SUHAKAM
AFTER 7 YEARS:

STOP

SHEDDING RESPONSIBILITIES

Organised by

ERA CONSUMER MALAYSIA
Education And Research Association For Consumers, Malaysia

Supported by

Embassy of Finland 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 a critical issues ranging from consumer, human and women's right to the environment and food security.

Foreword

We are now into eight years of the establishment of SUHAKAM, the Human Rights Commission of Malaysia. An eventful eight years, indeed. Unfortunately, though, not a period from which SUHAKAM has emerged as a shining knight.

This is because suggestions and recommendations made to SUHAKAM on some very basic concerns of Malaysian society over human rights have not been attended to over these years. Which may give some credence to criticism – and made in sarcasm too by Ministers in the Federal Cabinet as well – that SUHAKAM is a "toothless tiger".

It is our hope here, as we review the work of the Commission in our report "SUHAKAM After Seven Years: Stop Shedding Responsibilities" that there will be earnest moves on the part of the Government to give SUHAKAM the authority and legal bite to carry out its duties more effectively.

Let me quote this segment from the report of my own officers monitoring SUHAKAM, which begins on Page 3.

> *"Critics view SUHAKAM as a powerless body, appointed for the purpose of window-dressing the government's poor human rights record, thereby deflecting attention from the government's responsibility over rights violations and providing the international community with a sanitised version of the situation in Malaysia."*

We must make it clear here that SUHAKAM alone cannot be blamed for this state of affairs. Despite all the feedback and input from civil society groups in the country, the Government of Malaysia has not taken one single step to give SUHAKAM the place it rightly deserves as the nation's guardian of human rights, or give due respect and recognition to its findings and recommendations.

And now, because of the disdainful treatment the Government itself accords SUHAKAM, the very credibility of the Commission is at stake. The global monitor and regulator of human rights, the International Coordination Committee of the

National Human Rights Institution, is considering downgrading SUHAKAM to "B" status, which would effectively bar it from attending sessions of the United Nations Human Rights Council.

And how did the Government respond to this? "Oh, we have until September 2009" to look into the matter. What kind of response is this? And coming from a Government that does not even bother to table SUHAKAM's annual reports in Parliament for discussion?

With this report, we appeal to the Government again: Act before it is too late. Show sincerity, transparency and accountability by giving SUHAKAM the powers, position and stature it rightfully deserves to be an effective guardian of human rights in the country. Give it the teeth to bite!

Datuk Marimuthu Nadason
President
ERA Consumer Malaysia
2008

Compliance by the Human Rights Commission of Malaysia (SUHAKAM) with the Paris Principles

Prepared by Mohan Sankaran [1] *and John Liu* [2]

Introduction

This paper looks at the performance of the Human Rights Commission of Malaysia (SUHAKAM) in regard to its compliance with the Paris Principles. This is done from the perspective of Malaysian human rights non-governmental organisations (NGOs), which have been engaging and monitoring SUHAKAM at the national and regional levels from 2000 to 2007.

Critics view SUHAKAM as a powerless body, appointed for the purpose of window-dressing the government's poor human rights record, thereby deflecting attention from the government's responsibility over rights violations and providing the international community with a sanitised version of the situation in Malaysia.

Character of the National Human Rights Institution (NHRI)

1. Establishment

SUHAKAM was established in 2000 by an Act of Parliament – the Human Rights Commission Act 1999.

SUHAKAM's main functions, spelled out in Section 4(1) of the Act are to:

- Promote awareness and provide education relating to human rights;
- Advise and assist the government in formulating legislation and procedures and to recommend necessary measures;

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- Recommend to the government the subscription to, or accession of, treaties and other international instruments in the field of human rights; and
- Inquire into complaints on infringement of human rights.

Hence, with the Act passed, Malaysia joined the bandwagon of many countries in the region that have established such national institutions for the promotion and protection of human rights in their countries.

2. Independence

The NHRIs should not only be independent but should also be seen as independent. However, in the Malaysian context the Human Rights Commission Act 1999 did not make strenuous attempts to ensure SUHAKAM would be an independent body with freedom to discharge its statutory functions without fear or favour on any part. This has also been one of the reasons why the Commission is being criticised as being ineffective and labelled as a "public relations tool"[3] of the government and further, as a "toothless tiger".[4]

Under the Act, the Commission is purely an advisory body and the government is free to accept or reject its recommendations. Most of SUHAKAM's more substantial recommendations have been ignored by the government. Even though the Commission submits its annual report to Parliament, the government has steadfastly refused to facilitate debate on its contents. As in previous years, Parliament did not debate SUHAKAM's Annual Report 2006.

When SUHAKAM was established in 2000, it was placed under the jurisdiction of the Ministry of Foreign Affairs. Jurisdiction was transferred to the Prime Minister's Department in 2004. Being under the direct supervision of the Prime Minister's Department has further undermined the Commission's credibility and dispels claims that it has any semblance of structural autonomy from the Executive branch of the government.

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[3] For instance, see Syed Hamid Albar, 1999, Rationale for the Human Rights Commission of Malaysia. In Tikamdas, R & Rachagan, SS (eds.) *Human Rights and the National Commission*. (pp. 103-110) Kuala Lumpur: HAKAM.

[4] For instance, Hector, C (2004): "BN has no respect for human rights." *Aliran Monthly*. http://aliran.com/oldsite/monthly/2004a/ef.html last accessed Aug 18, 2007

Similarly the provision regarding the appointments and reappointments of the commissioners, which we will discuss later, also begs the question of the commission's autonomy in regard to its composition.

Control over funds is another area by which the Commission's autonomy is measured. Section 19(1) of the Act states, "The Government shall provide the Commission with adequate funds annually ...", while Section 19(2) prohibits the use of foreign funding. The ban reflects SUHAKAM's lack of autonomy to determine its finances, although some argue that it also ensures independence from external parties. Still, the fact that SUHAKAM is not even allowed autonomy to decide whether or not to receive a particular external fund is indicative of distrust in its ability to make independent decisions. The Commission's budget from the government for 2006 was RM7.6 million.[5]

3. Appointment processes and organisational process

Pursuant to Section 5 (1) and (2) of the Act, the Commission shall consist of not more than 20 members who are to be appointed by the Yang di-Pertuan Agong (King) on the recommendation of the Prime Minister. However, the Act provides no further guideline as to the qualification of the commissioners, merely providing that they be appointed from "amongst prominent personalities, including those from various and racial backgrounds" [6] but more importantly, human rights knowledge/experience is not stated as a criterion in such appointments.

This provision also seems to put inconceivable power into the hands of the Prime Minister in relation to appointments and renewals, and so the public cannot be faulted for being cynical about the appointments of certain individuals or the motives behind the non-renewal of the tenure of certain commissioners.

Such absolute right is certainly open to abuse and in conflict with one of the fundamental features of the Paris Principles, which calls for an independent appointments procedure that is transparent and consultative with civil society groups in the country to maximise the likelihood of committed and active appointees in an NHRI.

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5 SUHAKAM 2007, *Annual Report 2006*. (p. 193).

6 Section 5(3) Human Rights Commission Act of Malaysia

With such wide powers, it is the Prime Minister who ultimately selects as commissioners those who are seen as not hostile to the government. It is also possible that political considerations may influence the decision to appoint or not to renew the tenure of a particular commissioner. In this process therefore, the best person may not get selected, thus affecting the quality of the Commission as there is no check-and-balance mechanism to ensure that the appointment process is politically neutral.

In the absence of such mechanism, the public loses confidence in the independence and impartiality of the Commission. The appointment of the current chairman, Tan Sri Abu Talib Othman, has been controversial. As Attorney-General in 1987, he publicly defended the use of the Internal Security Act, a legislation that provides for detention without trial, during a massive crackdown on activists called Operation Lalang. He was a member of the government prosecution team during the 1988 impeachment of former Lord President Tun Salleh Abas and five Supreme Court judges, an episode now referred to as the judicial crisis that marked the end of the independence of the Malaysian Judiciary.

Under Section 5(4) of the Act, commissioners hold office for two years and are eligible for reappointment. As re-appointments are at the prerogative of the Prime Minister, there is a real danger that commissioners will practise self-censorship and conduct themselves in such a way so as to secure renewal of tenure. The few who are critical of the Government often end up being marginalised and typically, do not get their tenure renewed when their term is up. This has been seen in more than one instance: In May 2006, Prof Hamdan Adnan, the vocal head of the investigations and complaints committee, was not re-appointed. In 2002, the tenure of two highly competent commissioners, Anuar Zainal Abidin and Mehrun Siraj – who led a probe into police brutality in the "Kesas Highway" incident and produced a report highly critical of the Government – was not renewed.[7] This means that there is no security of tenure, which is essential because the tenure of the commissioners cannot be made dependent on the goodwill of the Prime Minister or the Executive.

[7] In 2001, SUHAKAM conducted an inquiry into police brutality at a gathering of 100,000 people along the busy Kesas Highway in November 2000. Its report was critical of the police for violating human rights. In relation to this, former Commissioner Anuar Zainal Abidin revealed in an interview in 2006 that his service was not extended following a disagreement with then Prime Minister Dr Mahathir Mohamad, who was vehemently opposed his decision to publicly announce the findings of the inquiry. (*Malaysiakini*, July 7, 2006. "Ex-rights Commissioner Anuar slams SUHAKAM" http://www.malaysiakini.com/news/53558 last accessed July 29, 2007). See SUHAKAM 2001: *Inquiry 2/2000: Inquiry on its Own Motion into November 5th Incident at the Kesas Highway*. Kuala Lumpur: SUHAKAM.

