occasions to document and monitor the situation. Law enforcers are usually quite wary of being heavy-handed if a human rights body such as SUHAKAM watches them. Looking ahead, there is an urgent need for SUHAKAM to look into carving protection rights for undocumented land settlers and the Orang Asli, for land disputes concerning them escalate by the day.

SUHAKAM's presence at the "ground level", where the human rights battles take place daily, will be welcomed - whether it is the presence of its commissioners or officers at assemblies, or through instructions given to lawyers to make submissions as *amicus curiae* in human rights cases.

Among other challenges that continue to be faced are the lack of public commitment and awareness levels among Members of Parliament. Many of the public statements by MPs continue to demonstrate a severe lack of understanding of international human rights standards. SUHAKAM must take its educational initiatives to the next level by bringing human rights to Parliament.

SUHAKAM is bound by the provisions of the Universal Declaration of Human Rights in its work, and by extension, international human rights law such as treaties agreed upon. It must not shy away from "sensitive" issues such as Islam or the

11 Malaysiakini.com, *No deadline set on IPCMC decision*, 11 April 2007.

freedom of religion. These issues are inextricably linked with other rights violations, such as abuse of power by law enforcers. While we understand the context of religion in our society, we question the utility of the following statement made in the Annual Report by a human rights body of SUHAKAM's stature:

"To comment on or criticise a religion – even if by someone professing the same religion or more so by someone of another religion – may cause uneasiness and lead to disruption of public order and general welfare in a plural society."[12]

Adopting a public position on issues pertaining to religious freedom is necessary; for being overtly silent on the issue does not advance the human rights culture of protecting religious pluralism through dialogue and discussion. SUHAKAM should conduct research and craft a legal policy paper to act as a human rights guide on this matter. There is a growing body of opinion today, even within the Muslim world, that Syariah laws should be human rights compliant. In line with the robust spirit of free expression for effective human flourishing, everyone should be encouraged to discuss issues of religion and religiosity in an objective and rational way. As such, the SUHAKAM statement above, taken at its best, is ambiguous or may be misinterpreted as a *carte blanche* for the silencing of religious rights violations in the name of religion. Arbitrarily suppressing a cardinal right in the name of another will create more problems than it will solve.

IV. Conclusion

SUHAKAM has attempted to address basic issues of law enforcement abuse and misconduct, particularly those perpetrated by the police. Greater attention should be given to the other law enforcement agencies as well, such as those dealing with immigration and Syariah laws. SUHAKAM should increase its speed in responding to human rights violations, taking the initiative *proprio motu* without first having to be called upon by civil rights organisations.

Recommendations made should be monitored in detail by SUHAKAM to ensure that the government takes them up. Its activities should include practical aid to victims of abuse, and more should be done to expand the educational and practical training of law enforcers across the country. Effects of such training should be

12 Annual Report 2005, p.21.

documented to track through time whether these have had any successful impact in changing the mentality and actions of law enforcement agents.

The public at large will benefit significantly with a fearless, driven and purposeful SUHAKAM.

The country needs no less.

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SUHAKAM and the Freedom of Religion: A Review of the SUHAKAM Annual Report 2005

Malik Imtiaz Sarwar

I Introduction

To say that civil society activists have been consistently disappointed in the efforts, or the lack thereof, of SUKAHAM in the area of the freedom of religion would be an understatement. Its position is perhaps best described as having been, and still is, non-interventionist.

This position has been criticised from as early as 2002 when, among others, the National Human Rights Society (HAKAM) queried the failure of the Commission to make recommendations to the Government on the question of apostasy in the context of a controversial draft law proposed in1998. As is evident from the SUHAKAM Annual Report 2005, the Commission continued to take the same position in the face of what has obviously become a worsening situation. In this review, being written in 2007, it can be said that the trend continues.

As it will become clear in the course of this review, the non-interventionist position is not easily reconciled with SUHAKAM's mandate, both under the United Nation's Principles Relating to the Status of National Human Rights Institutions, or the "Paris Principles" and the Human Rights Commission of Malaysia Act, 1999. It is also suggestive of an intentional disregard of obvious violations and a refusal to discharge responsibilities.

II Functions and Powers

To view matters in context, it would be beneficial to consider again the functions and powers of SUHAKAM. These are as provided under Section 4 of the Act, as follows:

Functions:

a. To promote awareness of and provide education in relation to human

rights;

b. *To advise and assist the government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;*

c. *To recommend to the government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and*

d. *To inquire into complaints regarding infringements of human rights.*

Powers

a. *To promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;*

b. *To advise the government and/or the relevant authorities of complaints against such authorities and recommend to the government and/or such authorities appropriate measures to be taken;*

c. *To study and verify any infringement of human rights in accordance with the provisions of this Act;*

d. *To visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations;*

e. *To issue public statements on human rights as and when necessary; and*

f. *To undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.*

It is also crucial to bear in mind that under the 1999 Act, SUHAKAM can either act on its own motion or on a complaint of an infringement of a human right, either by the person or persons aggrieved or by persons acting on behalf of the aggrieved persons.[1] The latter category would necessarily include, as is borne out in practice, non-governmental organisations (NGOs) or rights groups.

1 Section 12: *The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons.*

Once the process is initiated, the Commission has the powers to take the necessary steps. As has been seen primarily in the case of complaints concerning abuses of power by the police, SUHAKAM more usually holds inquiries.

III Freedom of Religion

There is no question as to the human right to the freedom of religion. It is entrenched in the Universal Declaration of Human Rights 1948 (UDHR)[2]. The SUHAKAM Act obliges the Commission to have regard to the UDHR to the extent that it is not inconsistent with the Federal Constitution. The Constitution guarantees freedom of religion for all persons in Article 11(1)[3]. There is no inconsistency between the UDHR right and the constitutional guarantee. It is therefore indisputable that the Commission is obliged to promote and uphold this freedom.

It is crucial to note that the emphasis placed by Article 11(1) on "person" is consistent with a key feature of human rights discourse: The protection of the rights of the individual. While the wider concerns of the community may be relevant in considering acceptable levels of state intervention where such is permissible, for instance in the preservation of public order, the basic human rights of the individual cannot be sacrificed to the wider community interest or that of a particular section of the community. Where the freedom of religion is concerned, this principle has been given added recognition by the Federal Constitution in allowing for restriction of the right to practice, and not profess, in the limited situation where such restriction is necessary for the public order, public health or morality.[4] As will be seen though, the Malaysian experience has been one where sectoral interests have been placed on a higher plane than that of the individual's right to protection, a state of affairs that SUHAKAM has regrettably appeared to have endorsed.

It must also be borne in mind that freedom of religion, like any other human right, is indivisible from other rights. The articulation, protection and promotion of the

2 Article 18, 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*

3 Article 11(1), Federal Constitution: *Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.*

4 Article 11(5): *This Article does not authorise any act contrary to any general law relating to public order, public health or morality.*

freedom of religion necessarily involve invoking other rights such as the freedom of expression and the right to equality or to not be discriminated against[5] . As is made clear by Article 11(1), the exercise of the freedom of religion is premised on the twin components of "professing" and "practising". The former concerns a declaration to oneself and to others of the subscription to a particular faith or to none at all. The latter concerns a manifestation of the subscription to that faith or to none at all. Both involve some form of expression.

Similarly, where persons of a particular faith consider themselves to be wrongfully treated, the ability to express their grievances is a necessary incident of their practice of the faith in that they are acting in the protection and promotion of their faith. Additionally, where they are not afforded the same treatment afforded to adherents of other faiths by the state and its agencies, then it could be said that they are being discriminated against.

IV Infringements of Religious Freedom and Associated Rights

The Malaysian experience has brought into focus various infringements of human rights in the context of religious freedom. These have largely been the result of political purpose and brought about through political process. Though in contravention of the Federal Constitution, judicial pronouncements since 1998, more usually the result of judicial activism, have allowed for a silent rewriting of the Federal Constitution and have allowed for the entrenching of policies and mechanisms to deny freedom of religion and associated rights. This in turn has led to the undermining of the Rule of Law and constitutionalism, most commonly manifested as a denial of access to justice.[6]

Space does not allow for a comprehensive enumeration of the infringements that have taken place. Furthermore, the infringements are largely caused by systems that have been set up by the government and its agencies and the blurring of lines

5 Both of which are protected under the Federal Constitution by Articles 10 and 8 respectively.

6 The names of those individuals courageous enough to have taken a public position through litigation - Lina Joy, Syamala, Moorthy, Rayappan Subashini and Revathi to name a few - have become rallying points for the cry for religious freedom and the restoration of constitutionalism. Despite mounting tensions and manifest injustices, SUHAKAM has remained outside the fray, leaving vulnerable to reprisal civil society groups that have engaged in the issue.

between public and private lives, in particular where Islam is concerned. It would as such be more useful to consider the nature of the infringements and connected matters in a summary form. These are as follows:

Regulation by the State of religious matters:

- Definitions of religion/religious principles/believers – this necessarily excludes or limits the diversity inherent in the freedom;
- Moral policing based on religious values (as distinct from general restrictions aimed at protecting public morals); and/or
- The creation and empowerment of a "clergy" class with virtually absolute power over definitions and discourse through legal provisions which give them such authority and/or which make questioning authority and rulings/edicts (or disobeying the same) offences.

Failure on the part of the State to provide adequate safeguards/protection:

- Failing to recognise the universality of the right to religious freedom;
- Failing to establish and/or maintain the requisite machinery to ensure the promotion and protection of free exercise of religion;
- Validating through inaction the restrictive positioning of pressure groups;
- Validating through inaction conduct aimed at or having the effect of fettering religious freedom, including hate speech, incitement; and
- Supporting indirectly efforts of individuals or organisations whose principal objective is to put in place wrongly restrictive religious frameworks.

The infringements noted above (and others) necessarily involve an infringement of the freedom of expression and the right to non-discrimination as:

a. Definitions restrict diversity and the freedom to be diverse, and impact on the freedom to profess and practice. Non-complying or "unacceptable" religious communities are commonly forced to go "underground" and in doing so are:
    - Impeded in freely professing their religion of choice, or the lack

thereof;

- Impeded in the free practice of their religion of choice; and
- In some cases, compelled by circumstance/law to practice a particular faith or practice in a particular way.

b. The "absolutist" positioning necessarily requires the curbing of any matter that calls into question, directly or indirectly, this state of affairs. As a consequence:

- Where religious principles are in conflict (both within a particular religion and between different religions), religious minorities are compromised as they are subjected to the dictates of the "majority" religion. The inability to articulate the problems through repressive anti-expression frameworks or circumstances further entrenches the difficulties. This in turn has led to further erosion;
- Advocacy efforts aimed at promoting universality are not permitted.

V The SUHAKAM Response

As noted above, the SUHAKAM response has been negligible.[7] It is indisputable that SUHAKAM has received complaints concerning infringements since 2000. Additionally, SUHAKAM could, and should, have taken cognisance of the infringements. Sadly though, it has not taken a definite stand yet.[8]

By failing to come to the conclusion that the individual right to freedom of religion is a universal right available to all persons in Malaysia, SUHAKAM itself has failed. By failing to come to the defence of persons who have been made victims by a repressive framework created and maintained by the state, SUHAKAM has in effect acted in complicity with those who repress and infringe.

The question then arises as to the possible reasons underlying SUHAKAM's lack

7 Though, in fairness, the current chair has, post-Moorthy, openly criticised the Judiciary for its lack of courage. These views however remain his and not of SUHAKAM.

8 Allen V. Estabillo of the Southeast Asian Press Alliance quotes a SUHAKAM representative as having stated such in an interview in 2006 in 'The (Religious) Minorities' Report' at www.seapabkk.org/newdesign/fellowshipsdetail.php?No=605. No developments have occurred since.

of action. The closing paragraph to the section on the Freedom of Religion in Annual Report 2005 provides some hints, even as it illustrates the position complained of. In concluding a startlingly brief analysis of the year's events and of matters pertaining to the freedom of religion, the report declares[9]:

"Religion is an extremely personal matter and it governs only that person's belief and behaviour. The Federal Constitution guarantees the right of every person to profess and practice his or her religion and to propagate it. To comment on or criticise a religion – even if by someone professing the same religion or more so by someone of another religion – may cause uneasiness and lead to disruption of public order and general welfare in plural society."

It appears that SUHAKAM has itself taken the position that community interests, in this case public order and general welfare, are overriding factors that allow for the derogation of the freedom of religion and associated human rights. This is manifestly wrong for not only being inconsistent with the Federal Constitution but also with international human rights norms.

It is alarming that in founding its concerns, and that too not for the protection of human rights but for the need for public order, on "sensitivity", SUHAKAM has taken on the rhetoric of the government and the Judiciary.[10] Seen from this perspective, there is basis for concern that SUHAKAM is not acting in as independent a manner as it is obliged to.[11]

9 At p 21

10 Consider the position taken by the government on the proposed Interfaith Commission in 2005 and the more recent Article 11 Roadshow. In response to reactions by minority extremist views, the government declared the issue of faith "sensitive" and directed that there be no public discussion on matters pertaining to the freedom of religion. SUHAKAM has remained silent on these events, events that clearly disclose infringements of varying nature. Contemporaneously, the courts have referred to the need to protect the sensitivities of the Muslim community and against unrest in coming to decisions that have, in effect, denied the freedom of religion. See, for instance, the judgments of the High Court and the majority in both the Court of Appeal and the Federal Court in the Lina Joy case.

11 In response to an invitation by the Steering Committee of the Initiative Towards the Formation of a Statutory Interfaith Commission in late 2004 to participate in deliberations aimed at culminating in a draft law aimed at putting in place a consultative Commission to assist in the shaping of policies having an impact on religious harmony, SUHAKAM responded that it had not received any notifications of infringements of religious rights. In response the Steering Committee enumerated instances of such notifications from as early as 2000. SUHAKAM did not respond.

VI Conclusion

The active participation of SUHAKAM in efforts aimed at protecting the freedom of religion and associated rights, in the widest possible sense, is invaluable. SUHAKAM could give legitimacy to the efforts of civil society groups that have been marginalised and demonised for their vital efforts in promoting constitutionalism, the rule of law and human rights. Current trends only point to further erosion of the rule of law and constitutionalism. And with that, of human rights.

In having failed to engage, and in continuing to do so, SUHAKAM has chosen to turn its back on one of the most crucial aspects of human rights in Malaysia this decade.

The principal of M/s Malik Imtiaz Sarwar, Advocates & Solicitors, Malik Imtiaz Sarwar is a leading Malaysian human rights lawyer and activist and the current president of the National Human Rights Society (HAKAM). Through HAKAM and a coalition of NGOs callled Article 11 (after the constitutional guarantee of freedom of religion) of which HAKAM is a member, he has been actively involved in efforts to promote the rule of law and constitutionalism. In 2005, Malik served as Chairperson, Steering Committee of the Initiative Towards the Formation of the Interfaith Commission of Malaysia. He has presented and published numerous papers at various seminars, conferences and in many publications and is also author of various law-related material.

Migrant and Refugee Human Rights: The Othering Divide

Sharuna Verghis

This review was to focus on SUHAKAM's performance with regard to migrant workers and asylum seekers based on in its Annual Report 2005. However, given numerous fast-paced developments that took place in relation to migrants, refugees and asylum seekers since then, this review will extend its focus to issues that remain germane to the present context.

The review also attempts to draw attention to the state of human rights of migrants, refugees and asylum seekers before commenting on SUHAKAM's activities in 2005. This is in order to identify the extent of human rights violations and the background issues, in order to appreciate the context of the Commission's efforts and to make relevant recommendations.

Annus Horribilis: The State of Human Rights of Migrants, Refugees and Asylum Seekers

1. Arrests by RELA

For various reasons 2006 and 2007 are as much *annus horribilis* for migrant workers, refugees and asylum seekers as 2005. The massive nationwide crackdown on undocumented migrants that began in March 2005 continued unabated in 2006 and this year. Recurring complaints against RELA (or People's Volunteer Corps), including excessive use of force, theft, extortion of money, corruption, physical abuse of undocumented immigrants and unlawful behaviour continued well into 2007[1,2,3]. However, besides undocumented migrants, RELA continued its arbitrary and indiscriminate arrests of refugees and asylum seekers holding UNHCR documents

1 Release All Refugees and Asylum Seekers and Stop the Use of RELA Immediately, Tuesday, Jan 30, 2007. http://www.suaram.net/index.php?option=com_content&task=view&id=19&Itemid=29. Accessed on June 5, 2007

2 Global rights watchdog: Disband Rela (Malaysiakini). Thursday, May 10, 2007. http://www.suaram.net/index.php?option=com_content&task=view&id=107&Itemid=30. Accessed on June 5, 2007

3 RELA members caught for robbery. April 18, 2007. http://www.malaysiakini.com/news/66100

that confirmed their status as refugees, as well as those being considered for refugee status. In fact, indiscriminate arrests of refugees and asylum seekers are said to have increased since the public statement by Home Minister Datuk Seri Mohd Radzi Sheikh Ahmad that Malaysia "does not recognise the work of the United Nations High Commissioner for Refugees" and his accusation that the UN agency was "interfering" in law enforcement operations against "illegal immigrants in the country"[4].

RELA, on the other hand, seems unsatisfied with the new powers it was given in 2005, including carrying and using firearms; checking and arresting a person when there is "reasonable belief" that the person is a "terrorist, undesirable person, illegal immigrant or an occupier"; entering "any premises" while in pursuit; and searching any premises or vehicle without a warrant[5]. One only has to be at least 16 years old and hold a Malaysian identity card to be eligible to become a RELA member. There is no background screening process and once admitted, a 10-day training is provided. This does not include human rights training for the lower rung members who undertake raids, and there is no internal mechanism for disciplinary action in the event of misuse of powers or a complaint, save the stripping of membership. RELA is now demanding the "power to investigate and prosecute in court"[6].

In response to these developments, rights groups highlighted the repeated defending of RELA by the government, in spite of the complaints brought against it, and the "systemic impunity of law enforcement authorities, especially over indefinite detention without trial under the Internal Security Act, the Dangerous Drugs Act and the Emergency Ordinance"[7]. In response, SUHAKAM conducted training sessions for RELA and recommended integration of human rights into

4 Refugees Increasingly at Risk of Arrest by Immigration Department Despite Being Recognised by UNHCR. Published by SUARAM, March 2, 2007, in Malaysian NGOs and Migration. http://www.bangkit.net/2007/03/02/refugees-increasingly-at-risk-of-arrest-by-immigration-department-despite-being-recognised-by-unhcr/. Accessed on June 8, 2007

5 'They came with their batons and lock-cutters' (Malaysiakini). May 31, 2007. http://www.suaram.net/index.php?option=com_content&task=view&id=125&Itemid=30. Accessed on June 5, 2007

6 RELA chief: Give us more power. Malaysiakini, May 29, 2007. http://www.malaysiakini.com/news/67857

7 SUARAM: Powers given to RELA institutional ie vigilantism. The Sun, Tuesday, May 29, 2007. http://www.suaram.net/index.php?option=com_content&task=view&id=120&Itemid=30. Accessed on June 5, 2007

RELA's training programmes. SUHAKAM came under criticism from NGOs for its contradictory position of not supporting the Emergency laws, but yet supporting a body like RELA that was constituted through the Emergency laws. The NGOs accused SUHAKAM of failing to address issues such as:

- The causes of increase in numbers of undocumented migrants, including withholding of passports by employers and recruiting agents;
- Trafficked persons whose passports are held by traffickers; and
- The impact and the consequences of RELA's actions on the rights of migrants and refugees[8].

More recently, the Malaysian Bar unanimously passed a Resolution for the End of the State of Emergency and an End to Law Enforcement by the Untrained and Armed People's Volunteer Corps (RELA)[9].

In addition to raids by RELA, there were reports of women refugees and asylum seekers being arrested and detained when they went to local authorities to register the birth of their babies[10]. In one case, "both parents were reportedly unwell, with the mother still bleeding from childbirth and the father being freshly discharged from a hospital where he was treated for temporary paralytic limbs"[11].

Against this backdrop, Home Affairs Minister Radzi Sheikh Ahmad reported "28,079 illegals were detained in 2005" and 56,315 were apprehended in 2006[12]. Most did not have valid documents.

8 Irene Fernandez, RELA: SUHAKAM's perspective narrow. http://tenaganita.disagrees.net/info/index.php?option=com_content&task=blogsection&id=4&Itemid=53&limit=11&limitstart=11. Accessed on June 4, 2007

9 RESOLUTION FOR THE END OF THE STATE OF EMERGENCY AND AN END TO LAW ENFORCEMENT" BY THE UNTRAINED AND ARMED PEOPLE'S VOLUNTEER CORPS (RELA). (Passed unanimously at the 61st Malaysian Bar AGM held on March 17, 2007). http://madpet06.blogspot.com/search/label/HR%20Violations%20-%20RELA. Accessed on June 8, 2007

10 Malaysia: Government must stop abuse of Burmese refugees and asylum seekers. May 25, 2007, Refugees International. http://www.refugeesinternational.org/content/article/detail/10005/ Accessed on May 29, 2007

11 Broken Promises: Respect Rights of Vulnerable, Release Baby Detainees. March 9, 2007. http://www.suaram.net/index.php?option=com_content&task=view&id=129&Itemid=30. Accessed on June 5, 2007

12 RM3.2 Million Spent In 2006 To Repatriate Illegal Immigrants. BERNAMA, March 27, 2007. http://www.suaram.net/index.php?option=com_content&task=view&id=46&Itemid=30. Accessed on June 5, 2007.

2. Detention

Malaysia has no legislative provision for international refugee protection. Under the Immigration Act 1959, any person who enters or remains in Malaysia illegally is liable to prosecution, which may result in detention, corporal punishment in the form of whipping, a fine and/or deportation[13]. Thus, by virtue of their "illegal status", refugees, asylum seekers and persons of concern risk detention, prosecution and deportation under the Immigration Act, and this in some instances contravenes the principle of non-refoulement. By the end of 2006, 800 refugees and asylum seekers were in immigration detention on charges of illegal entry or illegal stay in Malaysia – including 120 women and children. During the year, UNHCR secured the release of 1,700 persons of concern from detention, 200 from immigration detention, 300 from prisons and 1,200 from police lock-ups. This was a marked increase from 2004, when it secured the release of only 200 persons. In August, the Attorney General issued orders not to initiate any more immigration law violation prosecutions by asylum seekers and refugees holding UNHCR papers'[14].

Other groups, such as trafficking victims and abused migrant workers, also face similar risks of arrest, detention and deportation, in spite of the vulnerability of their situation.

The aggressive crackdown exercise has lead to deteriorating conditions in detention camps. SUHAKAM reported that overcrowding continued to remain a problem[15]. Other reports from the periodic monitoring of conditions in detention centres included abuses as well as inadequate medical care, food, clean water, toilet and shower facilities and sanitary napkins in some detention centres, thereby increasing the risk of disease and death among detainees. Other concerns that continue to surface are inadequate ante- and post-natal care in detention, the handcuffing of pregnant women to hospital beds during delivery and mothers during breast-feeding, inadequate time to recuperate in hospital after delivery, detention of refugee mothers, babies and children, as well as inadequate supply of diapers and powdered milk for babies or suitable food for children[16,17,18,19].

13 IMMIGRATION ACT 1959/63. Section 6(1)(c)

14 Country reports-Malaysia. 2006. US Committee for Refugees and Immigrants. http://www.refugees.org/countryreports.aspx?id=1595. Accessed on June 1, 2007

15 Annual Report 2005, Human Rights Commission of Malaysia

16 Asylum Seekers & Migrants at Risk of Inhumane Arrest, Detention & Deportation in Malaysia. Nov 1, 2006. http://idcoalition.org/portal/content/view/78/82/. Accessed on June 5, 2007

Refugee International, on a recent mission to Malaysia, noted that some refugees agree to be taken to the Thai-Malaysian border to escape the "dire detention conditions". There, traffickers and smugglers pick them up and if they are unable to secure their release by paying RM1,500, then they are sold into forced labour[20].

3. Access to Justice and a Fair Trial

To compound problems, access to justice and fair trial remains a serious concern. The remoteness of Immigration/Sessions Courts set up in detention camps and the lack of access to detention centres by international agencies and organisations means that refugees and undocumented migrants have poor or no recourse to legal representation or medical assistance. In addition, the reported mindset and perspectives of the judicial officers and problems associated with mitigation are among other problems that raise serious concern over the absence of fair trial and miscarriage of justice[21,22].

The practice of corporal punishment by caning hundreds of migrants, refugees and asylum seekers breaching the Immigration law continues to be a major human rights concern.

4. Labour Rights

On the labour rights front, abuses, exploitations and violations persisted. Between June and November 2005, Tenaganita opened 182 case files on complaints registered by 606 migrants, with unpaid wages topping the list. From January to December 2006, Tenaganita received 257 complaints from 835 complainants. Again, unpaid wages and unlawful deductions from the salary continued to top the list of labour rights violations. Other violations included non-payment of overtime wages, threats, harassment and verbal and physical abuses by employers. An increase in accidents

17 Amnesty International Report 2006. http://web.amnesty.org/report2006/mys-summary-eng#4. Accessed on June 8, 2007

18 Memorandum to the Ministry of Women, Family & Community Development by Women's Aid Organisation on behalf of Joint Action Group for Gender Equality (JAG) 2006. http://www.wao.org.my/news/20060108JAGMWFCDMemo.htm. Accessed on June 7, 2007

19 Documentation by SBMI, Indonesia

20 Malaysia: Government must stop abuse of Burmese refugees and asylum seekers. May 25, 2007. Refugees International. http://www.refugeesinternational.org/content/article/detail/10005/ Accessed on May 29, 2007

21 Amnesty International Report 2006

22 A court within a camp - Malaysia welcomes the world. Contributed by Latheefa Koya. March 14, 2007. http://madpet06.blogspot.com/ Accessed on June 8, 2007

at the workplace and violence/abuse involving migrant workers in 2006 was also evidenced. An increase in the numbers of migrants being cheated by recruiting agents has also begun to emerge[23].

These abuses and violations have been attributed largely to the recently implemented Malaysian government policy of outsourcing, whereby the recruitment of foreign labour can only be done by approved outsourcing companies. In this form of outsourcing, the company provides an industry, often referred to as the "principal", with workers to do the jobs or tasks. The outsourcing company is left with the responsibility of recruitment, management of the workers, including paying their wages, arranging living quarters, providing transport to work and meeting all legal requirements, as in the case of migrant workers. The principal then has a contract where the terms of payment, number of workers and period of time are agreed upon'[24]. From cases handled by Tenaganita, even when these outsourcing companies are unable to place workers and pay them their wages, the workers are forced to pay the levy, work permit processing fees and their passports are not returned. Outsourcing companies have been known to use violence to quell demands by workers for payment of their wages. The ambiguities in the relationships between the outsourcing companies, the workers and the company that employs the workers pose immense problems for legal remedy in the event of non-payment of wages, wrongful dismissal and accidents at the workplace. Further, it is impossible for the workers to lodge police reports because they do not have their passports. The absence of transparency on the part of the government in the selection and licensing of outsourcing companies and the absence of legal protection, including remedies, for migrant workers increases their vulnerability to exploitation and abuse, and opens up yet another sector of the economy to corruption.[25]

Refugees, asylum seekers and persons of concern who are viewed as undocumented workers within the legislative framework of the country are, in principle, prohibited from engaging in gainful employment. However, in August 2006, the government issued between 32,000 and 35,000 work permits to Acehnese refugees and migrants. In the same month, 5,000 Rohingya refugees were registered for a similar exercise

23 Tenaganita case files

24 Tenaganita, A Fact Finding Report: Outsourcing in Labor or Trafficking in Migrant Labor? July 2007

25 Recruitment and employment through outsourcing of labour legalises trafficking in persons to Malaysia. Tenaganita Press Release, July 13, 2006. http://www.mfasia.org/mfaStatements/Statement57-MalaysiaOutsourcing.html. Accessed on June 6, 2007

after paying a fee. However, following allegations of fraud, the exercise was suspended, and the refugees continue to await the resumption of registration and issuance of work permits[26,27].

Documented refugees are often able to find work in the informal labour market, one where there are greater risks of exploitation and occupational injuries. At work, they have no protection, no insurance and in the face of a work related injury, employers are hesitant to take them to the hospital.

5. Migrant Domestic Workers

Issues concerning domestic workers continue to predominate in discussions on migrant workers' rights in Malaysia. Living in isolated conditions and working without legal recognition as workers, they are beyond the reach of human rights protection systems. There is no let up to the human rights abuses of migrant domestic workers, who continue to endure exploitative and forced labour like work conditions, including long working hours, no day of rest, non-payment of wages, withholding of passports, no sick leave and no medical insurance. The work and living conditions of migrant domestic workers reflect elements of trafficking in persons.

Malaysia's poor commitment to improving protection for and promoting the rights of migrant domestic workers during this period is reflected in the:

- Absence of amendments to the employment and immigration laws providing for legal protection for domestic workers; and,
- First, the dropping of domestic workers from the MoU on labour with Indonesia in 2004, and later, the development of an MoU with Indonesia for domestic workers in 2006, with provisions that are not congruent with internationally recognised labour standards.

6. Right to Health

Malaysia poses several challenges that contribute to health vulnerabilities of migrants, refugees and asylum seekers. For migrants and asylum-seekers who do not speak the primary languages of Malaysia, complications often arise in explaining

26 Country Reports-Malaysia 2006. US Committee for refugees and immigrants. http://www.refugees.org/countryreports.aspx?id=1595. Accessed on June 1, 2007

27 Australians for Just Refugee Programmes, March 5, 2007 - Nauru update. http://www.ajustaustralia.com/whatshappening_newsletter.php?act=newsletter&id=62. Accessed on June 9, 2007

their health conditions or accessing health services. Information provided by the Ministry of Health is often not available in their mother tongue. This is important in campaigns on diseases prevalent in Malaysia such as dengue, on precautionary measures for possible threats of outbreak as in the case of Avian Influenza, and for emergencies. The inability to access healthcare hinders vaccination coverage, which would be of danger to refugee children.

The Ministry of Health requires all healthcare practitioners, in public or private practice, under the Prevention and Control of Infectious Diseases Act, to report infectious diseases to the nearest health officer with the least practicable delay. Any person who contravenes this section commits an offence[28]. Under the Immigration Act [Article 8 (3) b], any person suffering from a contagious disease who makes his presence in Malaysia is considered dangerous to the community and is thereby prohibited to enter. Consequently, those diagnosed with infectious diseases such as HIV/AIDS or tuberculosis fear to access health services.

Migrants, who face mandatory HIV testing as a prerequisite for the annual renewal of their work permit, continue to be deported if they test positive for HIV or a list of other treatable infectious diseases. Moreover, the manner in which the test is conducted violates their right to privacy, confidentiality and access to treatment.

Through UNHCR's negotiations with several state authorities, the Ministry of Health agreed to provide refugees with a reduced rate at government hospitals on healthcare services[29] (a discount of 50 per cent).

However, refugees' barriers to accessing healthcare services in Malaysia, as documented in the recently released briefing paper by Medecins Sans Frontieres (MSF), include[30]:

1. Lack of knowledge about the healthcare system;
2. Linguistic barriers;

28 Prevention and Control of Infectious Diseases 1988 (Act 342). Part IV. 10.(2) and (5)

29 Country Progress Report 2006 – Malaysia: United Nations General Assembly Special Session on HIV/AIDS. December 2005. Accessed at data.unarids.org/pub/Report/2006/2006_country_progress_report_malaysia_en.pdf, on March 10, 2007

30 'We are worth nothing'. MSF briefing paper. Refugee and asylum seeker communities in Malaysia, April 13, 2007. http://www.msf.org/msfinternational/invoke.cfm?objectid=E9A79207-15C5-F00A-25B06785CFEFC1E5&component=toolkit.article&method=full_html. Accessed on June 8, 2007

3. Undocumented status and fear of deportation, arising from the necessity to declare "illegals" to the police, especially by public health workers; and
4. Financial barriers because even the reduced rate is unaffordable, given that many refugees are unemployed or earn meagre wages.

Moreover, the jungle sites they live in lack electricity, safe and potable water and toilet facilities, while the urban sites are overcrowded flats and buildings that make them prone to respiratory tract infections. Most refugees also complain of sleeping problems because of anxiety and fear of frequent police and RELA raids and harassment.

7. Rights of the Child

By the end of 2006, 9,295 of the 46,356 persons of concern registered with UNHCR were children. UNHCR also recorded 367 unaccompanied and separated children of concern during this period[31].

Most refugee children and asylum seekers, even those born in Malaysia, do not get primary education or free health services. Overall, there is a lack of access to any form of formal education, though some of the refugee communities have their own schools[32].

Migrant children in general face a similar situation.

Other problems of refugee children include absence of documents and therefore, statelessness. This lack of legal status makes them vulnerable to sexual exploitation, abuse and violence.

As for the detention of refugee children, the Committee on the Rights of the Child in its Concluding Observations, after considering Malaysia's report under the Convention, expressed concern over the use of the Immigration Act on these children, which "*resulted in detaining asylum seeking and refugee children and their families at immigration detention centres, prosecuting them for immigration-related offences, and subsequently imprisoning and/or deporting them*"[33].

31 Statistics provided by UNHCR upon request

32 Country Reports-Malaysia, 2006. US Committee for Refugees and Immigrants. http://www.refugees.org/countryreports.aspx?id=1595. Accessed on June 1, 2007

33 COMMITTEE ON THE RIGHTS OF THE CHILD. Forty-fourth session. CONSIDERATION OF REPORTS SUBMITTED BY STATE PARTIES UNDER ARTICLE 44 OF THE CONVENTION. Concluding observations: MALAYSIA. Feb 2, 2007. Para 81

It expressed similar concern over the absence of the full application and integration of the general principle of the "best interest of the child" in *"legislation, policies and programmes of the State party as well as in administrative and judicial decisions*" which "*has resulted in detaining and deporting migrant workers without effective efforts to prevent the separation of children from their parents*"[34].

SUHAKAM'S RESPONSE: OTHERING OF SELF?

The response of SUHAKAM is reviewed in the light of the state of human rights of migrants, refugees, and asylum seekers set out above.

Chapter 1 of the SUHAKAM Annual Report, on Key Issues, touches on migrants and asylum seekers in the section on Vulnerable Groups. Two cases related to wrongful arrest and detention of migrant workers were highlighted, in addition to the case of the 131 Thai Muslim asylum seekers who were provided temporary shelter by the government. SUHAKAM is commended for raising the issue of migrants and asylum seekers in the section on Key Issues for the 2nd and 3rd consecutive years in its 2005 and 2006 annual reports.