The Act also does not specify limits on re-appointments. The renewal of appointments after the two-year term also depends on the Prime Minister, and is such that if the Prime Minister finds a particular commissioner as vocal or seen to be critical of the Government of the day, then his or her appointment will not be renewed. There is every chance, of course, that commissioners enjoying the perks of office may want to "to toe the line" in order to secure reappointment: A situation where such commissioners compromise the independence of the office.

a. Composition of the NHRI's membership and appointment process

Currently there are 18 commissioners and all are part-time commissioners. Most of the commissioners are engaged in employment elsewhere and some serve as directors, independent directors and advisers to many companies. Some commissioners are also known to be linked to political parties. Therefore, they are unable to give their full commitment to the promotion and protection of human rights or act impartially on issues pertaining to human rights.

In the commissioners' appointment process, there is also no consultation whatsoever with the public or civil society groups. In addition, vacancies for commissioners are not advertised and public or public interest groups are not given a chance to make recommendations. There is also no consultation with, or participation of public or civil society groups, on the renewal of tenure. Hence, the whole process of appointment and selection is conducted in secrecy.

b. Pluralism

The Paris Principles state that the composition of an NHRI and the appointment of its members must "afford all guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights …" It must therefore have representation of various sectors, including NGOs, trade unions, concerned social and professional organisations; institutions of philosophical or religious thought; universities and qualified experts; Parliament; and government departments.

Although the composition of SUHAKAM seems to have fulfilled the criterion of plurality to a certain extent, the competence and independence of some commissioners remain open to question. For example, it is pertinent to note that 32

non-governmental organisations "disengaged" with SUHAKAM for 100 days shortly after the current chairman took office. This is largely due to his role as Attorney-General during the "Operasi Lalang[8]" Internal Security Act crackdown in 1987 and the judicial crisis of 1988.

4. Relationship with Civil Society and Human Rights Institutions

a. Formal Relationship with Civil Society

SUHAKAM generally has had a rocky relationship with human rights NGOs since its inception. [9] during the period under review, this relationship did not change much, as plainly illustrated by the walk-out by NGO representatives in June 2006 after only five minutes into a meeting to push for a public inquiry into the "Bloody Sunday" incident.

According to a report published by the Education and Research Association for Consumers Malaysia (ERA Consumer Malaysia), Malaysian NGOs had initiated annual consultations with SUHAKAM during the last six years. However, the SUHAKAM Chairman has not attended any of these sessions. Less than 10 per cent of the commissioners have turned up at these events, despite personal invitation letters being issued to all of them and reminders being sent. [10] It is pertinent to note that in its oral intervention at the 60th session of the UN Commission on Human Rights on April 14, 2005 SUHAKAM stated that it looked forward to the "*continued **support"*** of the Government towards its activities and also to its "*continued*

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[8] Operation Lalang (or Weeding Operation; also referred to as Ops Lalang) was carried out from Oct 27, 1987 by the Malaysian police to crack down on opposition leaders and social activists. The infamous operation saw the arrest of 106 people under the Internal Security Act (ISA) and the revoking of the publishing licences of two dailies, *The Star* and the *Sin Chew Jit Poh* and two weeklies, *The Sunday Star* and *Watan*

[9] In 2002, a coalition of 32 NGOs disengaged with SUHAKAM for a period of 100 days in response to the controversial change of personnel in the Commission, and SUHAKAM's poor record. In response, SUHAKAM expressed disappointment. Commissioner Prof Hamdan Adnan said the boycott was unfair and would only cause a loss to society. He observed that the boycott showed that the NGOs had their own interests at heart and were not sincere in defending human rights. He further said they had not followed-up on key issues over which they had criticised SUHAKAM, and that it was not right to pass all responsibility to a body that was just a year old

[10] Kang, R 2006: Malaysia's commitment to international human rights instruments and mechanisms: A review of SUHAKAM's roles, approaches and impact.Nagarajan, S (ed.) *SUHAKAM After 5 Years: State of Human Rights in Malaysia*. Petaling Jaya: ERA Consumer. (p. 9).

discourse" with civil society. This reflects the true relationship of SUHAKAM with NGOs.

Still, many NGOs regard the Commission as important and continue to co-operate with it. One reason is because SUHAKAM has access to locations – such as places of detention – where human rights violations allegedly occur and which are not accessible to civil society groups. However, the level of co-operation between NGOs and SUHAKAM varies from one group to another.

For example, in taking up the issue of trafficking in persons, the Commission visited the Kajang Women's Prison and observed a large number of foreign nationals, mainly young girls, being held on remand. The Commission then set up a sub-committee to study the problem of trafficking in women and children.

At the National Conference on "Stop Trafficking in Persons: Transborder Crime in the Region" held in Kuala Lumpur in September 2006, a SUHAKAM representative gave a presentation on the Commission's experiences and initiatives. She commented: "NGOs that operate at the grassroots […] would be able to provide vital information, motivation and support. There needs to be coordination between NGOs […] local community members, groups and agencies should be actively engaged."[11]

Indeed, there has been constructive engagement between SUHAKAM and NGOs on this issue. As a result of a series of dialogues with NGOs, government agencies, individuals and selected embassies, SUHAKAM published two reports, *Trafficking in Women and Children* (2004) and *Reducing Violence Harm and Exploitation of Children* (in collaboration with United Nations Children's Fund, UNICEF, 2005).

The most recent example of engagement was at the ASEAN Human Rights Mechanism. In March 2006, SUHAKAM hosted the second meeting of the ASEAN National Human Rights Institutions' Consultation Mechanism. However, the meeting in Kuala Lumpur was organised in a rather exclusive manner, with only limited NGO engagement.[12] Subsequent meetings and roundtable discussions were similarly attended only by a handful of NGOs.

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[11] Pillai, K 2007: SUHAKAM's Experiences and Initiatives. In TENAGANITA (ed.) *Stop Trafficking in Persons: A Transborder Crime in the Region*. (pp. 45-68). Kuala Lumpur; TENAGANITA

[12] Kang, R 2006. (p. 14).

b. Cooperation with the United Nations, regional and national institutions

i. SUHAKAM at the national level

A review conducted by ERA Consumer Malaysia[13] showed that SUHAKAM's approach at the national level with three key stakeholders, the Government, NGOs and Parliament can be summarised as follows:

SUHAKAM and Government: Could be interpreted as operating on a fine line. SUHAKAM is either resorting to low profile constructive engagement with the Government or it is applying censorship. The Government has sent two block responses to SUHAKAM's report so far.[14] Half of these responses could be considered as lectures to SUHAKAM.

SUHAKAM and NGOs: Annual consultations in the last six years were initiated by the NGOs, particularly by ERA Consumer Malaysia. However, none of these were attended by the Commission's chairman. The few commissioners who attended the first three consultations did not attend any more, despite personal invitation letters sent to all and follow-up calls made.

SUHAKAM and Parliament: The Malaysian Parliament never debated any of SUHAKAM's annual reports the past six years. SUHAKAM submits its annual reports to Parliament every year, as required in the Act. Although SUHAKAM has expressed regret that Parliament has been neglecting its reports, it never took any proactive step to get Parliament to pay more attention.

ii. SUHAKAM at regional and international forums

National NGOs will normally find it difficult to monitor human rights issues at regional and international platforms because of financial and geographical constraints. On its part and with the official mandate, how SUHAKAM presents its country's human rights situation at these platforms will help shape the international

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[13] Kang, R 2006. Malaysia's commitment to international human rights instruments and mechanisms: A review of SUHAKAM's roles, approaches and impact. *SUHAKAM After 5 Years: State of Human Rights in Malaysia*. Petaling Jaya: ERA Consumer. (p. 9).

[14] The Government sent its response to SUHAKAM Annual Report 2001 and 2002 and other specific reports on March 17, 2003. On Jan 17, 2005, the government sent its response to SUHAKAM Annual Report 2003.

community's views on Malaysia. This will in turn have an impact on the NGOs' activities at the grassroots. As seen from the history of social movements, information and contextual gaps hinder the international community from making timely and informed decisions. Any actor that actively functions at this level to act as a bridge will have plenty of leverage in helping to shape the international community's views.

In recent years, SUHAKAM has taken an active part in three important regional and international meetings – the annual sessions of the UN Commission on Human Rights (Geneva), the annual workshop of the Asia Pacific Forum (APF) on National Human Rights Institutions and in cooperation among four national human rights institutions in the ASEAN region.

iii. SUHAKAM at the UN Commission on Human Rights

SUHAKAM intervened at the UN Commission on Human Rights for two consecutive years, i.e. in 2003 and 2004. It ceased this activity in 2005 when Malaysia was elected as a member of this Commission. Though it kept a low profile in 2005, SUHAKAM's delegation did attend the UN Commission's sessions. It is not known whether the Malaysian Government had influenced SUHAKAM to keep a low profile.

In general, SUHAKAM's past intervention at the UN HR Commission's sessions, which were attended by Government officials, experts, UN specialised agencies, donors and regional NGOs, tended to be very narrative and technocratic. It generally focused on its activities and outreach, and less on articulating substantive controversial issues as case studies or lessons for the purposes of dialogues and experience-sharing with other key stakeholders. Its report appeared to be cautiously optimistic and portrayed the Malaysian human rights landscape as acceptable.

The questions are: Is such an approach paying off in terms of Government acceptance at international level? Is it working towards the improvement of the protection and promotion of human rights?

Few indicators can be explored to study the trends:

i. Year 2001: Malaysia made the first official mention of SUHAKAM at the UN Commission on Human Rights. Foreign Minister Datuk Seri Syed Hamid Albar informed the 57th session of the UN Commission on Human Rights, in front of representatives from 191 member states and UN experts, on March 20, 2001 that:

> *"…the establishment in 1999 of the Malaysian National Commission on Human Rights, or SUHAKAM, reflected the Government's commitment to strengthening human rights standards in the country. SUHAKAM sought to increase awareness of human rights issues and investigate allegations of human rights violations. Malaysia believed that only through a rational, realistic and pragmatic approach could human rights problems be solved, and it would continue to advocate that human rights should be dealt with comprehensively, that democracy should be productive and that capitalism should be humane."*[15]

ii. Between 2002 and 2004: In its annual session, the UN Commission on Human Rights allocated a specific agenda under item 18 (b), national institutions and regional arrangements, to allow national human rights institutions to engage with their governments on the effective functioning of human rights mechanisms. SUHAKAM made oral interventions under item 18 (b) for the years 2003 and 2004. Unfortunately, over the three years, SUHAKAM was not mentioned nor referred to in any of the Malaysian Government's intervention and statements to the UN Commission.

iii. Year 2005: Malaysia was re-elected to the UN Commission on Human Rights. The same year, SUHAKAM ceased making its oral intervention under item 18 (b). Syed Hamid came to Geneva again to address a high level meeting of the 61st session of the UN Commission on March 14, 2005 with a five-page statement. This time, he made no reference to SUHAKAM's roles or activities.

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[15] Summary record of the 2nd meeting held at the Palais des Nations, Geneva, on March 20 2001, E/CN.4/2001/SR.2.

He said, "Human Rights in Malaysia are explicitly protected in the Constitution and legislation as well as the policies and measures of the Government. This approach is aimed at promoting racial harmony and equitable socio-economic development. The rights of individuals are ensured without compromising the rights of the majority as well as the security and well-being of the nation. It is within these broad parameters that we advance human rights in our country … Malaysia's commitment to the protection and promotion of human rights of our people has been reflected in the consistent and concerted efforts of the Government to advance the well-being and welfare of Malaysians."

In additional, Syed Hamid's statement also referred to a recommendation by other member states on the proposed designation of prominent and experienced human rights figures as heads of delegation to the UN Commission. The Malaysian Government's reply was *"…we take the view that this issue does not arise as we have always been represented by qualified representatives"*.

Unfortunately, there was no mention of the potential human rights expertise of the SUHAKAM commissioners.

How SUHAKAM frames its working relationship with NGOs at international forums is also a worthwhile study. SUHAKAM's oral intervention at the 60th session of the UN Commission on Human Rights on April 14, 2005 as mentioned earlier ended with the following remark:

"Mr Chairman, SUHAKAM looks forward to the continued support of the Government towards the activities initiated by SUHAKAM and also to the continued discourse by civil society with SUHAKAM."

The term "continued support" was used in reference to Government while "continued discourse" was preferred when referring to NGOs. In the new millennium, the United Nations and member states have been openly discussing the enhancing of interaction with civil society organisations and recognise their contributions, as seen from the deliberations of UN

Secretary-General Kofi Annan's Panel of Eminent Persons on Civil Society and UN Relationships since 2002. In this context, SUHAKAM's careful choosing of the words "continued discourse" to describe its working relationship with NGOs is worth studying by grassroots human rights practitioners.

iv. SUHAKAM at the Asia-Pacific level

At the Asia-Pacific level, SUHAKAM is an active member of the Asia Pacific Forum for National Human Rights Institutions (APF). APF was established in 1996 after the first regional meeting of national human rights institutions in the Asia Pacific.

As a full member of APF, SUHAKAM is required to submit its report annually. Experts, donors and representatives from NHRIs, governments, UN specialised agencies and regional NGOs attend APF's annual meetings. SUHAKAM's reports to the annual meetings of APF[16] are very narrative and technocratic and are much longer than its statements to the UN Commission. The reports focus on SUHAKAM's activities and outreach, not on substantive issues.

SUHAKAM became a full member of APF in November 2002, barely two months after 32 Malaysian NGOs ended their 100 days of disengagement with SUHAKAM following the appointment of former A-G Abu Talib as its chairman and the dropping of some progressive commissioners. This incident reflects the delay in communication between the national movement and the international community, where the latter was not able to make timely and informed decisions

The United Nations wants APF to upgrade its mandate to serve as a quasi-interregional mechanism for human rights due to the failure of Asia-Pacific governments to come up with an effective mechanism after more than 20 years of "deliberations".

[16] SUHAKAM's reports submitted to the annual meetings of the Asia Pacific Forum for National Human Rights Institutions can be viewed at http://www.asiapacificforum.net

However, the UN proposal got the cold shoulder from most APF members. They see it as highly risky, which could put them in direct confrontation with governments and jeopardise the good working relationship they have developed. As a stakeholder in the larger human rights community in the Asia-Pacific region, SUHAKAM's position on this is not clear.

v. SUHAKAM at the ASEAN level

ASEAN declared its willingness to set up a human rights mechanism at the 16th ASEAN Ministerial Meeting in Singapore on July 23-24, 1993. In line with this spirit, SUHAKAM, which is one of the four national human rights institutions in the region, took the initiative to bridge the gap between the government sector and civil society in the absence of an effective regional human rights mechanism. The co-operation of the national human rights institutions of Indonesia, Malaysia, the Philippines and Thailand is pivotal to the development of such an intergovernmental mechanism.

SUHAKAM hosted the second meeting of the ASEAN National Human Rights Institution's Consultation Mechanism in Kuala Lumpur from March 15-17, 2006. The meeting focused on five thematic areas: Migrant workers; human trafficking; terrorism and the rule of law; economic, social and cultural rights; and human rights education. The four commissions also discussed the development of a draft memorandum of understanding to establish the basis for future cooperation.

Unfortunately, this meeting was again organised in a rather exclusive manner and did not include members from civil society. Hopefully, the four national human rights institutions will open up the process soon to enable a wider NGO engagement. It is not clear how SUHAKAM is planning to use this platform to bridge the gap between the government sector and civil society in Malaysia and ASEAN in general, in the absence of an effective regional human rights mechanism.

Compared with the NGOs, SUHAKAM is obviously in a more advantageous position as it has the resources, opportunities and the official mandate to sensitise the international community on the Malaysian human rights

situation. SUHAKAM can thus continue to navigate and strengthen many unexplored spaces and opportunities while discharging its mandate.

SUHAKAM is still struggling to balance its position with two important stakeholders – the Government and the NGOs – even though it has been functioning for seven years. This positioning of power relationship will determine SUHAKAM's accountability, mode of engagement and the impact of its outreach. Unfortunately, SUHAKAM's current mode of engagement with the NGOs is not proportionate to the recognition it has received from the international community, the views offered the international community on Malaysia's human rights situation and the roles it is playing at the regional and international forums.

Until today, there is no institutional mechanism to allow NGOs to comment on the positions SUHAKAM presents at various UN forums or at the annual meeting of APF. There is a growing trend for progressive governments and national human rights institutions to consult NGOs prior to their appearance at important human rights forums. However, this is not the case with SUHAKAM.

For a start, SUHAKAM could include human rights NGO representatives in its working groups and subcommittees. SUHAKAM should also organise regular consultations with NGOs before stating its positions at important international forums. SUHAKAM could also conduct regular consultations with the Malaysian Government and assert its position before going on official missions abroad. It should also keep the people informed through the media.

Second, human rights are the concern of the larger humanity, which goes beyond state sovereignty and citizenship. Just as Malaysia is an active member of the United Nations, its responsibility is not merely to its citizens but also to humanity as a whole. Thus, SUHAKAM's mandate can be interpreted in a broader sense to include making recommendations, advising and assisting the Government on human rights issues at regional and international levels. At the institutional level, SUHAKAM could push for regular dialogues with the Government on its human rights policy as well as on its position at regional and international forums.

Undoubtedly, human rights are best implemented by national mechanisms, but these mechanisms must first be strengthened. SUHAKAM and Malaysian NGOs will have to ponder this question: By developing an effective strategy to hold the Malaysian Government accountable at regional and international levels, will there not be a spillover impact at the national level?

Third, SUHAKAM needs to rethink its philosophy and strategy of constructive engagement" with the Government. The Commission should become vocal and critical of human rights violations, and at the same time engage constructively with the Government. Drawing from the brief history of SUHAKAM's role at the UN Commission on Human Rights, we can see that when SUHAKAM failed to contribute any substantive input or "bite" at the international level, the Malaysian Government immediately ignored it. Similar things could have happened at the national level. Thus, SUHAKAM needs to rethink two fundamental issues:

i) The need to maintain a balanced and effective working relationship with its constituencies, including the Government and the NGOs; and

ii) The necessity to negotiate with strength and to assert pressure at the right time, rather than provide recommendations through its reports.

General Jurisdiction and Functions

1. Mandate to promote and protect human rights

According to the Paris Principles, a NHRI ***"shall be given as broad a mandate as possible".*** However, Section 2 of the Human Rights Commission of Malaysia Act confines the definition of "human rights" to such fundamental liberties as enshrined in Part II of the Federal Constitution. This tremendously limits SUHAKAM's mandate.

Although Section 4(4) of the Act states that ***"regard shall be had to the Universal Declaration of Human Rights [UDHR] 1948 to the extent that it is not inconsistent***

with the Federal Constitution", there is no provision for incorporation of the rights embodied in international conventions, to which Malaysia is a party, into local laws. The definition should be in accordance with the UDHR and other international human rights laws.

It must be pointed out that Part II is not the only section of the Federal Constitution that enshrines human rights. Many critical matters such as rights of citizenship, right to universal adult franchise, eligibility to contest a seat in the Lower House of the Parliament and protection for detainees under preventive detention laws are stated in other parts of the document. Yet, these have been deliberately excluded from the Act. Even the few fundamental liberties in Part II can be easily circumscribed as the Constitution subordinates individual rights to the need for social stability, security and public order. It permits the Executive and Legislature to impose many restrictions on fundamental liberties.

Further, the Act provides SUHAKAM powers similar to those of a court of law in the matter of discovery of documents and attendance of witnesses. However, Section 12(2) of the Act bars it from inquiring into any complaint relating to any allegation of infringement of human rights which

a) is the subject matter of any proceedings pending in any court, including any appeal; or
b) has been finally determined by any court.