SUHAKAM's interventions concerning migrants and refugees in 2005 were mainly in the form of complaint handling, site visits, organising and attending dialogues and meetings, and giving lectures on human rights for senior Malaysian police and navy officers. SUHAKAM reported that it proactively made visits to detention camps and took preventive measures by organising separate meetings with the police, immigration and prison officials at various levels. It stated that this "*networking has helped enforcement officers to be more aware of human rights issues in undertaking their duties. In turn, SUHAKAM officials have gained access to persons with primary responsibilities or duties in these agencies"*[35].

The above initiatives are welcome efforts, given the serious nature of violations suffered by migrants, refugees and asylum seekers during this period.

However, beyond this, it is difficult to make further comment on the effectiveness and coherence of these actions of the Complaints and Inquiries Working Group

34 Ibid. Para 36

35 SUHAKAM Annual Report 2005, p 69

vis-à-vis the Paris Principles or other human rights standards. This is because information provided in the report is not disaggregated by migrants, refugees and asylum seekers and often provides descriptive administrative details, rather than substantive content.

A point deserving mention is that the Complaints and Inquiries Working Group took the lead in all these interventions for migrants, refugees and asylum seekers.

On the other hand, the review of SUHAKAM's response, as an institution, to the migrant/refugee issue seems to indicate the ominous divide that exists between nationals and non-nationals, where the foreigner/migrant/refugee/asylum seeker is seen as the "Other" and is "Othered" in everyday life in the country. Othering can take place through policies, laws and mechanisms that seek to bar the political/social/economic/cultural participation of these people, or through sheer indifference and/or neglect by overlooking their existence and humanity, resulting in their non-inclusion. It can be the result of a deliberate act of exclusion or of an unconscious attitude.

Notwithstanding the many critical concerns of migrant and refugee rights that did not find a place in SUHAKAM's agenda for 2005, the Commission's Annual Report 2005 contains various spaces where issues pertaining to migrants, refugees and asylum seekers could have been included in its activities, but somehow fell between the cracks:

- The right to education of children of migrants, refugees and asylum seekers within the discussion on compulsory and free primary education in the sections on Key Issues and Human Rights Training for state education officers;
- The right to healthcare for refugees and migrants in the Forum on Right to Health – Achieving the Health MDGs that discussed affordable healthcare for all Malaysians.
- These populations are again absent in discussions on the Policy Dialogue on Human Rights Perspectives of MDGs in the area of maternal and child health, HIV, malaria and tuberculosis. In fact, the wording used in the paragraph identifying issues and recommendations related to Migrants' Needs is troubling:

  The influx of both documented and illegal foreign workers and their families into Malaysia has to be carefully monitored for the impact on

healthcare services, education and other social and economic indicators. Whether or not basic social services and targeted programmes should be made available to undocumented migrants is a subject for further policy debate. It is important to bear in mind that migrants, especially those lacking proper documentation, often have limited access to healthcare services, and this could result in undesirable outcomes.

Sadly, this paragraph lacks both the perspective and language of human rights. The right to health perspective is very clear on the scope of access to health services for vulnerable populations, including refugees and undocumented migrants.

- Article 12.1 of the International Covenant on Economic, Social and Cultural Rights states: ***Every*** *human being is entitled to the enjoyment of the highest attainable standard of health* that is conducive to living a life in dignity.
- General Comment 14 (2000) by the Committee on ESC Rights (CESCR) affirms the principles of non-discrimination and equal treatment in exercising the right to health (paragraphs 18 & 19). It emphasises that non-discrimination is the very least that governments can do, and it has minimum resource implications. As such, States have an immediate obligation to ensure non-discrimination and that this is not subject to progressive realisation (paragraph 30).
- The right to health is also enshrined in CEDAW, CERD, CRC and ICMW.
- General Comment 14, paragraph 34 states that, "In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, **to preventive, curative and palliative health services**; and abstain from enforcing discriminatory practices as a State policy".
- The UN Special Rapporteur on Health affirmed the above recently in the context of undocumented migrants.[36].

36 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, MISSION TO SWEDEN. HUMAN RIGHTS COUNCIL, Fourth session, Item 2 of the provisional agenda, Feb 28, 2007.

- In addition, good public health policy and praxis reiterates the critical need to include hard-to-reach and vulnerable populations such as undocumented migrants, especially in interventions dealing with the spread of infectious diseases.
- Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, Convention Relating to the Status of Refugees 1951, the Protocol Relating to the Status of Refugees1967 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, were not included in the work of the International Treaties Working Group despite the migrant/refugee issue being a major and serious problem in Malaysia.

However, the 2006 report of SUHAKAM fared better in terms of the integration of migrant health in the recommendations to the National Health Financing Mechanism, as well as in attempting to use human rights standards as the basis of the implementation of its mandate, even if this manner of reporting was not consistent throughout the report. The SUHAKAM Annual Report 2006 also developed anti-trafficking interventions as a response to the outsourcing policy, kept up the interventions with law enforcement authorities and included refugees' concerns in discussions on the Pre-Dialogue Meeting on Understanding Economic, Social and Cultural Rights in the Context of Malaysia. Yet, there remain core issues and areas that fail to find a place in the Commission's activities. These will not be discussed here as the 2006 report is outside the scope of this review.

SUHAKAM may have many limitations in terms of its powers. However, in terms of addressing the human rights of migrants and refugees, it is yet to exhaust the scope of its mandate. Through its recommendations to the government in 2003, SUHAKAM has shown that it recognises the complexity and multi-sectoral nature of the intervention required, and the need for institutionalising human rights standards in the government's response to the issue of migrants and refugees[37]. There have been some efforts by other working groups after 2005 to pick up the issue of migrants and refugees. However, there does not seem to be a pulling through of these efforts at an institutional level for a more coordinated, sustained and effective response, despite recognition of the complexity of the migrant/refugee

37 Recommendations SUHAKAM'S COMMENTS ON THE GOVERNMENT'S RESPONSE TO SUHAKAM'S ANNUAL REPORT 2003, SUHAKAM Annual Report, 2005, p 195-196

issue. Simultaneously, the core human rights issues of migrants and refugees continue to be lost in the bigger institutional agenda.

It is not clear whether SUHAKAM recognises that the attendant issues related to migrants/refugees have long-term implications for the human rights of Malaysians as well. As such, the issue deserves a much more comprehensive, cohesive, integrated and proactive approach overall on the part of SUHAKAM as an institution.

That crucial migrant and refugee issues do not find a place within the bigger picture of SUHAKAM and its programme planning could be reflective of gaps in human rights perspectives, especially migrant and refugee rights, within the Commission itself. One of the critical elements of a rights based approach is the "pre-occupation of human rights with the marginalised"[38]. The gross violations taking place against migrants and refugees, with impunity by both state and non-state actors, makes them one of the most marginalised groups in the country today. It is indeed sad that this recognition does not come through in some of the positions taken with regard to these populations and the manner in which the Commission developed its programmes. In fact, it seems to mirror the divide and the Othering in the every day public life of the country.

A perspective that views migrant and refugee human rights violations as an issue of "the Other" misses the point that these violations are only a symptom of a bigger problem in the country. As such, the failure to address these violations as one's own concern means risking the loss of one's own fundamental freedoms and rights, and in that sense, "Othering the self".

It is important that SUHAKAM takes stock of the key issues involved in the violations of human rights of migrants, refugees and asylum seekers because this has serious and far-reaching implications on the violations of the human rights of Malaysians as well.

There are two types of issues involved in the violation of human rights of migrants, refugees and asylum seekers. Given its powers to monitor and advise/make recommendations to government and/or Parliament on laws, regulations and policies

38 Paul Hunt, Mandate and Role of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. INTERNATIONAL HUMAN RIGHTS ACADEMY, Utrecht, August 2004

or programmes/ international treaties, SUHAKAM needs to be much more proactive in addressing these two types of issues.

The first relates directly to migrants and refugees, and includes structural problems such as:

- Absence/inadequacy of legislative and administrative provisions dealing with the right to seek asylum or the protection of refugees;
- Migration policy if any, has scant or no regard for human rights principles and standards; and
- Absence of coherence of process – there does not seem to be a proper, formal and ongoing coordinating mechanism of the different agencies of government, or guidelines based on principles of good governance, to spell out the process of coordination.

The other relates to attendant issues arising from migrant/refugee concerns such as the use of RELA and its tactics, the outsourcing of recruitment and placement of migrant workers, the new migrant workers legislation, and Project IC in Sabah. While these may be derivative issues, they deserve equal attention because they reflect:

- The increasing shrugging off of responsibilities of protection, security and welfare by the state to private bodies in tandem with inadequate, comprehensive monitoring mechanisms;
- The escalating absence of transparency in the development of new policies, legislation and mechanisms for dealing with migrant labour;
- The growing culture of impunity that could lead to greater human rights violations and has dangerous implications for respect for the rule of law; and
- The consequent potential for an erosion of principles and structures of democratic governance.

These four concerns have the potential to directly impact on Malaysians as well. Thus, the concerted effort and seriousness with which SUHAKAM, as the national human rights institution of the country, addresses the migrant/refugee rights issue will match the protection and promotion of freedom in the country and the democratic structures and processes that support the enjoyment of human rights by all Malaysians.

Recommendations:

In order to address the complex issue of migrants and refugees comprehensively,

1. SUHAKAM needs to be clear about the perspectives and positions it will take as an institution in terms of migrant and refugee rights, so that this translates effectively into programmes and advisory positions it will undertake. These perspectives and positions should be congruent with internationally recognised human rights standards and principles.

2. SUHAKAM needs to have a dedicated mechanism within the Commission to ensure that migrant and refugee issues are holistically integrated into the mandate and functioning of the Commission, and to take proactive measures, both nationally and regionally, to prevent, and address, human rights violations of migrants, refugees, asylum seekers and trafficked persons. While it is better to have separate mechanisms for migrants, refugees and trafficked persons because of the diversity of the groups and the specific needs and interventions required for each, possible resource constraints are understandable. If the Commission can have only one mechanism, then the capacity of its Commissioners and staff needs to be addressed thoroughly, considering the diverse issues and the human rights standards involved in working with different groups. A Commissioner with a good knowledge of human rights, particularly migrant and refugee rights, and a record of taking positions on issues in line with international human rights standards and principles, should head this mechanism. If need be, the Commissioners and staff of this mechanism should have the benefit of capacity building programmes on migrant and refugee issues and rights.

3. In order to be effective in its advisory functions vis-à-vis the government, it is important that SUHAKAM improves its monitoring capacities and programmes. If need be, capacity-building should be facilitated to better integrate human rights perspectives and standards as well as principles of documentation in its monitoring activities. Monitoring needs to be timely, consistent and proactive.

4. Given the regional and global character of the issues of migration and refugee

movement, SUHAKAM is also encouraged to develop independent relationships with national, regional and international bodies in and outside Malaysia, including other national human rights institutions that share a common commitment to protecting and promoting the human rights of migrants, refugees and asylum seekers.

5. Towards this end, SUHAKAM should develop an institutional mechanism locally for hosting a regular consultative process with organisations of migrants and refugees, as well as NGOs and international agencies providing services and working with migrants and refugees. This will help it to strengthen its awareness and knowledge of human rights concerns of migrants and refugees and be more effective in its advisory role with the government.

6. Last, but not the least, the current culture of impunity needs to be addressed before it is too late. A time-tested strategy to deal with the culture of impunity and bring about greater respect for the rule of law and human rights is to replace it with a culture of accountability. SUHAKAM as the national human rights institution with the mandate to advance human rights in the country has a very important role to play in bringing about this culture of accountability. However, to be effective in this role, it is critical for SUHAKAM **TO TELL IT LIKE IT IS!**

Sharuna Verghis is the Executive Director of Health Equity Initiatives.

A Review of SUHAKAM's Role in Protecting Freedom of Assembly in Malaysia

Chang Lih Kang

SUHAKAM was established under the Human Rights Commission of Malaysia Act, 1999 (Act 597). Its mandate includes undertaking research, advising the government or relevant authorities on human rights matters, verifying any infringement of human rights, visiting detention centres and undertaking "appropriate activities" where necessary.

The Act defines "human rights" as the fundamental liberties that are enshrined in the Federal Constitution. SUHAKAM's functions[1] include:

- Promoting awareness of and providing education relating to human rights;
- Advising and assisting the government in formulating legislation and procedures and recommending the necessary measures to be taken;
- Recommending to the government the subscription to or accession of treaties and other international instruments in the field of human rights; and
- Inquiring into complaints on the infringement of human rights.

The Act states that the principles enshrined in the Universal Declaration of Human Rights 1948 (UDHR) should not be inconsistent with the Federal Constitution. This means that rights and liberties not stated in the Federal Constitution but referred to in the UDHR must be considered, provided there is no conflict with the Constitution.

The right to assemble peaceably is enshrined in both the Federal Constitution (Article 10) and the UDHR (Article 20[1]). This right is also recognised in other international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR).

1 SUHAKAM official website, http://www.suhakam.org.my/en/about_functions.asp

Laws and Legislation[2]

Despite the Federal Constitution making it clear under Article 10 that Malaysians have the right to freedom of assembly, the Police Act 1967 circumvents this right and confers the police with wide discretionary powers to regulate assemblies, meetings and processions in public and private places.

A police permit is required under the Police Act for any public assembly, meeting or procession to be held. These gatherings, the law states, must not be "prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace". The application for the police permit can be refused, but if issued, conditions can be imposed or the permit cancelled at any time. The police can stop any assembly, meeting, or procession taking place without a permit or if the conditions imposed are breached, and order the gathering to disperse.

One of the biggest obstacles to Malaysians enjoying their right to freedom of assembly is the "catch all" Section 27 of the Police Act, which is interpreted according to the whims and fancies of the police. For instance, Clause (5)(b) of the section says "Any assembly, meeting or procession in which three or more persons taking part neglect or refuse to obey any order … shall be deemed to be an unlawful assembly," and that all attendees shall be guilty of an offence. This clause has been misinterpreted and erroneously perceived by the public and even some police officers as meaning that any gathering in which three or more persons take part shall be deemed unlawful. Moreover, in any prosecution of an offence of unlawful assembly, ignorance of the facts or circumstances of the gathering or unintentional association with the assembly is not acceptable as defence.

Amendments made to the Police Act in 1987, which came into force on Jan 8, 1988, provide the police with wide powers to stop and disperse activities in private places as well, if the activity is "directed to, or is intended to be heard or participated by persons outside the premises," or "attracts the presence of 20 persons or more outside the premises," or is "prejudicial to the interest of Malaysia or … excite(s) a disturbance of the peace". The amendments further provide the police with power to use force against participants when thwarting these events, whether in public or private places. They may "do all things necessary to disperse and arrest" and if anybody resists, "may use force as is necessary for overcoming resistance".

2 Malaysia Human Rights Report 2005 - Civil and Political Rights, SUARAM

The Act also empowers the police to regulate the playing of music in public places, prohibit the display of flags, banners, emblems or placards and the use of loudspeakers, amplifiers and other devices. The police can also confiscate the offending items. Violators, including those participating in illegal assemblies, can be fined between RM2,000 and RM10,000 and can be imprisoned for up to one year.

SUHAKAM's position on freedom of assembly

Since its inception, SUHAKAM has been consistently advocating freedom of assembly. It produced at least two comprehensive reports on this issue, "Freedom of Assembly" and "Inquiry 2/2000: Inquiry on its Own Motion into the November 5th Incident at the Kesas Highway".

SUHAKAM in these reports made recommendations that were in line with international human rights standards. Besides calling on the government to allow peaceful assemblies, SUHAKAM also recommended professional procedures in crowd dispersal. For instance, the commission said the order to disperse should be given three times at 10-minute intervals, with the order to disperse being clearly audible.[3]

In its 2005 annual report,[4] SUHAKAM recommended that Section 27 of the Police Act, which requires that a permit be applied for to hold a peaceful assembly, be amended. It said the need to apply for a permit to hold a public gathering clearly contravenes the right to peaceful assembly enshrined under Article 10 of the Federal Constitution. These recommendations are consistent with SUHAKAM's recommendations on freedom of assembly in its previous annual reports.

In March 2007, SUHAKAM published its latest report on a public inquiry into the brutal dispersal of crowds during a fuel price hike protest at KLCC. The incident is better known as "Bloody Sunday". The Inquiry Panel recommended the repeal of subsections (2), (2A) to (2D), (4), (4A), (5), (5A) to (5C), (7) and (8) of Section 27, and also Section 27A of the Police Act 1967, so as to do away with the need to apply for a permit to hold public assemblies.[5]

3 Freedom of Assembly, SUHAKAM, pg 12.

4 SUHAKAM Annual Report 2005, pg 20.

5 Report of SUHAKAM Public Inquiry Into The Incident At KLCC On 28 May 2006, SUHAKAM, pg 88.

The Situation on the Ground

Overall, SUHAKAM's welcome recommendations on freedom of assembly remained an impressive academic exercise. Despite its consistency in advocating the right to assemble peaceably, SUHAKAM failed in its role to protect the fundamental right of the people to assemble peacefully.

The SUHAKAM advisories are almost always ignored. For example, the police have clearly not paid heed to SUHAKAM's recommendations on freedom of assembly and crowd dispersal. The Commission recommended restraint in the use of water cannons; that orders to disperse be given three times at 10-minute intervals; and that the gathering be given enough time to disperse. Yet, time and again, the police have wielded unnecessary, heavy-handed measures to disperse peaceful demonstrations and gatherings. There were many instances of these in 2005:[6]

- In January 2005, 164 Burmese refugees, including three women, were arrested while staging a protest outside the Burmese Embassy. Those arrested were held in a police lock-up for 10 days and then handed over to the Immigration Department, where they faced the risk of deportation to their home country.

- In February 2005, 18 Burmese, including a woman, were arrested for staging a protest against the Rangoon military junta outside the Burmese Embassy. After being held for a week, they were all charged with illegal assembly under Section 27(5) of the infamous Police Act.

- In March 2005, police used chemical-laced water cannons and teargas to violently disperse an anti-war protest outside the United States Embassy. Some 400 people attended the peaceful demonstration to condemn the US-led invasion of Iraq. While the crowd was retreating, the police launched a second attack, despite being fully aware that there were children and elderly people among the crowd.

The list can go on to include several PAS-organised *ceramah* (public political speeches) in Terengganu that were forcibly dispersed by the Federal Reserve Unit (FRU) and the public protest initiated by Parti Keadilan Rakyat (PKR) during the ASEAN Summit, which resulted in 19 police arrests as well.

6 Malaysia Human Rights Report 2005 - Civil and Political Rights, SUARAM

Other than the police force, the administrations of public universities have not shown any respect for SUHAKAM either. Setting aside SUHAKAM's advocacy, public universities including the University of Malaya (UM), Universiti Putra Malaysia (UPM) and Universiti Sains Malaysia (USM) took action against students for their involvement in public assemblies and gatherings in 2005 to press for free and fair elections in their campuses.

The various university authorities pressed several charges against 14 students, for which they faced the risk of expulsion. One charge was that they took part in an assembly in front of the Parliament building on Sept 21, 2005 to hand over a memorandum on campus elections to the Minister of Higher Education. They were also accused of taking part in a procession from the National Mosque to the SUHAKAM building on Oct 7, 2005 and submitting a memorandum to SUHAKAM.

The move to charge these students for taking part in public assemblies is a blatant disregard of SUHAKAM's advocacy on the right to freedom of assembly. Prosecuting them for submitting the memorandum to SUHAKAM is indeed total disrespect to the National Human Rights Commission. Unfortunately, SUHAKAM was not able to do anything about this, and its request to monitor campus elections was rejected outright by the university authorities.

SUHAKAM's Deficiencies

SUHAKAM's inability to make any impact on human rights issues in the country is largely because it does not have any enforcement power. Under the Human Rights Commission of Malaysia Act 1999, SUHAKAM is purely an advisory body. On its part, the government has steadfastly refused to debate SUHAKAM's inquiry findings.

The reality of it is that Malaysia has a poor human rights record. SUHAKAM's fear of "jeopardising" its relationship with the authorities further contributes to this undesirable situation.

Rather than striving for the government to pay heed to its reports and findings, SUHAKAM seems to favour activities centring on human rights education, by holding workshops, consultations and conferences.

It has also made no concerted attempt to push for the implementation of its recommendations. Despite having produced so many reports since its establishment, SUHAKAM has recorded no achievement in law reform or freedom of assembly for the people. Laws restricting the right to peaceful assembly are still in force, and the attitude of the enforcement authorities has not changed. People who take part in peaceful assemblies and gatherings still risk brutal treatment, arrest and persecution at the hands of the police.

Even the government has accused SUHAKAM of bias. After the SUHAKAM report on the Kesas Highway incident was published, a government committee headed by the then Minister in the Prime Minister's Department, Datuk Seri Utama Dr Rais Yatim, reported to Parliament that: "The action taken by the police is correct. The Committee also found that SUHAKAM's report on the incident does not portray the real situation, and is biased."[7] To date, SUHAKAM has not been given the opportunity to defend its report in Parliament.

How is SUHAKAM going to defend the people's right to freedom of assembly when it is not even allowed to defend the credibility of its reports?

Of late, the government does not even bother to respond to issues raised by SUHAKAM. The Commission's 2005 annual report does not have the government's response to matters SUHAKAM raised in its 2004 report because the government did not make any response. Instead, the report includes SUHAKAM's comments on the government's response to its 2003 report.

This non-confrontational approach adopted by SUHAKAM is not doing anybody any good. SUHAKAM should not remain complacent with the status quo, unless it wants to be a detached bystander, merely producing observational reports.

Conclusion

To its credit, SUHAKAM has made numerous good recommendations that are in accordance with international human rights standards. It has also taken courageous positions in various issues, often contrary to the position taken by the government. However, these efforts can only be meaningful if the Commission's recommendations

7 SUHAKAM Annual Report 2003

are implemented fully, and immediately.

As the National Human Rights Commission, SUHAKAM has a vital role in ensuring and protecting the right to freedom of assembly in Malaysia. Being fully aware that mere reports or conferences would not give protection to protestors on the street, SUHAKAM should be finding ways to empower itself by looking beyond the framework it exists in now.

If this is not done, SUHAKAM will end up as nothing more than an academic institution that produces reports: It will have no meaningful impact on the human rights situation in the country.

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Detention Without Trial

Gobind Singh Deo

SUHAKAM's Annual Report 2005 in the area of Detention Without Trial must be criticised as thoroughly brief and lacking in many crucial aspects.

It appears that SUHAKAM has overlooked the fact that apart from the Internal Security Act 1960, there are other laws in our country that provide for detention without trial, such as the Emergency Ordinance (Public Order and Prevention of Crime) 1969 and the Dangerous Drugs (Special Preventive Measures) Act 1985. The bulk of the arrests, detentions and complaints stem from the use, or rather abuse, of these laws as well.

Hence, not mentioning these two laws indicates a lack of appreciation of the actual extent of the problem at hand.

Laws that provide for detention without trial have constantly been criticised. There have been repeated calls for repeal, amendment and of late, greater judicial intervention into their application.

While SUHAKAM must be commended for being consistent in its call for the repeal of the ISA, what seems more real at present is the fact that though such calls remain loud, they are not heard. This simply means that there is no hope of any achievement in this area.

Therefore, greater emphasis has to be placed on the search for legitimate (even legitimising), ways and means of dealing with these laws and their draconian effects.

SUHAKAM should thus consider giving more attention to areas that currently serve as safeguards for those detained under them, and look into expanding on these so as to lessen the persecutory effects such laws have on detainees.

A minister, or his deputy, is empowered to detain any person if he is satisfied that it is necessary for the purposes sought to be achieved by these laws.

What is of immense significance is that these laws are not without protective caveats. For instance, detainees are entitled to know the grounds for their detention, and they are also given the opportunity to appear before an Advisory Board, where they can make representations against their detention. These provisions are found in the three laws and are also guaranteed under the Federal Constitution.

In addition, there is always the option to file an application in the High Court for a Writ of Habeas Corpus, which has the effect of quashing the order on which the detention is based, thereby securing the release of the person detained.

These are mechanisms already available to a detainee under these laws. What SUHAKAM has to do is carry out a thorough scrutiny of the efficacy of these protective caveats, and seek ways and means of broadening their applicability and effect.

SUHAKAM ought to look into the current Advisory Board procedure and system. At present, representations can be made against the orders, and the detainee is allowed to engage lawyers to represent him at the hearing.

However the detainee is given limited information about the charges levelled against him; witnesses are not called for cross-examination and very seldom does the Board ever actually disclose the content of the file it is given on the charges against the detainee. These are areas that must be looked at very seriously with a view towards change.

Greater emphasis should also be placed on making it compulsory for the minister to consider restricting the movements of a suspect before ordering detention, since this will help, especially in cases where the suspect is a young person from a good background. Such people are not hardened criminals. To detain them and place them together with hardened criminals certainly goes against the purpose of the legislation, which is to prevent crime by way of rehabilitation.

Another move can be to call for a shorter maximum period of detention, say perhaps six months.

One more area of grave concern is that of Habeas Corpus. Recent pronouncements of the Federal Court have very seriously limited the scope of law in this area, which is alarming.

In June 3005, the Federal Court in the case of **Lee Kew Sang** vs **Minister of Home Affairs, Malaysia and Others** (2005, 3 CLJ 914) decided thus:

"… in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD (SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provision of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement, then there cannot be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance."

This utmost rigid interpretation and approach taken by the Federal Court has served as a most severe blow to those who believe in resorting to the courts for reprieve in cases of preventive detention.

Simply put, it means that no matter how absurd the minister's reasons in support of the detention order are, the court cannot, and must not, interfere. It is only in cases where a procedural requirement exists and is breached that the court may interfere. Steps should be taken here to demand that the courts, which are supposed to be independent of government and Parliament, have latitude in deciding such applications, especially in cases where detentions are politically motivated but colourfully justified under the cloak of "national interest".

Yet another area of concern is rearrests, where there appears to be utter disregard of and disrespect for the rule of law. In most cases where a detainee is victorious, the minister or police orders his immediate rearrest and detention as he makes his exit from prison or the court.

The reality of it is that there is a greater threat to citizens than detention without trial: The system in the country, as it is now, inspires lesser confidence and trust in the courts and the laws of the land. Even where there is success through legal recourse, the government appears to totally disregard the rule of law and makes a rearrest.

These are areas that SUHAKAM must show greater interest. Efforts must be put in place to prevail upon the government that while arguments in support of anti-terrorist preventive detention laws stand ever so tall and compelling today, nothing justifies the complete exclusion of review, be it judicial or otherwise, of detentions altogether. There ought to be confidence in our judges in matters of this nature. Judges should be given the right to decide whether detention is necessary, or an abuse, when a challenge is made. The government must trust our judges. If it does not, nobody will.

SUHAKAM, being the body it is, with prominent members and influence, has the might to convince the government to give greater latitude in mechanisms already existing to ensure that basic human rights are preserved in cases such as these. This, the Commission has not done, and must do now.

The sting of detention without trial is not the detention itself but the sense of injustice brought about by it upon the detainee who feels insecure because he hasn't had the opportunity of being heard when his personal liberty is deprived.

This sense of injustice affects not just detainees but also their families and ultimately, society at large. If not addressed quickly, this may lead to the very thing preventive detention seeks to eliminate: People with no respect for the law; people who take matters into their own hands to prove a point.

SUHAKAM must conduct a deeper inquiry into this area and come up with proposals that address the real problems occasioned by these laws. A general overview of matters as fundamental as these certainly cannot be enough.

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Rights of Vulnerable Groups: Indigenous Peoples

Ramy Bulan

Introduction

SUHAKAM's Annual Report 2005 lists the concerns of minority and vulnerable groups among key issues that were brought to its attention. In the first chapter on "Key Issues and Outcomes", the rights of indigenous peoples were reported under the heading "Rights of Vulnerable Groups", along with migrant workers, persons with disabilities, women and children. This underscores the fact that they deserve special attention. Indeed, this is a clear thread throughout the reports of each of the different working groups, as well as the reports from SUHAKAM's offices in Sabah and Sarawak. Problems affecting the indigenous communities are multifaceted. Whether the concerns touched on land rights, the rights of the child, education, health or poverty or problems with identification papers, indigenous peoples are featured clearly as those needing special attention.

While the underlying problems faced by indigenous groups may be similar, it is necessary to understand that as a result of the different historical and political backgrounds of Peninsular Malaysia, Sabah and Sarawak, indigenous peoples are defined separately under the Constitution as well as under different legislation that govern them. It is imperative to understand this when dealing with their rights, so that the actions proposed for dealing with the different issues would be addressed precisely.

Indigenous peoples, Orang Asal and Orang Asli: What is the Connection?

In Malaysia, the term "indigenous peoples" is generally understood to refer to Malays, Natives and Orang Asli in Peninsula Malaysia. Article 160 of the Federal Constitution defines each group of people specifically. A Malay is defined as one who speaks Malay, practices Malay customs and is Muslim; an aborigine is an aborigine of the Malay Peninsula. Section 3 of the Aboriginal Peoples Act 1954 defines Orang Asli according to parentage, adoption and whether a person speaks

an aboriginal language or habitually follows an aboriginal way of life. However, "Native" refers to a person belonging to an indigenous group in Sabah and Sarawak, as defined under Article 160 (6) and (7) as well as the Interpretation (Definition of Natives) Ordinances of the two states. It must be noted that a Malay in both Sabah and Sarawak is classified as a native under the Federal Constitution and the Interpretation Ordinance. This differs from definition of Malay in the legislation of each peninsular Malay state.

SUHAKAM's 2005 report uses both the terms Orang Asli and Orang Asal. While Orang Asli clearly refers to the aboriginal people in West Malaysia, the term Orang Asal is used in a broad sense to refer to the natives or indigenous groups in Sabah and Sarawak. Still, there appears to be some confusion in the terms used in the introductory chapter with reference to Orang Asli and natives, and the "status of native customary land". At first blush this might appear to be trivial and inconsequential. However, given the specific legislative provisions governing them and the rights that they might claim, it is best to be clear as to which community is referred to.

"Indigenous" is often used synonymously with *bumiputera,* which is really a political classification. It is in that vein that SUHAKAM called for the Federal Constitution to be amended to recognise Orang Asli as *bumiputera* in its 2004 Report. It is significant to note that the term *bumiputera* does not appear anywhere in the Constitution but the above proposition appears to have read the term *bumiputera* into Article 153, alluding to and equating it with the protection and "privileged status" accorded to Malays and natives under Article 153. A separate article, Article 8(5), does make a provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service. It is important to note that during the parliamentary debate on the National Economic Policy in 1972, the first Prime Minister, Tunku Abdul Rahman, said the term *bumiputera* referred to Borneo natives and that if the term is used by the government with reference to the states of Peninsula Malaysia, it should be understood as referring exclusively to Malays and Aborigines of the peninsula.

Land Rights: Aboriginal Customary Title and Native Customary Land Rights

From the time of its inception, one of the most ubiquitous complaints brought to SUHAKAM has been in relation to dispossession of natives from their traditional territories both, in Sabah and Sarawak, and of aborigines from their reserved lands and their traditional aboriginal inhabited areas, thereby affecting their livelihood. Historically and politically, land laws developed differently in Peninsula Malaysia, Sabah and Sarawak. In Sabah, the *Land Ordinance* (Cap. 69) makes provision for native customary rights to land while in Sarawak, the *Land Code* 1958 (Cap. 81)**,** recognises the "creation" of native customary lands under specific provisions. For the Orang Asli, the *Aboriginal Peoples Act* 1954 (APA 1954*)* has provisions for the creation and gazetting of aboriginal reserves. Some aboriginal communities, however, live in areas that are not designated as aboriginal reserves but are in "aboriginal areas" or "aboriginal inhabited areas" and hold the lands under a form of aboriginal customary title.

In the SUHAKAM Annual Report 2004, the Commission called for an urgent review of the National Land Code and proposed amendments to the APA 1954, the review and amendment of the Sabah Land Ordinance and Sarawak Land Code. SUHAKAM has continued to draw attention to the complaints that have been made on the issue of land in 2005. These took the form of:

(i) Organising of seminars and meetings with cross-sections of the public to create awareness of human rights and to foster dialogues between indigenous groups and related government agencies; and

(ii) Field visits by the members of the Commission to native areas as well as Orang Asli settlements. It held "grass root dialogues" under its "SUHAKAM Bersama Rakyat" programme to get a clearer picture of the situation on the ground, so that it would lead to more realistic approaches to problem-solving. The Commission also received complaints from the public and on occasion, solved problems through mediation.

The Education and Promotion Work Group organised a seminar on Land Rights of Indigenous Peoples in Kuching from March 23 to 27, 2005. Five recommendations emerged from the proceedings:

(a) That indigenous peoples' customary land be exempted from provisional leases;

(b) That a review be conducted on the need for indigenous peoples to produce documentary evidence to prove ownership of land … since these communities have occupied the land for generations;

(c) That interpretation of legal terms involving Native Customary Rights be clarified to assist indigenous peoples, as this is crucial to their right to land as well as helpful to the authorities in land related matters;

(d) That initiatives of indigenous peoples in mapping their areas be officially recognised as valid methods of determining their boundaries; and

(e) That the authorities and developers engage with and consult indigenous peoples when planning development projects.

These recommendations are good as they touch on core issues affecting NCR. Strategies for the implementation of these recommendations will need to be worked out clearly. It should be noted that all indigenous communities mark their boundaries according to customary markers, using geographical features on the land, and among themselves; their knowledge of boundaries and ownership is contained in oral histories, and not in documentary evidence that is often required from them.

The issue of provisional lease is significant as it shows the paradox of dealing with indigenous groups. Documentary titles or alienation of land are not granted unless and until a survey of the land has been completed, but "where the immediate survey is impracticable, the Superintendent may order that a provisional lease … be executed in favour of certain persons" (Section 28 of the Land Code 1958) without the necessary survey being conducted. This is often given to allow that party to work the land as a plantation, be it rubber or oil palm plantation, or to allow the lessee to log the area. Thus where such provisional lease is given on lands that include land claimed under customary rights, the whole character of the land would have changed upon reversion. This is where consultation with and the participation of the affected indigenous groups is crucial.

'Grass root Visits', Dialogues and Receipt of Complaints

SUHAKAM conducted three visits to Orang Asli settlements in Selangor, Pahang and Perak to get first hand information and data on the status of indigenous peoples in relation to land rights and resources for livelihood, education, identification documents and indigenous skills and knowledge. The Annual Report does not give a clear picture of the outcome of these visits in relation to land rights, although

many observations were made in respect of education.

In Sabah, the "SUHAKAM Bersama Rakyat" dialogues in the rural areas have revealed further disturbing statistics as land issues top the list of complaints. For instance, at a session in Pitas district, it was reported that 90 per cent of the issues raised were about land problems; in Keningau sub-district, 95 per cent of the problems raised were on land matters; in Kinabatangan district, 85 per cent of the problems raised were related to land; while in the Beluran district, 93 per cent of the complaints were related to land matters. The general figures for the complaints received by the Sabah office in 2005 show that 48.1 per cent (or 376 out of 781) of the complaints received during the year were related to land matters, compared with 44 per cent in 2004.