This can be problematic as it may restrain the Commission from investigating cases involving other forms of violation, apart from matters in the courts. This could give the Commission justification to refuse to hear matters taken to court without considering if these involve other forms of violation. This means the Commission may have to refrain from inquiry when an alleged violator initiates legal action to frustrate any inquiry.[17] The recent decision of the Commission to call off its inquiry into the use of "live" bullets by police during the Sept 8, 2007 riot in Batu Buruk, Kuala Terengganu, is a clear indication of how narrowly the provision in Section 12(2) of the Act was used to prevent a victim of human rights violation from taking his complaint to court and at the same time asking SUHAKAM to conduct an

[17] Tikamdas & Rachagan provided a formulation in that an inquiry would be discontinued only if the complainant initiates an action in the courts, the subject matter of which is identical to the Commission's inquiry. See Tikamdas, R & Rachagan, SS 1999. Human Rights Commission of Malaysia Act: A critique. In Tikamdas, R & Rachagan, SS (eds.). *Human Rights and the National Commission*. Kuala Lumpur: HAKAM. (pp. 194-195).

inquiry. Such a position as taken as SUHAKAM in this case will only encourage more violations and a culture of impunity

Another restriction the Commission faces is with regard to visiting places of detention. While Section 4(2)(d) gives it the power, visits can only be done ***"in accordance with procedures as prescribed by the laws relating to the places of detention…"***. Therefore, in order to inspect conditions of prisons, SUHAKAM must first write to the Prisons Department for permission. It is pertinent to stress that such notification only gives the authorities time to clean up their act, thereby defeating the basic reason for checks on conditions at prisons and detention camps. SUHAKAM should be given the power to conduct spot checks in order to get a more realistic view of conditions and to ensure that the level of maintenance and treatment of detainees are on par with stipulated standards at all times.

2. The mandate in practice

a. Insufficient will to protect human rights

Although it is widely acknowledged that SUHAKAM's ineffectiveness is largely due to its restricted mandate, the Commission does not seem to have made much effort to circumvent the restrictions. It seems to lack the will to do so and conveniently uses the excuse of mandate to justify its lack of effectiveness in human rights protection.

One instance of its lack of will was seen in June 2006, when civil society groups called for a public inquiry into alleged police brutality in the "Bloody Sunday" incident. A complaint was lodged with the Commission on May 31, 2006 with photographs and video footage of police beating up demonstrators. The complainants were told that a decision as to whether or not to conduct a public inquiry would only be made at the Commission's monthly meeting on June 12, and would require the support of two-thirds of the commissioners present.

Upon learning that the Commission was reluctant to conduct the public inquiry, members of civil society organistions staged a sit-in protest at its office while the meeting was in progress. As anticipated, the Chairman announced that the Commission would need to hear the police version of the incident and to obtain

more evidence before making a decision. This prompted civil society representatives to stage a walkout protest after only five minutes into their meeting to press the Commission to hold the inquiry. The Commission's excuse that it needed more evidence was unjustifiable as the photographs and video footage submitted could already form the preliminary basis for inquiry.

At its next monthly meeting in July 2006, after civil society groups intensified pressure and Inspector-General of Police (IGP) Mohd Bakri Omar publicly defended the police action, SUHAKAM decided to hold a public inquiry. This was conducted in October and the report of the findings was released in March 2007. However, the inquiry could have had more impact if the Commission had subpoenaed the IGP, especially in light of his vehement defence of his personnel in saying they had applied "minimum force" and that they had a "right to defend themselves".[18] Power to subpoena is provided in Section 14(1)(c) of the Act, enabling SUHAKAM "to summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession". However, since this power was not used to full effect in the "Bloody Sunday" inquiry, SUHAKAM in this instance cannot cite its limited mandate as an excuse for its ineffectiveness.

Similarly, there has been no news of any inquiry initiated by SUHAKAM into allegations of police brutality against those gathered at the Batu Caves temple hours before the Hindu Rights Action Force (Hindraf) rally on Nov 25, 2007, despite being provided with video clippings and news reports that the police had discharged tear gas and water cannon at the crowd inside the temple grounds, causing injuries to some individuals. The commissioner who received the complaint said it would be brought up at the next Commission meeting and a public inquiry would be held if there were definite violations of human rights.

b. Slow response to human rights violations

SUHAKAM is clearly reactive, not proactive, when it comes to protecting human rights. Section 12(1) of the Act states that "the Commission may, on its own motion

[18] *Malaysiakini*. May 31, 2006. "Bloody Sunday: Police chief justifies action" http://www.malaysiakini.com/news/51840 last accessed July 29, 2007; *New Straits Times*m June 1, 2006. "Policemen have the right to defend themselves".

or on a complaint made to it …" inquire into allegations of human rights infringement. However, in practice, the Commission does not open an inquiry until a complaint is lodged.

When the Commission receives complaints of violations, it is often slow in responding or, in many cases, does not respond at all. A common excuse is that commissioners need time to discuss the matter and that their meetings are convened only once a month. Yet, they have not taken the initiative to address even this situation. The commissioners are not exclusively focused on human rights work, and most of the time, are not even in the office. As a result, little is done to follow-up on complaints. As at May 2007, only nine complaints lodged for the year had been resolved.[19] However, the Commission has periodically met with officials in the Government departments accused of violations, who only pay lip service to the need to improve the situation.

In 2006, only 417 of the 1,222 complaints SUHAKAM received were deemed to involve violation of human rights.[20] In 2007, up to the month of August, only 37 of the 761 complaints had been resolved. Another 219 were still pending investigation, while the rest were not pursued as they were "not related to human rights".[21]

Although SUHAKAM is frequently criticised by NGOs for its incompetence, it has – to its credit – come up with considerably good reports and recommendations. However, these initiatives to promote human rights are routinely ignored by the Government and its agencies.

For example, SUHAKAM has since its inception been consistent in its position on freedom of assembly. In several comprehensive reports, it has made recommendations supporting the right to peaceful assembly in line with international human rights standards. These include professional procedures in situations where crowd dispersal is justifiable; for instance, that an audible order to disperse is given three times at 10-minute intervals before the police move into action.

SUHAKAM's report on the "Bloody Sunday" inquiry reiterated its recommendations in protecting the right to peaceful assembly, but the authorities

[19] *Buletin SUHAKAM*. April 2007 – June 2007. (p. 11).

[20] SUHAKAM. 2007, *Annual Report 2006*, Kuala Lumpur: SUHAKAM (p. 76)

[21] *Buletin SUHAKAM*. July 2007 – September 2007, (p. 11).

have not implemented any of these. Although the police have, to a certain extent, subsequently refrained from using force, to the same extent the government has continuously disregarded and disrespected freedom of assembly. This was seen in several forced eviction operations and during protests against the increase in toll charges after the "Bloody Sunday" inquiry report was released. Similarly, the police also used excessive force to disperse the BERSIH and HINDRAF supporters during their peaceful demonstrations.

During the period under review, major recommendations were made with regard to preventing deaths in custody, following the suicide of S. Hendry. There is, as yet, no evidence of SUHAKAM's recommendations being adopted.

At another level, the ratification of international covenants and treaties is one of the benchmarks of human rights promotion and protection. Since 2000, SUHAKAM's recommendations to the Government to sign several key international documents have been ignored. Ratification of the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) remains as distant as ever.

c. Limited outcomes of intervention

SUHAKAM's ability to influence change is seldom visible. It is possible that the Government and its agencies have not revealed the changes implemented, for fear of adverse publicity or simply because of their historically poor track-record of official disclosure and accountability.

However, a positive outcome was seen in February 2006 when SUHAKAM announced its decision to hold a public inquiry into the death of A. Ravindran while in police custody in Penang. This possibility led to the police expediting an inquest into this long-overdue case. The district police submitted the case file to the Public Prosecutor's Office the same day SUHAKAM issued subpoenas to witnesses, including police officers connected with the case. This resulted in SUHAKAM calling off its intended action.

A positive result was also recorded in the area of trafficking in persons. SUHAKAM's work on this since 2003, in consultation with stakeholders, contributed to the Anti-

Trafficking in Persons Bill being passed in May 2007. However, the Act provides little protection for victims – instead, they can be forced into a shelter by a magistrate and will be punished if they choose to leave the shelter.

d. Functions regarding national legislation

As mentioned earlier, SUHAKAM has not been able to play a meaningful role in formulating legislation and policies to safeguard human rights and civil liberties at the national level. This is largely due to the lack of political will on the part of the Government in wanting the Commission to play an active role. If this situation continues, then SUHAKAM is in danger of being labelled only as a warehouse for storing reports and memoranda.

e. Encouraging ratification and implementation of international standards

One of SUHAKAM's four mandates is to recommend to the Government the subscription or accession of treaties and other international human rights instruments. Since its establishment on April 24, 2000, SUHAKAM has not succeeded in bringing substantive improvements to Malaysia's commitment to international human rights instruments and mechanisms. Therefore, ratification has no meaning if it is not translated into or harmonised with national laws and policies affecting the everyday life of the ordinary citizens. Another mandate of SUHAKAM can be broadly interpreted as to advise the Government in formulating legislation compatible with international obligations and standards. In this regard, SUHAKAM was visionary in its decision in 2003 to restructure its institutional set-up to enable it to engage the Government in a more effective manner. This was done by merging the Law Reform Working Group with the Treaties and International Instruments Working Group to form the Law Reform and International Treaties Working Group (LRITWG).

Malaysia's position remains the same six years after SUHAKAM was established. Out of the seven core human rights instruments[22], the Government has signed

[22] International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

only two. They are CEDAW and CRC, ratified in 1995 when Tan Sri Musa Hitam was the chairman of the 52nd session of the UN Commission on Human Rights (CHR) in Geneva. Malaysia has yet to ratify the other instruments, including five relevant provisions of the human rights treaties or optional protocols[23], which will allow Malaysian citizens to file individual complaints on human rights abuses should local remedies be exhausted, as well as three other specific optional protocols. The specific optional protocols are for abolition of death penalty, sale of children, child prostitution and child pornography and involvement of children in armed conflicts. Malaysia has also yet to ratify the 1951 Convention on the Status of Refugees and its 1967 Protocol, as well as the two ILO Conventions on migrant workers (Conventions 97 and 143).