Similarly, in Sarawak, more than 50 per cent (or 59 out of 91) of the complaints received by the Sarawak office had to do with land. It is reported that native groups, for example in Kampung Raso, Lundu, complained of encroachment on their land by logging companies, and inadequate compensation for their lands. Another example given is at Kampung Wahid, Miri, where villagers complained of relocation of villages without adequate compensation. These are mere examples of a widespread problem that is repeated over and over again in various places in the state, especially in the interior.

The plight of the Penan was highlighted with regard to the destruction of their traditional foraging areas by loggers. There is the added difficulty in claiming rights to their land, because of the fact that most of them are recent settlers. This has also been highlighted in SUHAKAM's Laporan Aduan dan Siasatan Hak Masyarakat Asli in 2004, and it continues to be one of the Commission's focus.

Education

Another core area that affects indigenous peoples is the lack of education. The amendment to the Education Act 1966 made primary education mandatory, but as the 2005 report points out, education is not entirely free. This affects children from the indigenous and minority communities who live in remote and inaccessible areas, where transport services are not regular and many families live below the poverty line. These factors, along with the fact that many do not have birth certificates or personal identification documentations, make it difficult for students

to enrol in schools. Even in cases where they have attended school without identification papers, it is difficult for them to apply for tertiary institutions or scholarships. Workshops that were conducted to discuss these issues have recommended, among other things, that education be made available in situ, within indigenous settlements and communities.

Reports on the Education Working Group's visits to Orang Asli villages indicate that there is a correlation between poverty and the low percentage of students receiving education. The lack of or insufficient income is exacerbated by displacement of communities and disruption to the sustainability of their livelihood. The parents lack awareness of the importance of education, and cannot motivate their children. Even where they do go to schools, it is reported that Orang Asli children not only find it difficult to cope with Bahasa Malaysia and English, but also feel that they are "looked down upon" by other children, for instance, being called pejorative names, further alienating them from the school system.

At a roundtable discussion on the Indigenous Community's Right to Education on Oct 25, 2005, it was clear that there needs to be some effort to make the school curriculum more "sensitive", meaningful and relevant for indigenous children through the integration of indigenous culture and language. Perhaps this is one of the most crucial and fundamental issues that need to be dealt with. This should go hand in hand with motivational programmes for parents as well as government support for organisations that provide informal education to the Orang Asli. SUHAKAM has also suggested that additional schools be built in the interior, with increased hostel facilities to cater to children from remote villages. Even without these facilities the "Sekolah Balai" concept, where classes are conducted in the community, would be more effective and reduce the sense alienation of the child from its community.

There is a strong recommendation that experienced and qualified teachers be sent to those areas. However, the reality is that few teachers would venture into the interior, unless they have a heart and a vision for the poor and the marginalised. Perhaps it would be better if the people from the community themselves are helped, motivated and trained so that they can teach their own people and raise the standards of education in their own community. It might then be possible to introduce a more flexible approach of allowing students to use their mother tongue as a means of communication at the early stages of learning, before easing them into Malay and English. This would also serve to reaffirm their sense of identity.

The access to education is a special challenge for aboriginal communities and other indigenous groups such as the Penan in Sarawak. There is a moral obligation on the state to ensure that every child gets an education. SUHAKAM has urged the government to review the situation so that primary education fully complies with the Covenant on the Rights of the Child, which states that the child has a right to education, since it is the state's duty to ensure that primary education is free and compulsory.

Poverty and Inequality

A policy dialogue on the Human Rights Perspective of the Millennium Development Goals (MDG) shows that Malaysia still needs to eradicate poverty and deprivation that exists among certain groups, and this includes the Orang Asli and the indigenous peoples of Sabah and Sarawak. These groups comprise the majority of the households that are concentrated in the agricultural sector. In SUHAKAM's report on the Human Rights Approach to the MDG, the Orang Asli community recorded the highest incidence of hardcore poverty in the country, followed closely by the many indigenous communities in Sabah and Sarawak. As many of these groups lose their land base, their traditional livelihood is affected. They become part of the increasing rural-urban migration, giving rise to "new layers of poverty", which includes urban poverty. It must be borne in mind that as rural indigenous groups move into urban areas in search of employment, without the necessary education, they will become part of the urban poor that the government will have to address.

SUHAKAM's Recommendations

As a result of the number of field trips, workshops, consultations and dialogues that SUHAKAM has organised, a number of recommendations have been put forward that are pertinent to indigenous groups.

With numerous problems relating to land in Sabah, the Commission has recommended that the Sabah Land Ordinance be reviewed and amended to eliminate ambiguity and confusion. As an administrative measure to address land issue, it was suggested that multiple applications should not be allowed for one piece of land, and applications should be treated on first-come first-served basis. An independent mediator should be appointed to examine land disputes, an expert on land administration has to be employed to identify the real source of the problem,

and an ad hoc independent inquiry committee needs to be formed to look into the grouses and complaints of those whose applications are rejected. The Valuation Section of the Land and Survey Department should be made a separate department operating in its own right. It would be interesting to see how many of these recommendations will be accepted by the Sabah government as a means of solving the problems.

In Sarawak, SUHAKAM has advised the authorities to exercise extra caution over approvals for the use of native customary lands and to prevent unsupervised development of such areas. SUHAKAM has also recommended a greater participation of indigenous peoples in matters that concern them. This applies not only to land matters but also to education and health. In education, SUHAKAM's recommendation to the Ministry of Education is that the study of both globalisation and human rights must be incorporated into every subject.

It also recommended that the government takes the necessary steps to consider a "Rights-based Approach" to policy-making. According to the UN, "a human rights based approach ensures that human standards, as established in international law, are applied as criteria for policy orientation and the solution of problems in specific areas"[1] . Such an approach will not only incorporate human rights into policy-making, but will also "prevent a situation where national interest may override human rights considerations". This is particularly so where such policies might exacerbate the incidence of poverty and human rights abuse.

Concluding Remarks

It is significant that indigenous peoples are classified as a vulnerable group. "Vulnerability" speaks of a situation or relationship where one person possesses unilateral power of discretion on a matter affecting another "peculiarly vulnerable" person, such that the former has the power that can be exercised to the benefit or the detriment of the vulnerable party (see *Tengku Abdullah ibni Sultan Abu Bakar vs Mohd Latiff bin Shah Mohd* [1996] 2 AMR 2633). This gives rise to what is called a fiduciary relationship, where persons in question, in this case, natives and Orang Asli, are subject of a peculiar vulnerability vis-à-vis special government decision-

1 1998 Report of the UN Secretary general to the ECOSOC, quoted in the SUHAKAM Annual Report 2005, p 36.

making justifying preferential treatment of them.

It is suggested that in dealing with the multifaceted problems facing indigenous groups, a fiduciary obligation arises out of the states' ability to impair native rights, giving rise to a duty to protect their welfare in a manner that is consistent with those rights. In other words, there is a duty on the government to make sure that indigenous peoples are not put at peril. The words of Justice Gopal Sri Ram in *Kerajaan Negeri Selangor vs Sagong bin Tasi* (2005) 6 MLJ 289 (*Sagong Tasi*) sums up the position succinctly, where the judge said:

> In a system of parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power - the public body - may be a Minister of the crown or any other public authority. The power is accordingly held on trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the general good of the nation as a whole, that is to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.

Sagong Tasi has established that where the authorities were aware of the policy to "protect and promote" Orang Asli interests and they put it out of their contemplation that they had to protect the rights of the "vulnerable peoples first" and left them exposed to serious losses in terms of their rights in the land, they were said to be in breach of their fiduciary duty.

Overall, neither the problems raised nor the recommendations in the report are new. SUHAKAM has drawn attention to these problems in the past, as evidenced in the earlier annual reports. With regard to the most prevalent complaints on land issues, the facts of the breaches are often obvious. From the perspective of the indigenous groups themselves, perhaps what is needed is a clear legal perspective as to the basis of claims by the natives and Orang Asli that is imbedded within their traditional laws and customs.

Is there a way of bridging the divide between the strict statutory laws and the

native or aboriginal understanding of the law? Recognition of customary laws by the courts and the ensuing indigenous peoples' interests based on those traditional laws is forging a new approach to law that does not necessarily bend to the strict Austinian positivism that monopolises the general concept of Malaysian law. Perhaps SUHAKAM could initiate a thorough study of the laws along these lines.

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Review of Annual Report 2005 of the Human Rights Commission of Malaysia in the Area of Women and Children

Saira Shameem

Established by an Act of Parliament on Sept 9, 1999, the Human Rights Commission of Malaysia (SUHAKAM) has to date published six Annual Reports for the years 2000 to 2005, both in English and in Bahasa Malaysia.

All the Annual Reports are also available on the official SUHAKAM website, although except for the year 2000, only the English versions are currently available electronically.

In general, SUHAKAM's Annual Reports provide the following broad categories of information:

i. An overview of the general state of human rights in the country;

ii. Working Group reports (over the years, the names and numbers of these groups have changed, but in general, there are four working groups – human rights education, law reform and international treaties, complaints and inquiries and economic, social and cultural rights);

iii. Issues in focus;

iv. A report on how Human Rights Day was commemorated that year;

v. Reports from SUHAKAM offices in Sabah and Sarawak;

vi. A concluding chapter; and

vii. When available, the government's response to the SUHAKAM Annual Report of the previous year.

The Appendix contains the audited accounts for the year and listings of activities, visits and events of the Commission. In the 2003 report, the SUHAKAM Secretariat contributed a chapter on its work during the year.

The first SUHAKAM report of 2000 is unique, for it contains certain critical aspects that have been omitted in subsequent reports. Aside from the normal introduction

and assessment of the current human rights situation in Malaysia, the 2000 report carried information on the function and powers of the Commission and as an analysis of its management arrangements and human resources. This important information enables the reader to contextualise the Commission's achievements for the year in question.

The 2000 report also included the Paris Principles, which relate to the status and functioning of national institutions for the protection and promotion of human rights that have been endorsed by the Human Rights Commission and UN General Assembly; the Universal Declaration of Human Rights (in Bahasa Malaysia), and most importantly, the complaints registration procedure of SUHAKAM as well as the guidelines for investigation of complaints.

Although it may be argued that this information can be obtained on the website, the inclusion of such pertinent information in the Annual Report will enable action, encourage increased reference, usage and registration of complaints and ensure that the writing of these reports is not merely an exercise in recording history, but serves to raise awareness and encourage action on the part of a wider segment of society.

a. Summary of ERA Consumer's Five-Year Review of SUHAKAM's Annual Reports

In 2006, ERA Consumer Malaysia published a five-year review of SUHAKAM's Annual Reports (2000-2004), which looked cumulatively at the impact of the Commission since the first group of commissioners was appointed in early 2000. Some of the significant recommendations of SUHAKAM[1] during that five-year period, with special regard to furthering women's rights, are:

i. Prohibiting gender discrimination in the Federal Constitution. This led to a constitutional amendment under Article 8 in the year 2001;

ii. Ratifying the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the withdrawal of reservations on those international instruments that have already been ratified, including CEDAW and the Convention on the Rights of the Child (CRC);

1 Kukathas, Angela M. '*SUHAKAM's role in furthering women's rights*'. SUHAKAM: After 5 years: State of Human Rights in Malaysia, p 72. ERA Consumer Malaysia. (2006)

iii. Recommending equality for Muslim women in Malaysian society and the protection and promotion of equality of all peoples, irrespective of religious belief;

iv. Reviewing the interpretation of Syariah law;

v. Granting women all rights enshrined in CEDAW and making provisions for CEDAW to be translated into a national law;

vi. Reviewing all discriminatory laws, policies and practices;

vii. Undertaking a holistic approach to gender mainstreaming;

viii. Enabling the collection and analysis of gender disaggregated data; and

ix. Involving a variety of stakeholders in the formulation of Malaysia's CEDAW report.

ERA Consumer's review noted inconsistencies in the quality and strength of recommendations made in the Annual Reports over the years. However, this may be reflective of the difference in the composition and capacities of the commissioners themselves. This therefore raises the need to review the process of appointing commissioners, as well the basis upon which both the appointments and the composition of the Commission are made.

The ERA Consumer review also noted that the overall quality of reporting in the Annual Reports of 2000-2004 was not thoroughly analytical. Only the first chapter would be self-critical of the role of the Commission in carrying out its work during the year of the report. However, this chapter was altogether absent from the Annual Report 2004.

Concern was also raised over the lack of analysis[2] in Annual Reports 2003 and 2004 on the government's response to SUHAKAM. It is not clear how SUHAKAM, an advisory body and therefore without binding legal powers, can respond to a situation where the government disagrees with it or does not choose to act on its recommendations. Further, none of SUHAKAM's Annual Reports has been tabled and debated in Parliament, as required under the Malaysian Human Rights Commission Act 1999.

In 2001, SUHAKAM attempted to redress this matter with two proposals[3]:

2 Kukathas, Angela M. "SUHAKAM*'s role in furthering women's rights."* SUHAKAM: After 5 years: State of Human Rights in Malaysia. p 73. ERA Consumer Malaysia. (2006)

3 Ibid. Pg. 75.

i. That the Human Rights Commission of Malaysia Act be amended to address the limitations of the existing law and clarify ambiguities to make the implementation of the law more effective. For a complete review of the Act and of the findings by SUHAKAM, refer to the SUHAKAM Annual Report 2002, which can be downloaded at: http://www.suhakam.org.my/en/document_resource/details.asp?id=30

ii. That the government develops a National Human Rights Plan of Action[4], which will ensure improvements in human rights standards in the context of public policy.

These and other related concerns will be revisited later in this paper.

b. Review of the 2005 SUHAKAM Annual Report

The 2005 Annual Report of the Malaysian Human Rights Commission is a hefty 293 pager with four chapters:

i. Key issues and outcomes;

ii. Malaysian Human Rights Day 2005;

iii. Reports of the Working Groups; and

iv. Reports from the SUHAKAM Offices in Sabah and Sarawak.

SUHAKAM's comments on the government's response to the 2003 Annual Report are carried as an appendix, along with tables listing its activities, both national and international. The audited accounts are also provided herein, as is an interesting accountability monitor – the tabulation of Commissioners' attendance at the monthly meetings.

The first chapter is reflective, and attempts to chart developments during the year that contributed to the increase in awareness in the country about individual rights as well on conceptual issues related to human rights in general. The report uses a number of indicators for this, including the willingness of the public to speak up on relevant issues as well as to question alleged violations or abuses.

4 As recommended by the United Nations Office of the High Commissioner for Human Rights

It also mentions responses such as government action as a direct result of the Commission's work, citing one example as the disclosure of the Air Pollution Index, which since 1997 was deemed too sensitive to be released to the public.

The first chapter is an overview of the human rights situation in the country during 2005 from a number of perspectives, including:

i. Detention without trial;
ii. Law Enforcement (both police and other agencies);
iii. Administration of Justice;
iv. Freedom of Speech and Information;
v. Rights of Vulnerable Groups (including indigenous peoples, migrant workers/asylum seekers, persons with disabilities, women and children and the specific target groups of the Millennium Development Goals);
vi. Freedom of Assembly;
vii. Freedom of Religion; and
viii. Right to Education.

The report speaks of some significant gains for human rights during 2005. One example given is the government's response to public concerns over police treatment of persons who are arrested or detained. The government created a Commission of Inquiry into the Standard Operating Procedure, Approaches or Regulation in the Handling of Body Searches in Connection with Arrest and Detention by the Police in direct response to public outcry over a "nude squat" video that was widely circulated and reported on by Malaysiakini.com, an online news website. The video detailed a woman who was arrested, stripped and forced to perform "ear squats" in the nude, which police said was their standard procedure. The Commission of Inquiry was established only in December 2005.

The Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysian Police was released in May 2005, after a year-long review that included public consultation. The first chapter of the SUHAKAM report analyses the impact of the Royal Commission's report, and draws parallels between the recommendations made and the numbers and types of complaints SUHAKAM received against the police. The Annual Report points out that implementation of the Royal Commission's recommendations have been slow, but acknowledges that some gains have been made, including a directive from the Attorney General's

chambers to cease the use of cautioned statements and confessions in criminal trials.

The report also reflected on the January raid by officers from the Federal Territory Religious Department (JAWI) on a nightclub in Kuala Lumpur, during which 100 Muslim patrons were arrested, with the women detainees claiming harsh and degrading treatment. In February, the government ordered religious authorities to obtain police approval before conducting a raid, and to include a senior police officer in their teams. SUHAKAM saw this restriction on the powers of the religious authorities as a constructive move, since such agencies play a critical role in ensuring a fair and efficient criminal justice system that should protect the rights of the public. The report also notes that SUHAKAM in 2005 received 50 complaints against officers of enforcement agencies other than the police.

In terms of vulnerable groups, the right of children from Orang Asli communities to education was taken up by SUHAKAM, leading to a roundtable discussion on indigenous people's right to education. SUHAKAM is to study this issue further for solutions.

As for women and children, SUHAKAM focused on the rights, liberty and safety of children in 2005, building on previous forums on trafficking. This involved the development of a report on "Trafficking in Women and Children", which has been submitted to the government and is pending a response. The Annual Report 2005 also echoed the reservations of a wide group of women, including senators, NGOs and the public in general, over the rights of Muslim women, with special reference to the hasty passage of the Islamic Family Law (Federal Territories) (Amendment) Bill 2005 by Parliament.

There is only a brief reference to the Millennium Development Goals, with a call to address poverty and deprivation faced by women as a result of multiple forms of discrimination.