SUHAKAM has been adopting a more focused approach (instead of going for universal ratification) in its lobbying with the Government. SUHAKAM has been reiterating its recommendations that ICCPR, ICESCR, CAT and the two Optional Protocols to the CRC be ratified by the Government without further delay. The NGOs, however, request that this list be expanded to include ICERD, which is considered very crucial for a multiethnic country like Malaysia.

The NGOs that participated in the 2002 National Consultation on SUHAKAM declared 2003 as the year of ratification and expressed their hopes that the Commission would spearhead the process. Unfortunately, there was not much headway in this campaign in 2003, which came 10 years after the World Conference on Human Rights and the follow-up to the Vienna Declaration and Programme of Action (1993).

At the 2003 National Consultation on SUHAKAM, then Commission vice-chairman Tan Sri Harun Hashim informed participants that the Foreign Ministry had given an assurance that the Government was in the final stage of preparing a paper for consideration of the Cabinet on Malaysia's accession to the ICPR and ICESCR. However, there was no mention of this in the subsequent annual reports of SUHAKAM in 2004 and 2005.

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[23] First Optional Protocol to the ICCPR (individual communication); Declaration under Article 14 of ICERD (individual communication); Optional Protocol to CEDAW (individual communication); Declaration under Article 22 of CAT (individual communication); Article 77 of the Migrant Workers Convention (individual communication).

SUHAKAM had a meeting with the Foreign Ministry in 2004. According to SUHAKAM Annual Report 2005, the Foreign Ministry had indicated that the study for possible ratification of the Optional Protocol to the CRC on the involvement of children in armed conflicts was in its final stages; while the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography was in its early stages.

Malaysia has entered one of the highest numbers of reservations on international conventions it has acceded to when compared with other countries in Asia. Malaysia ratified CEDAW and CRC in 1995 with 24 reservations. In 1998, it removed six reservations from CEDAW but eight still remain. Malaysia still retains 10 reservations to CRC and ironically, they are the less controversial ones. A total of 18 reservations are still there on the two conventions. The large numbers of reservations on the two treaties almost render the ratification meaningless as these articles incorporate the core values of the instruments. This is one of the reasons why the United Nations has called for the reform of the UN treaties body system.

SUHAKAM organised a forum on Malaysia's reservations on the CRC in September 2004. The participants felt that CRC reservations would reinforce rather than resolve problems. Thus, they recommended that most of the reservations should be withdrawn. Nevertheless, SUHAKAM has yet to adopt this as its official stand.

With regards to Malaysia's reservations to CEDAW, SUHAKAM recommended the withdrawal of the reservation to Articles 5(a), 7(b) and 9(2). The proposal was submitted to the Women, Family and Community Development Ministry in July 2004. SUHAKAM has adopted a careful stand on the remaining reservations on CEDAW articles, which were said to be linked to Islamic laws and practices. It is currently conducting further research into these areas.

Programmes for teaching and research[24]

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

[24] K.Arumugam, 2007. SUHAKAM After 6 Years: Are We, Honestly, Making Any Headway? Petaling Jaya: ERA Consumer (p.4-10)

> *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;*

However, the effectiveness of SUHAKAM in discharging this important function of education in and the promotion of human rights are 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) on appointments also plays a major role in the willingness of the commissioners to pursue this matter further. 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)[25] of the Act that requires decisions

[25] Section 7(4) states; The members of the Commission shall use their best endeavour to arrive at all decision of the meeting by consensus, failing which the decision by the two-thirds majority of the members present shall be required.

by consensus, failing which by a two-thirds majority of the members present at a meeting.

Similarly, 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 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.

SUHAKAM 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.

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.

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 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[26] (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[27] 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.

As for minorities, SUHAKAM can and should give due attention to the human rights of some of the most vulnerable groups. Minority groups abound in Malaysia. EWG has ignored groups such as Indians, the Thai Muslims in the north, the Portuguese and Chetty communities of Malacca, the Orang Asli 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 refugee and migrant workers, whether documented or undocumented, share a similar fate.

These 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.

Similarly, 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 in 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 labouring under a very restricted meaning of human rights.

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 of 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.

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[26] Ninth Malaysia Plan, Table 11-8 on page 260

[27] Ninth Malaysia Plan, page 261

Conclusion

In conclusion, there has not been any significant improvement in the human rights situation in Malaysia since SUHAKAM was established. Though SUHAKAM has religiously submitted its annual reports, together with various other reports and recommendations to the Government, the major shortcoming is the Government's reluctance to debate or pursue further these reports or recommendations. However, the recommendations are certainly very impressive but without political will, it will be a mere public relations exercise, thus defeating the very purpose of having a human rights commission. As a result, SUHAKAM now finds itself in a quagmire because civil society groups regard it as ineffective, while the Government on the other hand regards SUHAKAM as an offshoot of the civil society.

Thus, it is time for SUHAKAM to look into reinventing itself in order to enable it to discharge its rightful roles more transparently and independently. It should find ways to empower itself from within the framework it exists in order to play a more meaningful role in formulating legislation and policies to safeguard human rights and civil liberties in Malaysia.

Freedom of Assembly

*By Amer Hamzah Arshad **

"When injustice becomes law, resistance becomes duty"
-Adam Kokesh-

Freedom of Assembly within the framework of the Federal Constitution

The right to freedom of assembly is undeniably one of the most basic and fundamental rights that must be given due recognition. At the international level, such a right has been entrenched in Article 20(1) of the Universal Declaration of Human Rights (UDHR) and Article 21 of the International Covenant on Civil and Political Rights (ICCPR). Closer to home, the right to freedom of assembly is guaranteed under Article 10(1)(b) of the Federal Constitution which provides that *"all citizens have the right to assemble peaceably and without arms"*. This freedom has its roots in the tradition of petitioning to the legitimate Government for redress within the democratic process.[28]

However, like any other right under Part II of the Federal Constitution, the right to freedom of assembly is not absolute. It is subject to certain restrictions and limitations as provided under Article 10(2)(b) of the Federal Constitution which states that *"Parliament may by law impose on the right conferred by paragraph (b) of Clause 1, such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order"*.

It is to be observed that the restrictions under Article 10(2)(b) use the phrase *"such restrictions as it deems necessary or expedient"*. This begs the question as to whether Parliament is free to impose any restriction on the right to freedom of assembly regardless of how unreasonable that restriction may be? The provisions in the Federal Constitution that confer rights to the citizens must be construed broadly and not in a pedantic way – it should be interpreted with less rigidity and

[28] Tan, Yeo & Lee's Constitutional Law in Singapore & Malaysia, pg 845

[29] See Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29; Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor [1992] 1 CLJ 72; and Dr Mohd Nasir Hashim v Menteri Dalam Negeri, Malaysia [2007] 1 CLJ 19.

more generosity than other Acts of Parliament.[29] Whereas, the provisos to the rights in the Federal Constitution, which tend to restrict the guaranteed rights, must be read restrictively and are to be given strict and narrow, rather than broad, interpretation.[30]

In the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor*[31], it was held that in testing the validity of any State action with regard to fundamental rights, the court must consider whether the action directly affects the fundamental rights or its inevitable effect or consequence of the fundamental rights is such that it makes their exercise ineffective or illusory.

In Malaysia, the main legislation with the effect of restricting or curtailing the right to peaceful assembly is the Police Act 1967 (PA 1967)[32] . Under this law, the powers of the police to regulate assemblies and meeting in public places can be found in Section 27. Section 27(2) of the PA 1967 states that persons intending to convene an assembly must apply for a licence, commonly referred to as a "police permit". It is only when the Officer-in-Charge of the Police District (in which the assembly is to be held) is satisfied that the assembly is not likely to be prejudicial to the interest of the security of Malaysia or to excite a disturbance of the peace, will a permit be issued.

The requirement for a permit, the imposition of unreasonable conditions as well as the arbitrary refusal of the permit under Section 27 of the PA 1967 have always been the subject of criticism among members of civil society as they have the effect of rendering the right to assembly unattainable. Hence, it is arguable that such restrictions under Section 27 of the PA 1967 are unconstitutional and therefore certain steps or measures must be taken in order to ensure that such a fundamental right will not be rendered ineffective or illusory.

SUHAKAM's position on freedom of assembly

Suhakam is a statutory organisation which was set up pursuant to the Human Rights Commission Act 1999 (the Act) and one of its primary functions is to advise

[30] See the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craighead in Prince Pinder v The Queen [2002] UKPC 46; and Dr Mohd Nasir Hashim v Menteri Dalam Negeri, Malaysia [2007] 1 CLJ 19.

[31] [1992] 1 CLJ 72.

[32] Other restrictions can be found under Section 5 of the Public Order (Preservation) Act 1958

and assist the Government in formulating legislation, administrative directives and procedures and recommend the necessary measures to be taken by the Government.[33]

Generally, on the right to freedom of assembly, SUHAKAM's position is commendable as it has been consistently advocating freedom of assembly. This is evident from SUHAKAM's reports[34] as well as its public inquiries[35] pertaining to the right to freedom of assembly.

In 2001, SUHAKAM submitted a special report on 'Freedom of Assembly' to Parliament (2001 Report) pursuant to Section 21(3) of the Act 1999. In the report, SUHAKAM proposed several noteworthy recommendations based on the findings and best practices in other countries and through discussions with the police and other interested parties.[36] Among others, the recommendations in the 2001 Report are:

i) The replacement of the requirement to apply for a permit (under Section 27 of the PA 1967) with a procedure which merely requires the convener of an assembly or procession to notify the police of any intended assembly;
ii) The need to review and revamp the existing methods of crowd dispersal by the police;
iii) The need to review the procedure for the maintenance of law and order at assemblies and processions;
iv) The need to give official recognition to SUHAKAM, Bar Council and recognised NGOs as observers at assemblies and processions; and
v) The need to review and amend certain provisions of Section 27 of the PA 1967.