SUHAKAM makes a clear stand on the right of every Malaysian to profess and practice his or her religion, and to propagate it, as guaranteed by the Federal Constitution. However, this is followed by a contradicting statement that to comment on or criticise a religion, by anybody, a believer or a non-believer, may cause uneasiness and lead to the disruption of public order and general welfare in a plural society. As such, it is not clear how SUHAKAM would suggest a way forward to

achieving genuine understanding and acceptance of the diversity within the country as a strength, rather than something to be suffered in silence for the sake of superficial peace.

In 2005, the Education Act 1966 was amended to make primary education mandatory for all children, in line with Article 28 of the Convention on the Rights of the Child. A forum was also organised, in collaboration with relevant government and NGO stakeholders, on Malaysia's reservations to certain provisions of the CRC in an effort to remove these reservations.

SUHAKAM concludes its overview by stating that its aim is to create and develop a human rights culture in Malaysia, such that the nation comes ever closer to achieving the ideals as enshrined in the Universal Declaration of Human Rights. However, it does not clearly demarcate between general events that improved human rights in the country and how it contributed directly to these gains. As a result, the first chapter is vague in assessing SUHAKAM's actual impact on improving human rights in Malaysia. This therefore makes it difficult to measure the progress towards SUHAKAM's stated objectives.

Chapter 2 of the Annual Report 2005 summarises the proceedings of a conference held to commemorate the fifth Malaysian Human Rights Day. Themed "Human Rights and Globalisation", the one-day event aimed at delving further into the positive and negative impacts of globalisation and discussing appropriate responses to issues arising from systems of inequity within a globalised world.

Chapter 3 covers reports from the four working groups – the Human Rights Education and Promotion Working Group; Complaints and Inquiries Working Group; Economic, Social and Cultural Rights Working Group; and the Law Reform and International Treaties Working Group. It is clear that these Working Groups (WGs) have done an enormous amount of work, and most importantly, the work is funded, supported and enabled by the government.

Issues specifically related to the rights of women and children were prominent in the reports of all WGs. The HR Education and Promotion WG prioritised human rights education in schools as an area of generating impact, involving training of those that teach Civics and Citizenship in schools, direct engagement with children through seminars in primary schools, and the training of state-level education officers. In the area of rights of the child, SUHAKAM decided to channel its

energies on the training of young trainers on CRC. The Commission monitored the impact of these training programmes by documenting follow-up activities conducted by the trainees within their respective organisations. A number of independent activities were initiated involving CRC-related awareness raising workshops and programmes for other members within their organisations.

The HR Education and Promotion WG also conducted Human Rights Camps for school children aged 13 and 14 years, who demonstrated high levels of enthusiasm and leadership in drawing up CRC Action Plans to be implemented in their schools. The WG also carried out CRC Training Awareness Workshops for specific groups, including persons with disabilities, teacher trainers and indigenous people. Another area of work for this group was on land rights and the right of indigenous people to education. The WG conducted three visits to Orang Asli communities during the year to obtain data on the status of indigenous peoples in terms of their right to land and resources for livelihood. Though not directly related to women and children, the WG on HR Education and Promotion carried out a significant body of work on persons with disabilities, addressing concerns of employment, access and mobility.

This WG also conducted human rights awareness training workshops for 54 senior officers from the Prisons Department and for 38 district crime investigation police officers.

The Complaints and Inquiries Working Group (CIWG) registered a 118 per cent increase in complaints registered, from 614 in 2004 to 1,342 in 2005. This WG conducted 21 visits to places of detention, including prisons, drug rehabilitation centres, immigration detention centres and religious rehabilitation centres throughout the country. There were no details of the gender of the complainants, or whether the treatment meted to women and children within each of the detention facilities was compared and contrasted with the treatment meted to men. Perhaps this could be done in future visits, in order to provide gender analysis in the work of this WG.

Another step for SUHAKAM to consider is to make random checks, in addition to its scheduled visits to these detention centres, if it aims to bring about better practices in the management of the centres. Alternatively, finalising the dates of visits much closer to the time window allocated can also contribute to sustainable changes being undertaken to improve systems within the detention centres. SUHAKAM could do this by serving notice to a detention centre that a visit would

be scheduled some time during that year, and finalise the date only a week or two before the visit. This may force longer-term measures for good management within these centres, and reduce the tendency to shape up just before a visit.

The Economic, Social and Cultural Rights Working Group (ECOSOC) focused its work on aged people and the achievement of the Millennium Development Goals (MDGs). Women and their issues are clearly relevant in both areas, but these did not feature prominently in the reporting of the work done for aging with dignity. A significant number of challenges of the aged, from care to employment to mobility, affect women differently from men. A gendered analysis would have raised issues that are different from the norm within the recommendations made.

In its reporting, there is a significant overlap between what was recommended by participants of a workshop or dialogue organised by SUHAKAM and that recommended by the Commission. This could dilute the impact of the recommendations, or provide the government with justification to address only some recommendations and not all. Greater distinction needs to be made between reporting the result of a meeting and using these results to construct recommendations to the government.

In its work on the right to health, the ECOSOC Working Group held a forum in August that covered access to healthcare, financing, maternal health, HIV/AIDS and so on. However, the impact of privatisation of health services on sexual and reproductive health and rights (SRHR) was conspicuously absent in the deliberations. Given the direct linkage between comprehensive SRHR information and services and the achievement of the MDG on HIV/AIDS, this issue certainly warrants greater attention. As any form of privatisation will affect the preventive role of SRHR in ways that are significantly different from curative services. Accurate information and anticipation of the impact of decisions concerning the financing of health services for SRHR need to be made a priority of the ECOSOC Working Group, with particular regard to its work on the right to healthcare.

The Working Group on Law Reform and International Treaties did a significant amount of work in relation to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), with specific reference to Malaysia's reservations on Articles 5(a), 16(1)(a), (c), (f), and (g), and 16(2) of CEDAW.

SUHAKAM appointed two external researchers at the end of 2003 to examine

Malaysia's reservations about CEDAW. The research and SUHAKAM's recommendations were submitted to the Ministry of Women, Family and Community Development in July 2005 to enable the ministry prepare Malaysia's report to the CEDAW Committee, which was due in 2006.

In its 2005 Annual Report, SUHAKAM reiterated the reasons for its recommendations that the government withdraws its reservations on those sections of the CEDAW. These include:

i. On Article 5(a), which requires State Parties to eliminate prejudices, customs and practices based on the idea of the inferiority or superiority of the sexes or on stereotyped roles for men and women, SUHAKAM argues that neither the Quran nor the Sunnah states that men are superior to women, or that men have absolute authority over women. The report asserts that cultural and customary ideologies that stereotype the roles of men and women should not be confused with religious rules. SUHAKAM concludes that Islam recognises the equality of men and women as human beings, though it does not advocate absolute equality of roles between them, especially in family relationships.

ii. On Article 7(b) which places a positive obligation on the State to ensure that women have the right to participate in the formulation and implementation of government policy, to hold public office and to perform all functions at all levels of government, SUHAKAM recommended that the reservation be withdrawn *with modifications*. This is based on the argument that Article 8 of the Federal Constitution prohibits discrimination on grounds of gender. SUHAKAM also put forward the view that nothing in the Quran or the Sunnah excludes women from doing any legitimate work of their choice, so long as they have the required skills and expertise and are not exposed to any hazard. The report recognised the only restrictions as the appointment of a woman as an Imam (in leading men in prayers) or as Kadi (for the solemnisation of marriage, since the Wali in a marriage must be a man).

iii. On Article 9(2), which concerns equal rights for men and women with respect to the nationality (citizenship) of their children, SUHAKAM viewed the different regulations applicable to men and women in terms of nationality of their children in Malaysia as discriminatory and recommended that these regulations be amended immediately, and that Malaysia withdraw its reservation without delay.

iv. On Article 16, which refers to a series of matters, including the right to enter into a marriage, responsibilities of married couples, interests of children, ownership of property, right to gainful employment and the retention of family names of married women, among others, SUHAKAM saw these as more complicated areas of concern. It has embarked on further research and is also looking into reasons why other countries also have reservations about Article 16, whether due to contradictions with Syariah Law, or whether it contravenes national law.

Despite the seemingly significant and genuine efforts, this section of Annual Report 2005 pertaining to CEDAW was the most disappointing. SUHAKAM's arguments for recommending the withdrawal of the CEDAW reservations are weak, inconclusive, subjective and influenced by religious sentiments – which open them to interpretive debate. The commissioners responsible for this WG clearly need additional input from other sources, including women's views on the relevant sections of the Quran, as well as views from women human rights activists, if they are to succeed in convincing the government to withdraw its reservations on CEDAW.

SUHAKAM ought to establish an expert working group to guide the WG on Law Reform and International Treaties. This expert group should comprise women who have done significant work on CEDAW, women who are experts on the Quran, and women human rights workers who will be able to contribute to the capacity building of both the commissioners, the public that receives information from the Commission, and the government that depends on the Commission to chart the most progressive way forward for women's human rights in the country.

There is a danger, especially with sections of the Annual Report pertaining to CEDAW, that lines are becoming blurred, that the Commission has to justify its actions according to Islamic law before making its recommendations. This has led to concerns over the process and basis of appointing commissioners – whether they have the integrity and ability to differentiate between the responsibilities of public office and individual personal beliefs.

The WG on Law Reform and International Treaties also included, in its advocacy to the government, its views on Malaysia's reservations on eight provisions in the Convention on the Rights of the Child. SUHAKAM organised a forum in September 2005 to discuss Malaysia's reservations on the CRC as a way to resolve conflicts

arising between the Federal Constitution and other domestic laws, such as in the case of Shamala Sathiyaseelan vs Dr Jeyaganesh C. Mogarajah[5] . Regrettably, the consistent confusion between recommendations made by the participants of the event and that which SUHAKAM is advocating relegates this discussion to the more obtuse sections of the Annual Report.

It is noted that in addition to the above, the WG on Law Reform and International Treaties also worked on the issue of the right to be tried without undue delay, freedom of expression (which included research that examined the laws most commonly used to restrict freedom of expression in Malaysia), the use of preventive detention laws, life imprisonment and the ratification of other international human rights instruments.

SUHAKAM recommended that the Malaysian government ratifies the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention on the Rights of the Child (CRC) on the involvement of children in armed conflict and the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, all of which the government has so far refused to.

There isn't very much directly related to the issues of women and children in the last chapter of Annual Report 2005 on the work of SUHAKAM's offices in Sabah and Sarawak, other than the cross-cutting impact of the general work carried out. These include work on land matters, public meetings, a workshop on human rights and the media, education and the right of daily paid workers to a monthly wage. Greater gender awareness on the part of the commissioners could perhaps improve the approach and analysis so that perspectives affecting women, who make up the majority of the population, are included more systematically in SUHAKAM's work in Sabah and Sarawak.

5 This case related to a woman who attempted to stop her ex-husband from converting their children to Islam, without the mother's consent.

c. Conclusion

SUHAKAM made a significant recommendation in its Annual Report 2001, that the government develops a National Human Rights Plan of Action. Given that the government has not committed to such a plan, it is important that SUHAKAM devotes some of its resources to develop a Human Rights Plan of Action. Such a move will get us closer to conceiving a national plan. Unless SUHAKAM has a Plan of Action on human rights for all, it will be difficult to assess the progress of the Commission.

As in any review of an Annual Report, the obvious question to ask is, how far has SUHAKAM gone in its work to improve human rights in Malaysia? Without a plan of action in place, without clearly demarcated milestones and indicators, it is not possible to say whether SUHAKAM has done well in any given year, that it could have done better, or that it did not meet the minimum targets of performance. It is also difficult to measure how much closer we are to achieving the objectives of SUHAKAM as a result of the time, money and efforts spent in implementing its work in 2005.

On hindsight, and based on the Malaysian tendency to avoid self-criticism, it is too easy to complete an Annual Report that is not evaluative in nature, that is descriptive and anecdotal instead of being analytical. What were the lessons learned about what worked well, and why? What needs to be done better by SUHAKAM, and not only by the government, or done differently? These questions remain unanswered in this Annual Report.

The following recommendations are made so that SUHAKAM can improve its accountability to the public, as well as meet the objectives for which it was created:

i. The immediate development of a Plan of Action for Human Rights, preferably for a five-year period and involving public consultation as well;

ii. The development of Guidelines for all of SUHAKAM's reporting documents, which must include clarity of purpose and content and state the target groups for the publications. The Guidelines need to differentiate between the Report of the Human Rights Commission as submitted to the government, the Report that is submitted to parliament for debate, the Report that is targeted for public accountability of SUHAKAM's performance, and the Annual Report of the Commission. All of these reports must necessarily

have separate, or possibly merged, purposes and recommendations, and all should be made public for the sake of transparency and accountability. The purpose of SUHAKAM's Annual Reports is not clear, for what is at present contained in them includes a combination of activity reports, summary of proceedings of selected events, reflections on national level developments in the area of human rights, recommendations to the government by SUHAKAM, suggestions from participants in SUHAKAM's conferences, summaries of its position on certain issues, and at times, a summary of findings of research commissioned by SUHAKAM;

iii. The development of a Code of Ethics for Malaysian Human Rights Commissioners to ensure that individual personal beliefs do not inappropriately influence the execution of their official duties. The Code of Ethics should reflect and uphold the spirit of the Federal Constitution, not undermine it, as in the case of the infamous *Aku Janji* drive aimed at forcing conformance of public servants to the political status quo; and

iv. Gender sensitisation training be made compulsory for all commissioners and SUHAKAM staff members.

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Freedom of Speech and Information

Sonia Randhawa

SUHAKAM's Annual Report 2005 deals with freedom of speech and associated communication rights in two parts. In section four of the first chapter on "Key Issues and Outcomes", two paragraphs were allotted to the developments over the year. Chapter three, part four, had three paragraphs in the Report of the Law Reform and International Treaties Working Group. It was also referred to, indirectly, in various places where issues of transparency, information and awareness raising are broached. One example is a paragraph on page 85, on the need to improve information systems.

The two major threats to freedom of expression in 2004 were not mentioned in the report. The first of these was attempts by the police to secure jurisdiction over the Internet and the second was the startling number of takeovers and consequent concentration within the media industry. The use of religion to suppress opinion, both in the arts and the mass media, was not touched upon, despite a worrying trend that indicates this is exacerbating.

On freedom of information, SUHAKAM did not articulate cases where freedom of information was breached (such as gag orders on the media). Censorship, threats to the media and problems over the release of information such as the Air Pollutant Index were not mentioned.

In Appendix VII, freedom of the press is raised, but as this deals with SUHAKAM's actions and the responses from 2003, the issue will not be addressed here.

This review will look at developments in communication rights, then examine these against the framework of the Universal Declaration of Human Rights and evaluate whether SUHAKAM's summary of events as put forth in the annual report adequately reflects the current situation.

Developments in communication rights in 2005[1]

Despite improved government rhetoric on openness and accountability, 2005 saw no legislative change to Malaysian media laws. Strict control of the media was maintained through both legislation and ownership. Concentration of ownership accelerated, and increased commercialisation of the media was evident. Publications were routinely censored, and it was difficult to find journalists willing to talk on record, even anonymously, about their experiences because they feared repercussions. However, small gains were made in the arena of access to information, but as these were not part of institutional change, they are easily undermined and piecemeal.

Underpinning the repression is a barrage of legislation. The most wide reaching of these are the Printing Presses and Publications Act 1984 (PPPA) and the Communications and Multimedia Act 1998 (CMA), the former governing the print media and the latter the Internet, television and radio. Both laws put control over licensing in the hands of a cabinet minister, although for the Internet, television and radio, the minister consults the Communications and Multimedia Commission, which he appoints. The conditions of the licence, such as frequency of publication, content restrictions and language of publication, can be changed at any time, although the CMA allows that due notice must be given to the broadcaster. Print publications are granted annual licences. Thus, the threat of non-renewal is ever present.

In addition to these two pillars of legislation, there is an all-encompassing Sedition Act, which gives a very broad definition of sedition (causing "discontent or disaffection" to the residents of Malaysia or any other State); the Internal Security Act, which allows for up to two years' (renewable) detention without trial; criminal defamation laws; the Official Secrets Act and many other pieces of legislation that infringe upon communication rights.

Corporate control of the media is buttressed by legislation. The centralised decision-making process in the granting of licences means that the media is, as the Information Minister put it in April 2004, "free to make money". Commercialisation of the print media is so pervasive that advertorials often appear as editorials. Earlier this year, for example, an advertiser was allowed to deface a page three story in an English-

1 This section is taken directly from the Centre for Independent Journalism's '2005 in review'

language daily to sell infant formula. Pressure on journalists to consider the interests of advertisers and the line between the editorial and marketing departments is increasingly blurred. Advertisers, and to some extent editors, do not consider it unethical to dictate editorial decisions, such as asking for specific reporters to cover events or interviews.[2]

Parallel to this, this year has seen unprecedented concentration of media ownership. Two groups, Media Prima and Astro, control the vast majority of broadcasting channels (radio, free-to-air television and pay-TV) and publishing houses. Both have close links with the government, as do all other media companies. Smaller networks, such as NatSeven Sdn Bhd, which ran free-to-air NTV7, have been absorbed by these conglomerates. Most controversial was the "closure" of Wa FM, a Chinese language station that was taken over by Media Prima. Listeners were concerned that this would spell the end of the station's comparative independence. The takeover also prompted a group of Wa FM journalists to start an online radio station.