SUHAKAM, in the conclusion to the 2001 Report, states that peaceful assemblies are a healthy way for members of civil society to express dissatisfaction over matters that affect their lives and is of the view that peaceful assemblies do not disrupt peace and stability of the nation. SUHAKAM further adds that "peaceful

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33 Section 4(1)(b) of the Act.

34 "Freedom of Assembly-A Report by SUHAKAM" and SUHAKAM Annual Reports.

35 Section 4(1)(d) of the Act states that SUHAKAM has the power to inquire into complaints regarding infringements of human rights referred to it. Over the years, SUHAKAM has held several public inquiries in relation to freedom of assembly, namely, the Public Inquiry into the Nov 5 Incident at the Kesas Highway and the Public Inquiry into the Incident at KLCC on May 28, 2006 a.k.a 'Bloody Sunday' Inquiry.

36 See SUHAKAM's Annual Reports and Special Report to Parliament, "Freedom of Assembly-A Report by SUHAKAM" 2001.

assemblies" do not necessarily mean "silent assemblies". It merely refers to the absence of violence and therefore speeches and cheering at public assemblies are permissible and do not render the assemblies "not peaceful".

SUHAKAM's Annual Report 2006

Pursuant to Section 21 of the Act, SUHAKAM is required to submit the annual report of its activities to Parliament not later than the first meeting of Parliament of the following year. As a statutory body, SUHAKAM's activities are subject to Section 4 of the Act, which empowers it to do all or any of the following:

i) To promote awareness of and provide education in relation to human rights;
ii) To advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;
iii) 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
iv) To inquire into complaints regarding infringements of human rights referred to it.

In relation to the right to freedom of assembly, the SUHAKAM Annual Report 2006 (2006 Report) states that the Commission had received several complaints affecting the right to assembly. They include:

i) The public protest over the increase in petrol price in front of KLCC building on March 3, 2006;
ii) The public protest over the increase in petrol price in front of KLCC building on March 10, 2006;
iii) The public protest over the increase in petrol price in front of KLCC building on March 26, 2006;
iv) The disruption of Article 11's forum in Penang on May 14, 2006; and
v) The public protest over the increase in petrol price in front of KLCC building on May 28, 2006;

SUHAKAM conducted a public inquiry into one of the protests, the incident that took place on May 28, 2006 (which is commonly known as the "Bloody Sunday" incident). SUHAKAM's public inquiry into the "Bloody Sunday" incident

commenced on Oct 5, 2006 and a report of the said inquiry has been published ("Bloody Sunday" Report).[37]

It must also be noted that in the 2006 Report, apart from setting out brief descriptions of the complaints and making a general recommendations on the issue, there is no analytical discussion whatsoever over the aforementioned incidents.

The discussion on the right to freedom of assembly in the 2006 Report is lacking in many aspects. For instance, there is no mention of SUHAKAM's activities vis-à-vis its role or activities (if any) in promoting awareness and providing education to the public on the right to freedom of assembly. There is also no mention about the measures that SUHAKAM has undertaken (if any) as part of its advocacy in order to ensure the implementation of its recommendations under the 2001 Report.

It is also unclear from the 2006 Report whether SUHAKAM had any discussions or meetings with the Government and/or other relevant authorities as part of its advocacy activities for the promotion of freedom of assembly throughout 2006 and the accession and ratification of any international instrument, such as the ICCPR.

As the national human rights organisation, SUHAKAM ought to follow up with and lobby the Government and/or other relevant authorities for the implementation of its recommendations in its Annual Reports and most recently, its recommendations in its 'Bloody Sunday' Report.[38]

It must be emphasised here that the powers and functions of SUHAKAM under Section 4(1)(b) of the Act should also be interpreted generously since it is intertwined with the fundamental liberties in Part II of the Federal Constitution. Section 4 of the Act clearly permits SUHAKAM to take a more than passive role in its quest to uphold human rights in Malaysia, in particular the right to freedom of assembly.

Based on the 2006 Report, it appears that SUHAKAM had acted nothing more than as a complaints bureau and a human rights report-publishing organisation. Its reactionary approach to the issue of freedom of assembly leaves much to be desired and is highly regrettable. SUHAKAM, with its prominent commissioners, influence

[37] Report of SUHAKAM's Public Inquiry Into the Incident at KLCC on 28 May 2006. The Inquiry Panel recommended the repeal of sub-sections (2), (2A) to (2D), (4), (4A),(5), (5A) to (5C), (7) and (8) of Section 27 and Section 27A of the PA 1967.

[38] Supra note 9.

and resources, has the means of convincing the Government to give wider latitude for the public to exercise their right to freedom of assembly. Unfortunately, this was not done.

Recommendations

As a suggestion and a step towards becoming progressive, SUHAKAM should set up a permanent sub-committee entrusted to look specifically into the issues affecting the right to freedom of assembly.

This sub-committee should be given the responsibility to follow-up with the Government and/or other relevant authorities in order to ensure that SUHAKAM's recommendations in the 2006 Report and the "Bloody Sunday" Report, especially on the recommendation for the decriminalisation of peaceful assembly without a permit under Section 27 of the PA 1967, are duly considered and eventually implemented.

The sub-committee should also act as SUHAKAM's monitoring team, have the function of observing any public assembly and, if need be, intervene, if there is any unnecessary incident during a public assembly. Additionally, the proposed sub-committee could also play the role of mediator between the public and the authorities during the process of organising public assemblies.

Conclusion

SUHAKAM has been consistently advocating freedom of assembly and, as seen in its reports, made good recommendations that are in accordance with international human rights norms. In fact, the calling for the decriminalisation of peaceful assembly without a permit under Section 27 of the PA 1967 is laudable and timely.

However, in order for SUHAKAM to effectively protect human rights in Malaysia, it has to be bold in flexing its muscles and insisting the Government implements its recommendations. Lest we forget, reports and recommendations, without any proactive steps taken for their implementation, will not afford any form of protection to the public.

It is hoped that in the future, SUHAKAM will play a more progressive and vital role in ensuring and protecting the right to freedom of assembly in Malaysia. SUHAKAM has to adapt to the needs and calls of the public if it wishes to remain relevant. In order to protect the public's right to freedom of assembly, SUHAKAM must operate beyond its existing operational framework. It has to take the lead in the promotion and preservation of human rights in Malaysia.

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Freedom of Religion

By Dr Azmi Sharom*

Religious freedom in Malaysia became an important issue in 2006. High profile cases such Ayah Pin, Lina Joy and Shamala Sathiaseelan[39] pushed it to the forefront of public attention. Taken at face value, religious freedom is about the freedom of conscience; to choose whatever religion that one wishes to follow, or even to choose not to have a religion. From a broader perspective, it is about being secure in the practice of one's faith. However, religion may have even broader political and human rights connotations.

The 2006 Annual Report of the Human Rights Commission of Malaysia is assessed here in the context of three aspects of freedom of religion:

- The freedom to choose one's religion;
- The freedom to practise one's religion; and
- The democratic and human rights implications associated with freedom of religion.

However, it is first important to ascertain the role of SUHAKAM. The functions of SUHAKAM as per Section 4 (1) of the Human Rights Commission of Malaysia Act 1999 are to:

(a) Promote awareness of and provide education in relation to human rights;
(b) Advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;
(c) 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) Inquire into complaints regarding infringements of human rights referred to in section 12.

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39 Ayah Pin was a leader of a religious group deemed deviant by religious authorities. Lina Joy was a Muslim woman who encountered difficulties in removing the word Islam from her identity card upon her conversion to Christianity. Shamala was a woman whose husband had converted to Islam, who claimed custody of their children in the Syariah court after having converted one of their young children to Islam without her consent.

In order to carry out these functions, SUHAKAM is empowered, according to section 4(2), to:

(a) 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) 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) Study and verify any infringement of human rights in accordance with the provisions of this Act;
(d) 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) Issue public statements on human rights as and when necessary; and
(f) Undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.

Furthermore, according to section 12 (1):

> *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.*

It can be seen that SUHAKAM's role is primarily as an advisory investigative body. It is also charged with the role of educator. It is not in any way authorised to make changes in the law or to be an arbitrating body in any sense of the word. An examination of the 2006 Annual Report has to be done with this in mind in fairness to the body.

The freedom to choose one's religion

SUHAKAM uses as its point of reference the United Nations Declaration of Human Rights 1948, in so far as it is not inconsistent with the Federal Constitution. This is

not a particularly satisfactory state of affairs as it means the universality of the UNDHR is compromised, and therefore the protection the document aims to provide for all people.

Be that as it may, Article 18 of the UNHDR states:

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

Article 11 of the Federal Constitution states:

> *Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it*

This is subject to such practice not being "contrary to any general law relating to public order, public health or morality". Clause 4 gives the option for the State Legislature (and the Federal Legislature for the federal territories) to make laws restricting the propagation of religion to Muslims.

It would appear therefore that, on the face of it, Article 11 conforms largely with Article 18, apart from the limitations on the propagation of religion to Muslims. However, there are laws in place that make it an offence for a Muslim to leave the religion of Islam.

This apparent contradiction with Article 11 occurs due to the power supposedly given to State legislatures to make laws which go against the "precepts of Islam". This power is provided for in Schedule 9 of the Federal Constitution. Some State legislatures have deemed converting out of Islam, or apostasy, as going against the "precepts of Islam".[40] Thus they have the authority to make laws punishing it through their Syariah legislation.

[40] It should be noted here that there is no Quranic verse that prescribes any earthly punishment for converting out of Islam. The only authority is a Hadith (saying of the Prophet Muhammad) that prescribes execution for apostates. However this Hadith is not a strong one according to Islamic jurisprudential methods of grading the authenticity of the Hadith. Furthermore, there is no evidence that the Prophet actually executed anyone for apostasy. Although orthodox thinking considers apostasy a crime, there are Islamic scholars who believe it is a sin punishable only in the after life, unless the apostasy is coupled with some act of violence against the Muslim community or *ummah*. Therefore, to say that apostasy is against the precepts of Islam and deserves worldly punishment is not totally accurate and most definitely open to debate.

Looking at Article 11, it is quite clear that all persons in the country have the right to choose their religion. The limitations placed on the freedom of religion, i.e. the freedom to propagate and the commonsensical limits on the practice of religion, on the face of it, does not in any way take away one's ultimate right to choose one's religion. Unlike, for example, Article 10, which deals with the freedom of expression and plainly states that such freedom can be limited by properly made law.

Therefore making it an offence to leave Islam is clearly against the UNDHR and very arguably against the Malaysian Constitution. This issue has been side-stepped by the Judiciary, which has effectively washed its hands off the matter by stating that such questions have to be left to the Syariah Court.

Even though the offence of leaving Islam is a Syariah law, this does not detract from the fact that this is a constitutional question of one's freedom to choose one's religion under Article 11. It is true that there is a clear constitutional distinction between the jurisdiction of the Civil Court and the Syariah Court, but it has to be remembered that constitutional matters are undoubtedly in the jurisdiction of the Civil Court. All laws, including Syariah law, are bound by the limits put in place by the Federal Constitution which is, according to Article 4, the supreme law of the land.

These matters were raised by Datuk Zaid Ibrahim (now de facto Law Minister) at a conference during Malaysia's Human Rights Day 2006. SUHAKAM made two recommendations on religious freedom at the end of the conference. The first was to propose the establishment of a Ministry of Religious Affairs, which will "look into matters pertinent to religion and related matters that the people of various beliefs cannot by themselves resolve, or problems which cannot be managed within their own religious circles". The second was that religion should be a matter of an individual's belief and right and not a legal one. This second recommendation was based on the welcoming remarks of the SUHAKAM Chairman.

I believe SUHAKAM did not take the opportunity to state clearly, and forcefully, that religious freedom is a fundamental right that should be respected. It is enshrined not only in the UNDHR but also in our Constitution. In the context of how religious freedom is being threatened in Malaysia, the one-sentence recommendation made in the opening remarks of the Chairman was very weak.

Instead a thorough examination and elucidation of the concept of the freedom of religion should have been made, along with guidelines on how this concept ought to be reflected in the laws of the country and how it should be practised by Government agencies that enforce such laws.

The suggestion for a Ministry of Religious Affairs is also ill advised. Considering that many of the problems related to religious freedom in Malaysia come from governmental agencies that have disregarded the Constitution, it would be far better to pursue the establishment of an independent statutory body, such as the proposed Interfaith Commission that the Government has chosen to disregard.

The freedom to practice one's religion

Between 2003 and 2006 SUHAKAM received 11 memoranda and complaints about the demolition of places of worship. In June 2006, SUHAKAM held a meeting with several religious organisations to listen to their views. The groups expressed their concerns that the sanctity of places of worship was not respected; the fact that the historical factors of these places were not taken into consideration when decisions to demolish them were made; and that the appearance of selective demolition (i.e. places of worship of different faiths are treated differently) would give rise to feelings of enmity.

SUHAKAM acknowledged that many of the problems could be traced to legal issues related to land use. However in the light of the importance of such places of worship, it recommended consultation; sensitivity in the dealing with such demolitions (particularly in the handling of sacred objects and the timing of such demolition work); the preservation of places of worship with historical significance; amnesty for places of worship in operation before the National Land Code took effect; and the provision of alternative sites to build a new place of worship in the event an older one is to be destroyed.

Where religious freedom is concerned, these were the most concrete recommendations made in the 2006 Annual Report.

The democratic and human rights implications associated with freedom of religion

The freedom of religion has many connotations for human rights in general. For example, when one is not allowed to discuss a religion based on the prejudices of some of the followers of that religion. SUHAKAM recognised this issue by acknowledging the impropriety of the shutting down of public forums organised by a coalition of NGOs called Article 11.

Article 11 organised a series of forums to discuss the constitutional protections supposedly available to all Malaysian citizens. A forum in Penang in May 2006 was foced to stop by police, despite it being legally carried out, because of "vociferous protests" of some 500 people gathered outside.

SUHAKAM's response has been the reiteration of Article 10 of the Constitution and a request for the Government to review matters of peaceful assembly in a transparent manner. It is a generic response to all the issues in 2006 on peaceful assembly and the right of expression.

In fairness, this part of the 2006 Annual Report, entitled Key Issues, did not deal with religious freedom specifically, which explains the generality of the recommendations. However it is another opportunity wasted to make a stand on the balancing of competing rights and interests.

Both groups in the Article 11 case had the right to put their views forward. However neither has the right to stop the other from expressing its views. It should be noted that in Penang, the legally assembled Article 11 forum was forced to stop. One group's right to assemble must not be hindered by any other, particularly when it was clearly peaceful. It would appear that in matters relating to Islam, peaceful assembly can be stopped not only by the authorities but by any mob. Following this incident, the Government banned all public forums such as those organised by Article 11.

This leads to a matter not dealt with at all by the SUHAKAM report and that is the issue of Islamisation in Malaysia and its implications on democracy and human rights. If dealt with frankly, one sees that the issue of the freedom of religion is

essentially one that concerns Islam. There is no problem at all with regard to a non-Muslim converting to any religion other than Islam.

This Islam-centric nature of the problem is largely due to the contention that Malaysia is an Islamic State. This is a misconception and a fallacy. The Constitution does not state that the country is a theocracy. The fact that Article 3 states Islam is the religion of the Federation has been emphatically stated by the Reid Commission, which drafted the Constitution of Malaysia, as not meaning in any way that the Constitution is anything other than a secular one. Added to this, the fact that the Constitution itself (not the Quaran and Hadith) is the supreme law of the land means that any interpretation that Malaysia is an Islamic State is a serious misconstruction.

SUHAKAM must deal with this issue, thorny as it may be, if it is to properly handle the matter of religious freedom. The signs are already there that the Islamisation of Malaysia has led to a movement even further away from the ideals of democracy, for example the issue of free speech. Even though Islam affects the lives of all citizens, regardless of creed, there is a continuous cry that matters regarding Islam can not be spoken about. The Government reacted this way when faced with the Article 11 Penang debacle.

There is also a consistent cry that Islam can only be spoken about by those "qualified" to do so. One of the speakers at the Malaysian Human Rights Day 2006 said a non-Muslim can only speak about matters of Islam if he has "good intentions" – but unfortunately, SUHAKAM does not define "good intentions" in its 2006 Report.

It is obvious that in a democracy, the citizens have the right to discuss matters that affect their lives. And if a matter is a religious one, it should not have any bearing on one's human right to express oneself and one's democratic right to determine how one is to be governed.

The implications of blocking free expression in matters regarding Islam, when it is becoming so much a part of public life, is inherently undemocratic and an affront to human rights. SUHAKAM needs to deal with this matter, head on, or risk losing its relevance, not only in the issue of religious freedom but in human rights in general.

Conclusion

Section 12 of the Human Rights Commission of Malaysia Act 1999 gives SUHAKAM the power to make its own inquires into human rights violations. This it should do in the matter of religious freedom. It should be proactive and thorough in its investigations, studying not only the concept of religious freedom *per se* but also the implications of Islamisation on the overall human rights of Malaysians. In such study, SUHAKAM has to be absolutely unambiguous in laying down its stand. It will also have to make concrete proposals to the government as to what must be done to ensure that religious freedom and respect for human rights is maintained in Malaysia. The current methodology of dealing with complaints piecemeal and organising talks is far too feeble to deal with the erosion of fundamental human rights and disregard for constitutional protection in Malaysia.

Re-thinking Human Rights and the Millennium Development Goals (MDGs)

By Maria Chin Abdullah

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CPC	Criminal Procedure Code
JAG	Joint Action Group for Gender Equality
MMR	Maternal Mortality Rate
MDGs	Millennium Development Goals
MWFCD	Ministry of Women, Family and Community Development
OSHA	Occupational Safety and Health Act
PPP	Poverty as Proportion of Population
PLI	Poverty Line Index
SUHAKAM	Suruhanjaya Hak Asasi Manusia - Human Rights Commission of Malaysia
TBAs	Traditional Birth Attendants
UN ICPD	United Nations International Conference on Population and Development
WSSD	World Summit for Social Development

Rethinking Human Rights and the Millennium Development Goals (MDGs)

The 2006 Annual Report of SUHAKAM continues its efforts to monitor the implementation of the United Nations Millennium Development Goals (MDGs) in Malaysia. The MDGs pledge to fight extreme poverty and hunger, illiteracy, gender inequality, infant and maternal mortality and environmental degradation.

The SUHAKAM 2006 report recognises that there are more challenges than those posed in the MDGs. It highlights that "despite major progress towards achieving the UN MDGs, Malaysia faces a number of development challenges. These include the existence of pockets of rural poverty, especially among indigenous communities, women's political empowerment and halting and reversing the spread of HIV/AIDs". The report has taken up some of the critical comments recommended in ERA Consumer's 2005 Report on "SUHAKAM After 6 years: Are We Honestly Making Any Headway?"

Nonetheless, SUHAKAM's monitoring of the new challenges of the MDGs remains limited. In this paper, I will highlight some of the gaps in SUHAKAM's monitoring of the MDGs and suggest some indicators for consideration, if progress is to be made by SUHAKAM to ensure that the MDGs can better reflect the socio-economic realities in Malaysia.