In recent years, the Internet has provided a relatively safe space for freedom of expression. However, last year ended with threats made against three websites, each initiating discussions on Islam, each investigated under the Sedition Act. In December 2004, the Energy, Water and Communications Minister asked the media not to discuss the issue further, and it disappeared from the national press. Investigations are ongoing against at least one of the webmasters. One of the webmasters, *Malaysia Today*'s Raja Petra Kamaruddin, was also questioned under the Sedition Act for an article on the royalty, and his computers were seized in July 2005. They were released three months later, but he alleged that the computers could no longer be used.

A blogger, Mack Zulkifli of Brand Malaysian, was warned that he could be prosecuted under the Official Secrets Act if he did not remove a link to a third party's website. The third party site included copies of police statements made regarding wanted criminal Michael Soosai.

What was also worrying, though understandable, was the reaction of the blogging community. Rather than denying that the law enforcement authorities have a role in policing the Internet, bloggers are lodging police reports when "seditious" material

2 This information comes from formal and informal interviews with journalists who preferred anonymity.

is posted on their sites.

An about-turn occurred on the issue of mega-defamation suits. While the judiciary has recognised that huge awards are a threat to freedom of expression, one judge ordered writer Khalid Jafri to pay US$1 million to former Deputy Prime Minister Anwar Ibrahim for defamation. While Khalid's pamphlet, "50 reasons why Anwar cannot become PM", was undoubtedly defamatory, the award underlined the need for a cap on payments under the Defamation Act.

There have been some small victories in getting access to information. The Air Pollutant Index (API) and details on permits for the import of cars were released, after being under the Official Secrets Act for over five years. Nevertheless, a Minister in the Prime Minister's Department has asserted that Malaysia does not need freedom of information legislation and no institutional moves were made to guarantee the public's right to know.

The year ended on a sour note. Freedom of expression came under renewed threat, with activists and musicians arrested prior to and during the Asean Summit in Kuala Lumpur. Women's rights activists campaigning for an end to violence against women were arrested and warned that the universal symbol for "woman" was a cult symbol. Currently, all those arrested have since been released and no charges were filed against them in court.

Summary of events

- It has been three years since Internet news website Malaysiakini.com submitted an application for a licence to publish a weekly print edition – and it is still waiting for the decision.
- There has been increased concentration of media ownership: Media Prima has taken over three free-to-air television stations, two radio stations and began broadcasting a pay-TV service.
- Increased persecution of the online community.

Malaysian events from the perspective of international human rights conventions

Article 19 of the Universal Declaration on Human Rights reads:
Everyone has the right to freedom of opinion and expression; this right includes

freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This is reiterated in Article 19 of the International Covenant on Civil and Political Rights, which Malaysia has yet to ratify.

It is clear that Malaysia has violated these principles. The concentration of media ownership in the hands of an elite with close ties to the government seriously undermines the ability to "seek, receive and impart information and ideas". This is compounded by political involvement in the award of licences to operate the print and electronic media, with the exception of the Internet. Malaysia has a poor track record on media freedom and this impedes the exercise of other human rights. Significant improvements need to be made towards greater media freedom.

Evaluation of SUHAKAM Annual's Report 2005

SUHAKAM appears to be unaware of the threats to freedom of expression that developed throughout 2005. It does not mention the threats faced by bloggers nor the concentration of media ownership. The first two paragraphs of the section on media freedom (p 15) concentrate on freedom of information and even then, do not mention any specific violations. Instead, the report reiterates SUHAKAM's call for a Freedom of Information Act and notes the beneficial impact this could have on corruption.

The committee's report is slightly more detailed, and indicates that a survey on media freedom in Malaysia is under way. However, as with the earlier section, it does not deal with the emerging threats to communication rights. It refers to "A Case for Media Freedom: Report of SUHAKAM's Workshop on Freedom of the Media", published in 2003. This in turn does not deal with threats against bloggers, nor does it deal with concentration of media ownership.

The matter of mega defamation awards is not mentioned, neither in the annual report nor in the 2003 Case for Media Freedom despite this having received consistent condemnation from the international human rights community, as well as from judges and lawyers in Malaysia.

Lastly, the report refers briefly to the matter of discretion in the awarding of licences

for arts performances. However, none of the arrests of people who took part in politically motivated art (such as that of the young people arrested for drawing "cult" symbols) was mentioned in the report.

Thus, it is clear that the report is neither an accurate reflection of the deteriorating state of freedom of expression and communication rights in Malaysia nor, having failed to recognise the emerging threats to these rights, does it give clear guidelines on how to address these concerns. Even the threats that are recognised in the report are not dealt with comprehensively, and the recommendations made would fail to prevent further deterioration of communication rights, even if these are implemented.

Recommendations

1. SUHAKAM should work more closely with groups tackling issues of communication rights to ensure comprehensive documentation of violations of these rights.
2. With reference to both Article 19 of the UDHR and Article 10 of the Malaysian Constitution, SUHAKAM should take a more vigorous stance on human rights violations in the field of communication rights.
3. To show commitment to the recommendations it has made, SUHAKAM should adopt Freedom of Information principles across the Commission. This will entail, for instance, the publishing of accounts and other information.

Sonia Randhawa is the executive director of the Centre for Independent Journalism, which runs Radiq Radio, a community-based Internet radio station. She has been helping to coordinate the Freedom of Information Act coalition and is one of the co-authors of "A Haze of Secrecy". She also worked with a committee to draft state-level freedom of information legislation for Malaysia, has written extensively on environmental issues and worked as a journalist until 2004. She has an MA in Politics, Philosophy and Economics from the University of Oxford, and is currently pursuing a Masters degree at Universiti Sains Malaysia.

Target Groups in the Millennium Development Goals: The Sidelining of Women's Rights in Malaysia

Vizla Kumaresan

The Millennium Declaration is a pledge to fight poverty, illiteracy, hunger, lack of education, gender inequality, mother and child mortality, disease and environmental degradation. The Millennium Development Goals (MDGs), are the road map to implementing and achieving the Millennium Declaration.

In the Millennium Declaration, governments commit to promote gender equality and the empowerment of women as an effective method to combating poverty, hunger and disease, and to stimulate truly sustainable development[1] .

Goal 3 of the MDGs calls for gender equality and women's empowerment. However, the MDGs do not fully cover issues of the equality of women or empowerment or of women's rights.

SUHAKAM states in its Annual Report 2005 that Malaysia's country report on the progress towards the MDGs shows "significant progress has been made, but some issues require specific attention"[2] . It further claims that Malaysia's overall success has paved the way for the country to go beyond the MDGs, in terms of the targets and basic needs enshrined in human rights instruments.

As for its role in the implementation of the MDGs in Malaysia, SUHAKAM is reported to have held two dialogue sessions: "The Human Rights Perspective of MDGs and Beyond", and "Right to Health: Achieving Health MDGs (Goals 4, 5 and 6)".

This paper will first examine SUHAKAM's call that Malaysia can go beyond the MDGs because of its overall success in achieving the goals. It will also show that in establishing further strategies to fully achieve these goals, SUHAKAM failed to

1 www.un.org/millennium/declaration/ares552e.htm

2 SUHAKAM 2005 Annual Report, pg. 80

consider Malaysia's pledges in the women's convention and summits, and that it did not take a gender perspective in the analyses of issues, as well as in the recommendations it put forth.

Women in Malaysia and the MDGs

The SUHAKAM Annual Report 2005 states that Malaysia has fulfilled five out of the eight goals set out in the Millennium Declaration of September 2000[3] . However, it reports that Malaysia is still lagging behind in preventing the spread of HIV/ AIDS and poverty among the Orang Asli and women[4] .

To examine Malaysia's achievement where women's rights and the MDGs are concerned, the goals directly associated with women will be examined with regard to Malaysian women's achievements in these areas:

MDG 2: Achieving universal primary education

Statistics from the Ministry of Women, Family and Community Development (MWFCD) show that female students made up 48.6 per cent of overall enrolment in primary schools in 2004[5] .

However, a report from Sabah states that infrastructure for education is poor, especially in the rural areas. Children have to walk many miles to reach the nearest primary school, and most secondary schools are in the urban areas. Many in the rural areas are too poor to send their children to the urban areas to be educated, and often the female child has to leave school to help take care of younger siblings and do the family chores[6] .

So, while it appears that the goal of primary education can be met through the availability of schools, there are other factors to consider in ensuring that female children obtain education.

3 SUHAKAM 2005 Annual Report, pg. 80

4 Ibid.

5 Perangkaan Wanita, Keluarga dan Kebajikan Masyarakat, 2006; pg 21

6 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005; pg. 54

MDG 3: Promoting gender equality and empowering women

In 2004, there were 3,101 reported cases of domestic violence, 1,760 reported cases of rape, 334 reported cases of incest and 66 reported cases of migrant domestic maid abuse[7] . The incidents of violence against women are constantly rising, and it is a safe assumption that for every case that is reported, nine go unreported.

Violence against women is caused by the inequalities in society, where the perpetrator – usually male – tries to exert his power over women using violence. The large number of violence against women cases in the country is an indication that we are perhaps still a long way from achieving gender equality.

An often cited indicator of women's equality and empowerment is their representation in politics and decision-making roles. In Malaysia, only 23 (or 10.5 per cent) of the 219 Members of Parliament[8] are women. This indicates that women, who make up 50 per cent of the population, are disproportionately under-represented in government.

As for women in public office or decision-making roles, five out of 16 judicial commissioners, three out of 36 High Court judges and two out of six Federal Court Judges were women, in the year 2004. No woman has ever been appointed to the post of Syariah court judge[9] .

The fact that women are still under-represented in politics and decision-making is also an indication that Malaysian women have not reached the status of equality with their male counterparts.

Although Malaysia ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995, discriminatory laws against women still remain. One example is the citizenship law. Malaysian women who marry foreign men are treated less favourably than Malaysian men who marry foreign women. Malaysian women are not allowed to obtain permanent residence and citizenship status for their husbands or get dependant passes for their foreign

7 Royal Malaysian Police

8 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005;pg. 43

9 Ibid. pg. 45

husbands[10].

Also, Malaysia has reservations on articles 5(a), 7(b), 9(2) and 16 (1) (a), (c), (f), (g) and 16(2)[11]. The reservations also show Malaysia's lack of commitment in ensuring fully that Malaysian women are treated as equal members of society.

MDG 5: Improving maternal health

Statistics from the MWFCD indicate that the maternal mortality rate is 0.4 for every 1,000 births[12]. When Malaysia reported to the Committee on the Elimination of All Forms of Discrimination Against Women at its 35th Session, the committee commented that Malaysia has a very good record as far as maternal mortality rates are concerned[13].

However, access to health services remains problematic. Factors such as income determine accessibility to healthcare services. It seems that higher income groups live nearer to all categories of healthcare facilities compared with the lower income groups[14]. Also, the lack of information about the services available, social and cultural factors, such as being unable to leave home without the husband's permission, lack of transportation and alternative child care services, render even available services inaccessible to women[15]. These are the issues that stand in the way of improving health facilities for women.

An integral part of maternal health is family planning and contraception. However, the rights of women in reproductive health are often overlooked. Most public health facilities offer family planning services, but the use of contraception is low. Most women in rural Malaysia use traditional methods of contraception, the effectiveness and safety of which are not known. There are still many cultural barriers to the acceptance of certain methods[16].

10 Ibid. pg. 50

11 SUHAKAM 2005 Annual Report, pg. 102

12 Perangkaan Wanita, Keluarga dan Kebajikan Masyarakat, 2006; pg 37

13 See Summary Proceedings for 35th CEDAW Session at www.un.org/womenwatch/daw/cedaw

14 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005; pg. 77

15 Ibid. pg 77

16 Ibid. pg 81

Women assume family planning duties more often than men, and generally bear the responsibility of safeguarding against pregnancy, even if many women are still denied the right to make decisions about their own reproductive rights. Hospitals have refused to carry out tubal ligations and sterilisation procedures on women without the consent of their husbands[17]. Women are thus denied the right to integrity and autonomy over their own bodies!

A larger perspective must be taken when implementing strategies to ensure maternal health. Malaysian society, which is very much patriarchal, is still bound by very strong cultural attitudes about women and their bodies. In many families, men make the key decision on family planning methods, thus limiting the women's chance to space out pregnancies. Factors such as this also affect maternal health.

Women in Malaysia are a very diverse group, which any strategy must acknowledge and integrate. It is for this reason that the needs of migrant women seeking medical services have to be considered. Migrant domestic workers find their right to health compromised at different levels. For instance, migrant women who have to undergo surgery or deliver a baby have to deposit RM600 in a government hospital[18]. This makes it almost impossible for these women to get medical attention, leaving them to resort to self-medication, and therefore risking their lives.

MDG 6: Combating HIV/AIDS, malaria and other diseases

The SUHAKAM report puts Malaysia as still lagging behind in controlling the spread of HIV/AIDS[19]. The figures of women infected with AIDS are steadily increasing in Malaysia, from 7.6 per cent in 2000 to 10 per cent in 2003[20]. Worldwide, as in Malaysia, the numbers of heterosexual married women infected with HIV/AIDS are rising.

There are many reasons for this, with unequal gender relations being a main reason.

17 Ibid. pg 82

18 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005; pg. 80

19 SUHAKAM Annual Report, 2005; pg. 80

20 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005; pg. 83

Women lack the bargaining power in relationships to determine where, when and how sex takes place. For instance, many women still find it difficult to insist on the use of contraception during sexual intercourse.

Besides this, there is the larger issue of cultural sensitivity in dealing with sexual issues. Women are reluctant to seek testing and medical treatment for HIV/AIDS, for fear of being condemned as promiscuous or shunned by their families and community[21] . If a pregnant woman transmits HIV/AIDS to her baby, the transmission is described as "mother-to-child infection", focusing attention on the mother as the immediate source of infection. This perception remains, even though the majority of women are infected through monogamous relationships with their husbands.

A gender perspective to achieving this goal is important as men and women approach healthcare issues differently. The woman's role as primary caretaker for sick members of the family shifts the health burden associated with HIV/AIDS to her. Increased demands on her time will have a negative impact on her health, often with her delaying getting tested or seeking treatment because she is dealing with the health issues of the whole family.

Public healthcare centres, and some private ones as well, limit the family planning service to married women only[22] . This makes it difficult for sexually active single women to get contraceptives or medical care – practices that could also have an effect on the spread of HIV/AIDS among women.

Discriminatory treatment of migrant women means that those who have been abused or sexually assaulted fear hospitals, and those who contract sexually transmitted diseases (STDs) refrain from getting treatment.

One move taken by the Malaysian government to help curb the spread of HIV/AIDS in the country is mandatory testing for migrant workers. Foreign women are tested for more than 15 infectious diseases, including HIV/AIDS, STDs, tuberculosis and malaria, besides pregnancy. They will be deported, without any medical treatment provided, if they are found to carry any of these diseases, or are pregnant. Also, these tests are most often done without the women being informed, without

21 Ibid. pg. 84

22 NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: reviewing the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005; pg. 82

their consent or post-test counselling. This practice is clearly discriminatory against unskilled and semi-skilled migrant workers, the majority of whom are women.

SUHAKAM and the MDGs

There is still much to achieve as far as the MDGs and women's rights go. While country-specific goals are necessary, it is not clear whether SUHAKAM analysed, from the gender perspective, Malaysia's achievements of the MDGs so far.

Recommendations from the dialogue sessions held make it clear that "gender-related developments" remain an issue. While it is commendable that the urgency of gender issues is recognised, it is regrettable that these were not considered as part of the other issues raised. Gender cuts across each of the eight MDGs and the issues and recommendations raised should have acknowledged this.

Although the dialogue sessions on "The Human Rights Perspective of MDGs and Beyond" and "Right to Health: Achieving Health MDGs (Goals 4, 5 and 6)" saw it important to integrate a rights-based approach to the MDGs, no consideration was given to women's rights and empowerment.

Human rights are indivisible, integral and interrelated. Therefore, economic empowerment without reproductive rights, education without the elimination of violence against women, and denial of the full rights of citizenship do not allow for the full participation of women.

Goal 3 of the MDGs specifically calls for the promotion of gender equality and women's empowerment. But, it does not recognise that gender equality is not just an objective by itself but a key component for the achievement of the other seven goals. Also, all 13 issues that were raised at the dialogue session have gender issues cutting through, and yet the reporting of the recommendations does not indicate any acknowledgement of special requirements to ensure that the rights of women are promoted.

The forum on health did not raise any specific gender issue. However, it is seen again that gender cuts across every recommendation that was put forth to improve health and accessibility to healthcare services throughout Malaysia. It was seen in the above sections that women's access to healthcare services is affected by many

factors. It is not clear from SUHAKAM's report whether these were taken into consideration when the recommendations were discussed. The forum also did not consider the impact of health policies on the reproductive rights of women.

An important indication of the achievement of goals is data. The recommendations do not include making available gender disaggregated data. This is very important as statistics are a political tool, besides being vital for planning and monitoring national programmes and policies[23] .

It is also unclear whether the diverse situations and conditions women live in were considered when the recommendations were made. These include women with disabilities, indigenous women, sexually marginalised women, migrant women and others who generally belong to impoverished groups with little or no access to healthcare, education and other services.

Essentially, in the two forums, there was a failure to mainstream gender into the discussions. And because of this, gender-specific actions could not be integrated into policies that aim to fulfil the MDGs.

Attempting to meet the MDGs without incorporating gender equality will increase the cost involved, and minimise success. The MDGs are mutually reinforcing, thus success in meeting the goals will have a positive impact on gender equality, just as progress towards gender equality in any one area will help to further the other goals[24].

Malaysia is already, in the Beijing Platform for Action and through its ratification of the CEDAW, obligated to ensure that women's rights are promoted and protected. SUHAKAM lost an opportunity to encourage and promote Malaysia's commitments at these forums discussing the MDGs. Also, it failed to consider that the plans of action and commitments made could have been developed into a framework to advance the MDGs in Malaysia.

23 Women and the Millennium Development Goals, http://www.whrnet.org/docs/issue-mdg.html

24 Women's Empowerment, Gender Equality and the Millennium Development Goals: A WEDO information and action guide, http://www.wedo.org/library.aspx?ResourceID=5

CONCLUSION

The MDGs have been heavily criticised, especially in the area of women's rights, as the goals fall short of mainstreaming gender equality. Women's rights are set as a separate goal, and this is not right. There are those who believe that the MDGs and the Millennium Declaration contain a strong language on human rights, equality and democracy[25]. It is therefore important that SUHAKAM, in using the MDGs to push for full recognition of human rights in Malaysia, ensures that the government promotes and protects women's rights as part and parcel of human rights. If the Ministry of Women, Family and Community Development can promise to ensure that issues of gender are included in all policies the government makes, it is disappointing to see that SUHAKAM, in its report, did not take this into consideration.

If the MDGs are to be achieved in Malaysia, then women's lives and realities must be reflected in any strategy to eradicate poverty, to ensure environmental sustainability and global partnerships. The MDGs will not succeed[26] if their implementation is gender blind, and if adequate resources are not accordingly identified. Our hope is that SUHAKAM will consider the gender perspective in any recommendation it makes to the relevant authorities for the MDGs to be fully achieved in Malaysia.

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25 Women and the Millennium Development Goals, http://www.whrnet.org/docs/issue-mdg.html

26 Women's Empowerment, Gender Equality and the Millennium Development Goals: A WEDO information and action guide, http://www.wedo.org/library.aspx?ResourceID=5

Enhancing the Justice Delivery System in Malaysia

Jeyaseelen Anthony

INTRODUCTION

Delays in the disposal of court cases, both civil and criminal, have for long bogged the system of administration of justice in Malaysia. "Delay" is a bad word for plaintiffs in a civil case, for they will have to wait indefinitely to get their day in court. For the defendants, delay is good because they will be able to "buy time" (two words their lawyers commonly use), to the extent of forcing plaintiffs into a quick settlement and accept a lesser sum in damages.

There have even been instances of plaintiffs losing interest in pursuing their claims because of undue delays. More often than not, the plaintiffs die, and the family is no longer interested in pursuing the matter because of continuing delays and the ever-increasing cost of litigation.

Delays in criminal cases have adverse effects on the accused and their families. The accused languish in prison for long periods as they wait for their day in court and, in the course of this, they end up developing anti-social tendencies[1] . It is a fact that prolonged stay in prison severely affects a person's health, self-esteem and self-worth[2] . This is especially so with young people with no criminal records. If it is subsequently proven that the accused is an innocent person, then the accused would have wasted a substantial amount of time in prison. And if he is the breadwinner, then the family will be under severe financial hardship.

Another facet to this problem is that material witnesses may have died; cannot be found or the evidence from them may no longer be accurate because of the lengthy time lapse. The parties will then be faced with a problem of proving their cases to the satisfaction of the standards of proof the law requires. Material documents

1 Chan Sit Hoong vs Public Prosecutor (1975, 1 MLJ 261), where Justice Ajaib Singh referred to the observations by Professor T.T.B Koh on the adverse effects of detention and imprisonment on a person.

2 ibid at page 263

needed to prove a litigant's case could also go missing, or be distorted over the course of time. This applies to both civil and criminal cases.

The result of undue delay in the disposal of court cases ultimately leads people to believe that the judicial system is inefficient, thereby causing them to shy away from asserting their rights through a court of law. This will lead to people settling their problems by unhealthy means, such as using debt collectors or hiring gangsters to threaten and harass people into giving in to their demands.

CAUSES AND SOLUTIONS

Civil Cases

Cause: Wastage of judicial time

Some courtrooms are closed in the afternoon. This means there are judges who do not hear cases after the break for lunch.

Solution

Judges must hear cases throughout the day, so that judicial time is substantially increased and that cases, especially interlocutory applications, are disposed of at a faster rate.

Cause: Delays in Summary applications (Order 14, Order 14A, Order 18 and Order 33)

Matters where witnesses are not required, such as summary judgment applications, should be heard by the judge and not by court registrars. Summary judgment applications are meant for straightforward cases, those without any issues for trial so that they can be disposed of quickly. Under a two-tier system where the judge and a Senior Assistant Registrar (SAR) hear such matters, summary judgment applications can take more than a year to be heard and decided. The filing of written submissions and the practice of lawyers applying for more time to file their submissions also contribute to this delay. There can be an appeal to the judge in chambers by the unsuccessful party, which will further delay the matter.

Solution

Dispense with hearing summary judgment applications by SARs. Written submissions should be avoided and the judge should make his ruling immediately, or if judgment is reserved, the decision should be given within a few days of

hearing the oral submissions. Counsel should give a certificate of time, in which they would agree to keep their submissions within their timeframes. This is the primary purpose of summary judgment applications, which are for the delivery of swift judgments in simple, straightforward matters. This approach can also be adopted in applications for injunction.

Cause: Judges not placed in the right court

Judges appointed from among members of the Bar should be placed in that division of the High Court where they have their expertise. Often, we see judges appointed to a division that is totally alien to them. For example, in the most recent appointment of judges, a lawyer with wide experience in civil, industrial and commercial litigation was elevated as Judicial Commissioner in the criminal division of the High Court in Shah Alam. Such appointments are an absolute waste of precious human resources, since the person's knowledge and experience could have been used extensively in the civil and commercial divisions. A person with years of experience in civil practice might not be able to grasp the technicalities and principles of law involved in criminal litigation, especially in capital punishment cases. The judge's inability or inadequacy could result in criminal cases being postponed for submissions on simple points of law, trivial objections from counsel or worse still, the judge might even hand down a wrong decision based on erroneous understanding of the law. This is unfair to an accused facing a capital charge.

Solution

Senior members of the Bar newly appointed as Judicial Commissioners or High Court judges must be placed in those divisions of the court that are relevant to their knowledge and experience. This will ultimately promote specialisation and increase the rate of disposal of cases.

Cause: Written submissions

The filing of written submissions at the end of a trial or an interlocutory application, more often than not, contributes to delay. Most of the time, the court gives dates to the respective parties, by when written submissions must be filed. The counsel who does not file the submission within time applies for an extension. Similarly, the lawyer on the other side will also apply for an extension of time, since the time limit for filing written submissions has been disrupted. The judge usually grants the extensions, which may sometimes run into months. Precious judicial time is therefore wasted, with the parties involved deprived of speedy justice. There is also a tendency by counsel to go on "wild goose chases" in their written submissions, since they

do not address the important and pertinent points. In some cases judges do not read the submissions until the decision is due, and as a consequence wrong and rash decisions may be handed down.

Solution

Do away with this habit of calling for written submissions. The judge should fix a date for oral submissions, with a brief outline submission written by counsel, if so required. Ordering oral submissions will give the judge greater control over the proceedings, since he will be able to reject irrelevant submissions or authorities right away. Each party must be required to sign a Certificate of Time, to affirm that only a certain amount of time would be taken for the submission. If counsel exceeds the time limit indicated, the judge can tell him to stop. There has been a suggestion that counsel who exceeds his time be punished with costs, to be paid personally by him[3] . A competent judge should dispose of a case on the same day, after hearing submissions from both sides, or after a few days, with the issues and points raised by counsel still fresh in his mind. Here there is no delay, the parties are happy and the backlog is reduced faster. The lawyer can also improve his advocacy skills.

Cause: Shortage of judges

This is a perennial problem that needs to be addressed urgently. When a judge is promoted, transferred, retires or dies, the court he presided over is often without a replacement for a long time. As a result, cases in that court get postponed indefinitely. This is a major reason for delays. In some courts, the volume of cases pending trial is so high that it is quite impossible to dispose of the cases speedily. This is why more judges should be appointed to clear the backlog. For example, there have only been two judges – and one of them has since died – in the Appellate and Special Powers Division of the High Court in Kuala Lumpur, where the volume of cases is so high that hearing dates are given a year after written submissions are filed. And even then, in most instances, the hearing dates are vacated to give way to older cases!

Solution

It must be ensured that a judge is on stand-by when an impending vacancy is expected as a result of promotion, transfer or retirement, so that vacancies are filled immediately. More senior practitioners from the Bar should be appointed as judges

3 Tommy Thomas in his paper "Delay: Causes, Consequences and Remedies: Civil Courts" presented in the SUHAKAM forum on the "Right to an Expeditious Trial", April 8, 2005.

to overcome the shortage. Appointments can also be made on a contract basis, with an attractive remuneration package, in order to attract senior members of the Bar. Of course, only the best, in terms of ability, integrity and efficiency, should be appointed as judges. Immediate effort should be made to identify the divisions of the High Court that face the biggest backlog of cases and appoint more judges for those.

Cause: Too much time taken to record court proceedings

Too much time is taken to manually record each word spoken by counsel and witnesses. The notes of evidence are then typewritten. Sometimes, the typist may not understand what the judge has written and clarification is repeatedly sought. These factors contribute to delays in the disposal of cases. The typist may even misinterpret what the judge has written, or the judge may not be able to read what he himself had speedily written. These things happen when witnesses speak too fast. Sometimes, the judge might get rather tired with all that writing and may miss out recording some important points.

Solution

The swift and instant solution is to introduce electronic recording of all proceedings in the judge's chambers and in open court. The transcript of the proceedings can be distributed to the judge and counsel. This saves time, since the notes of evidence recorded by the judge, which can run into hundreds of pages, need not be typewritten again. The judge too need not take down any notes since there are recordings and transcripts.

Cause: Too many cases assigned to a judge

Judges, being humans, should not be burdened with a heavy workload, for they will be demoralised if they're overworked. This will ultimately affect the decisions judges make, because if demoralised or pressured as a result of heavy workload, they may not able to think effectively and as a result, hand down rash and wrong decisions. It is the litigants who will suffer in the end.

Solution

There should be a limit on the number cases of assigned to a judge. The office of the Chief Justice should constantly monitor the progress of each case to ensure that it is dealt with conscientiously by the judge, and without delay. If a reasonable number of cases is assigned to a particular judge, then it will easier to monitor the cases and the judge can spend more time on them, which will also help in the decision-making.

CRIMINAL CASES

Cause: Pursuing groundless and unsustainable charges

The backlog in criminal cases can be reduced only if charges that are sustainable are pursued. This means prosecuting only cases where the charge can be proven beyond reasonable doubt. Very often criminal cases are prosecuted with improper and ineffective police investigations, without material witnesses[4] and without forensic evidence or material exhibits. There have also been instances where the charge clearly did not satisfy the ingredients of the offence. The courts should not be burdened with such cases. At a magistrate's court in Klang recently, a person was charged with stealing chickens, Clearly the charge is unsustainable since how is the prosecution to prove that the chickens belong to the owner unless there are special markings or identification? Most criminal investigations are conducted by sergeants (Assistant Investigating Officers or AIOs) who may not be knowledgeable about the technical principles of criminal law to bring cases for prosecution. This is a reason that magistrates' courts are flooded with criminal cases. The police should also refrain from arresting a person before commencing or completing investigations. They should investigate before arrest, not arrest first and then investigate.

Solution

The prosecution must make sure police investigations are conducted properly and effectively before a person is arrested and charged; that material witnesses are available; all material exhibits are properly marked and identified; and that all forensic testing and analyses are completed before an accused is charged. The evidence has to be strong enough to secure conviction and only competent prosecutors should be assigned, to the case. These steps are necessary to ensure that the Magistrate's Court, Sessions Court and the High Court are not burdened with cases not fit for prosecution. Only a police officer with the rank of ASP and above, or a Deputy Public Prosecutor (DPP) in exceptional cases, should decide whether a case is fit for the magistrate's court. Magistrates and judges should exercise their powers under Section 173 (g) of the Criminal Procedure Code[5] to throw out charges that are unsustainable or groundless.

4 The trial of Koh Kim Teck & 2 Others, where a material witness of Chinese nationality was not produced by the prosecution, resulting in all three accused being acquitted without their defence being called.

5 Section 173 (g) Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if, for reasons to be recorded by the court, it considers the charge to be groundless.

Cause: Difficulty in obtaining documents from police and the prosecution

It is not unusual for the defence to receive documents such as first information reports, cautioned statements and sketch plans on the day of hearing. These documents are provided only after the defence complains to the magistrate or judge. Photocopies of these documents are then provided, and the defence counsel applies for a postponement, arguing for time to study the documents and obtain further instructions from the client. The application for such a postponement is not unreasonable but the point is, postponement could have been avoided had the police supplied the documents much earlier. There have also been cases where a report made under Section 399 of the Criminal Procedure Code, which is supposed to be served on the accused not less days 10 days before the commencement of the trial, is served on the day of the trial[6] , or that expert witnesses are called to give their reports orally in court[7] . In such an instance too, the defence counsel has to apply for a postponement to study reports of the experts so as to be able to cross-examine them effectively.

Solution

The police and the prosecution must ensure that documents and reports are handed over the defence and the accused within the time stipulated under the law[8] or within reasonable time. This is to ensure that the trial is not disrupted by postponements[9] .

Cause: Vacating trial dates for so-called "high profile" or public interest cases

Very often we find that cases that are already fixed for hearing are vacated instantaneously by the court to give way to a "high profile case", which is sometimes erroneously referred to as a public interest case. These so called high profile cases usually involve individuals in high places, such as ministers, political and corporate figures, career and television personalities and accused persons who are not prominent in their own right but made famous by the press, usually in cases that are sexual in nature. The question is, why must ordinary accused persons anxiously waiting for their day in court, who are languishing in prison because they can't

6 PP v Lee Wee Lip & 2 Others Case No: M3-83-1980-04, M3-83-1978-04 and M3-83-1979-04.

7 D.P Vijandran in his paper "Delay in Criminal Cases" presented at the SUHAKAM forum on the "Right to an Expeditious Trial" 8th April 2005.

8 Section 399 (1) of the Criminal Procedure Code

9 In Public Prosecutor v Raymond Chia [1985] 2 MLJ 63 Mohd Azmi J. said "….adjournments could and should be avoided by furnishing them (documents) to the accused before trial."

afford bail or that bail is denied, give way to these so-called high profile accused persons? Are the courts practising double standards here? The family members of the accused and the general public should not be given an impression that the rich and famous will be treated differently, with certain preferences and privileges, compared with the ordinary citizen. It is also amazing to see how these cases are speedily disposed of, after a few days of continuous hearing – which doesn't happen in normal cases.

Solution

The Federal Constitution clearly provides that everybody is equal before the law[10]. As such, every accused person, rich or poor, famous or infamous, should wait in the queue.

Cause: Prosecution witnesses not present in court

Reasons such as prosecution witnesses not present because they are engaged in other cases, the police officer is sick (medical certificate is not produced and the court usually does not insist on it), officer on duty elsewhere, on leave or undergoing a "kursus" despite being subpoenaed, missing investigation papers, civilian witnesses cannot be located, subpoena not served, order to produce (OTP) the accused was not issued and chemist's report not ready are the standard grounds for the prosecution to obtain a postponement. In one instance at a magistrate's court in Petaling Jaya[11], some police witnesses did not appear in court and on the third consecutive hearing date, the accused were given a discharge not amounting to an acquittal. What a waste of precious judicial time and resources!

Solution

When the court fixes hearing dates, the police and the DPP must ensure that their witnesses are present. No excuse should be given. The court case should take priority over all other appointments or engagements that witness might have. Only under very exceptional circumstances should the court allow postponement.

10 Article 8(1) of the Federal Constitution.

11 PP v Lee Wee Lip & 2 Others Case No: M3-83-1980-04, M3-83-1978-04 and M3-83-1979-04.

CONCLUSION

The Office of the Chief Justice must be congratulated for taking steps to dispose of pre-2000 cases that were filed in court. More steps like this are needed. The Director of the Criminal Investigations Department and Director of Prosecutions of the Royal Malaysian Police Force should monitor investigation papers and prosecutions conducted by its prosecuting officers. The courts have begun to play a bigger role in preventing delays. This is evident from a recent Court of Appeal decision, where it held that there is no need for the consent of the Public Prosecutor or for the Chemist's report to be given before a case under Section 39 (B) of the Dangerous Drugs Act can be transferred to the High Court[12]. This most welcomed decision should result in less delay. Unless there is a change in attitude on the part of the prosecution, including the police, defence counsel and the court, no number of reforms will work. All parties must regard themselves as officers of the court and work towards improving the system and preserving reforms that have been put in place.

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12 New Straits Times, 19.6.2007 at page 25.

About **ERA Consumer Malaysia**

The Education and Research Association for Consumers, Malaysia (ERA Consumer Malaysia) was founded as a voluntary, non-profit and non-political organisation in Ipoh, Perak, in 1985. It is a membership organisation registered under the Malaysian Societies Act of 1966 to develop critical consciousness on people-related issues arising from the larger socio-economic environment

ERA Consumer aims to create awareness among the people on issues affecting their lives through research and educational programmes. It consistently responds to the needs of the people and develops its services based on independent and balanced research. ERA Consumer focuses on consumer and human rights education, food, trade and economic issues. It carries out public education projects, makes policy recommendations to the government and international institutions and builds solidarity among NGOs and society. It also endeavours to increase South-South relations and North-South understanding.

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