MDG 1: Eradicate Extreme Poverty and Hunger

The Government of Malaysia claims success in its achievement of the MDGs in terms of its strategic poverty-reducing intervention. The MDGs set poverty as the proportion of population earning below US$1 **(PPP)** per day, and this is heavily criticised as being a very low and modest standard. Malaysia easily surpasses this low denomination – registering **PLI** at RM691 per month for 2004 (or RM23/US$6.86 per day) for a household size of 4.6. Poverty, therefore, cannot only be defined by income or money. UNDP defines poverty as *"multidimensional, involving not only a lack of income, but also ill-health, illiteracy, lack of access to basic social services, and little opportunity to participate in the processes that influence people's lives"*.[41]

[41] United Nations Development Programme (UNDP), 2007. Website: http://www.undp.org/poverty/propoor.htm

However, the neo-liberal policy taken by the Government of Malaysia does not adequately address these issues. It assumes that economic growth will generate a trickling down effect that will moderate the maldistribution of income. The growth benefits the "non-poor", as well as the wealthy, and hence improves the overall economic progress but it creates cracks, resulting in pockets of poverty, both geographically and specifically to communities, such as the Orang Asli and Orang Asal in Peninsular Malaysia and East Malaysia, respectively. In monitoring MDGs, SUHAKAM, though mentioning some of these issues in its Report, has not linked the needs of vulnerable groups to the broader definition of poverty. Hence, its strategies seem directed to "assisting" these vulnerable groups to have access to services, instead of longer term goals to reclaim and secure their rights so as to end discrimination and inequalities caused by poverty. The following are some issues which were not discussed in the SUHAKAM Report:

Regional disparities - Urban-rural differentials

The MGD Report noted that while the urban poverty was very low, the rapid urbanisation that has occurred over the decades means that the number of the urban poor is now considered significant.[42] The 2004 national statistics indicate that overall the poor are concentrated in Kelantan, Terengganu, Kedah, Perlis, Sarawak and Sabah, in particular the rural areas of these states. In 2005, the poverty rates for the poorest states were: Sabah, 23 per cent, Trengganu 15.4 per cent, and Sarawak 7.5 per cent.[43]

Ethnic disparities

In the 1970s, two-thirds of the Bumiputera households were living below the poverty line, while the poverty rate for the Chinese and Indian households were 26 per cent and 30.2 per cent respectively. By 2004, the poverty rates were 8.3 per cent, 0.6 per cent and 2.9 per cent for the Bumiputera, Chinese and Indians respectively. While overall incidence of poverty had decreased, it is still relatively high among the

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42 Ibid. The MDG Report. P. 37.

43 Ibid. Ragayah Haji Mat Zin, p. 4.

44 *Orang asli* refers to the indigenous people in both Peninsular Malaysia and *Orang Asal* refers to those in Sabah and Sarawak. Together with the Malays, they are classified as *bumiputera (sons of the soil).*

Malays and other Bumiputera (e.g. orang asli[44]) who also accounted for the high rural poverty since most of them are located in rural areas.[45] On the other hand, data for the poor Indians remained unchanged for the past five years, implying little improvement.

The well being of the orang asli has fallen into the cracks, as rightly indicated in the ERA Consumer's Report (2006). The poverty line for Peninsular Malaysia is RM590 a month and hardcore poor refers to those receiving monthly earnings not exceeding RM264.50. The poor orang asli households make up 76 per cent and a total of 22,967 families live below the poverty line.[46]

"Selective Information" on Poor Women

While there has been improvement in the collection and dissemination of sex-disaggregated data on women, there are still gaps in the presentation of statistics on women and poverty, including poor indigenous women and disabled women. Gender indicators provided by the Ministry of Women, Family and Community Development (MWFCD) has honed in on single female headed households, and makes the assumption that poor women are only confined to female-headed households, missing out other poor women from various socio-economic backgrounds, such as:

- Small but vulnerable "indigenous" communities, e.g. the Penan who make up less than one per cent of population;
- Poor women affected by age, ethnic background and geographical locations; and
- Elderly-headed households that have a higher poverty rate, e.g., 23 per cent in Sarawak, and are complicated by a pattern of aging populations.

[45] Ibid. Ragayah Haji Mat Zin, p. 6.

[46] Ibid. Ministry of Rural and Regional Development, Malaysia.

MDG 3: Promote Gender Equality and Empower Women

Low Percentage of Women in the Workforce

The percentage of women in the Malaysian labour force remains stagnant, registering an average of 46.8 per cent from 1975 until 2004. In comparison, male participation is a higher average, at 83.5 per cent (Table 1). Men dominate areas such as construction, agriculture, forestry, fishing and livestock and transport, storage and communications.[47]

Gender	1990	2000	2002	2003	2004
Male	85.3	83.1	81.5	82.1	80.9
Female	47.8	47.2	46.7	47.7	47.3
Malaysia	66.5	65.4	64.4	65.2	64.4

Women from the lower rung of the occupational hierarchy showed a decrease, from 73.9 per cent in 2000 to 73.1 per cent in 2005. This cannot conclusively mean that more women are moving up the social ladder. The presentation of the statistics is problematic as it prevents a comparison in the professional occupations over a time period, since classifications change annually.

Female unemployment rate showed a higher increase, from 2.8 per cent in 1995 to 3.8 per cent in 2004, as compared with the male unemployment rate, which increased from 2.8 per cent in 1995 to 3.4 per cent in 2004. It is not possible to establish if the unemployment rate is due to factors such as family obligations, non-family related, or marital pressure.

Gender Wage Gap

Dated statistics show that in the electronics sub-sector, female production operators have increased from 82.7 per cent in 1990 to 92.5 per cent in 1993.[48] Average monthly earnings of female thread and yarn spinners as a percentage of their male counterparts increased from 93.8 per cent in 1990 to 97.9 per cent in 1993. To date there is still no data to allow analysis on wage differentials between females and males.

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47 Ninth Malaysia Plan (2006-2010), pg. 283.

48 Ibid. Malaysian NGO CEDAW Report, p. 66.

Inadequate Access to Training Opportunities

Various training programmes are offered in Malaysia to upgrade the skills of women so as to improve their employment opportunities. The participation of rural women in these training programmes is small – 12 per cent of the target families (or about five per cent of the total four million rural women).[49] The outreach only benefits a small group of women and there is also the possibility of duplication of target families. Rural women who are not members of women's groups set up by the Government, or not members of political parties in Government, do not have access to such training.

Neglected Health and Safety Issues

Women are recruited as sprayers of pesticides and fertilisers and about 30,000 women are estimated to be working in the plantation sector, most of them Indians.[50] A 2003 study by Tenaganita revealed that "there was poor maintenance and leaks in the sprays, poor medical care and first aid facilities in the estate, and in some cases lack of protective equipment. Especially for women, the absence of medical monitoring and a total lack of understanding of how they are affected by these chemicals make it difficult to assess the extent of the impact of pesticides and chemicals on them, on their reproductive health and on their unborn children".[51] Under the Occupational and Safety and Health (OSHA) Act, it is required that a safety and health committee be formed if there are more than 40 sprayers in a plantation. Overall, there is lack of implementation of this law or its monitoring, and the health of women plantation workers is ignored.

Even though there is a Code of Practice on Sexual Harassment, the Code is not enforceable. Reporting of sexual harassment is low – 119 cases in 2004 as compared with 112 cases in 2000. Disappointingly, the Sexual Harassment Bill, advocated by the Joint Action Group for Gender Equality (JAG), did not gain support from the Ministry of Human Resources and the Ministry of Women, Family and Community Development (MWFCD). The former MWFCD minister Datuk Seri Sharizat Abdul Jalil said she does not want a Sexual Harassment Act. Instead, the Employment Act, Industrial Relations Act and Occupational Safety and Health Act 1984 should

[49] Ibid. Malaysian NGO CEDAW Report, p. 94

[50] World Rainforest Movement (2003), Malaysia: The plight of women workers in oil palm plantations, Website: wrm@wrm.org.uy.

[51] Ibid. World Rainforest Movement.

be amended.[52] That statement was made in March 2005 and until now, no there has been no such amendment made. This problem, seemingly. has been swept under the carpet.

Unprotected Women Workers and Discriminatory Practices

Women workers are also engaged in informal domestic work, and also as migrant workers. The Employment Act 1955 does not provide protection for these workers, leaving their fate to the mercy of their employers. MWFCD has raised the introduction of flexible working hours for women so that they can work from home, but there is nothing raised about employment benefits and protection for women who choose to work from home. This is a cause for concern as more companies are moving into contract labour. There are no statistics to impact flexible working hours for contract women workers, or to compare their situation with full-time women workers.

The migrant domestic workers are a permanent image in the Malaysian labour market but they are not covered by the Employees Provident Fund (EPF), do not have insurance and are subjected to physical and mental abuse. The abuse case of Indonesian domestic worker, Nimala Bonat (2005), captured international attention but until now, there has been no legislative reform to provide better protection for women workers.

Women's Inheritance and Property Rights

It is not possible to establish the breakdown of land ownership between men and women. The national statistics and the 2000 Population and Housing Census of Malaysia do not provide sex disaggregated data on women and land ownership. There is also no sex disaggregated data on housing titles. The breakdown of ownership is only limited to geographical location (rural and urban), ethnicity, type of housing, distribution according to individuals and government and private sectors.

Laws enacted to protect property are generally gender neutral and sometimes lead to unintended discrimination. For example, indigenous peoples in East Malaysia

[52] Malaysiakini, Shahrizat: No need for sexual harassment bill now Nurul Nazirin, 21 March 2005.

are required to apply for land ownership for native customary land, under the Sabah Land Ordinance or Sarawak Land Code. In practice, the law does not consider the fact women have difficulties going to land offices to register their land due to various reasons, including their inability to read and write and not having access to public transport. Eventually, women lose their land titles because the registration is carried out by their sons or husbands, to whose names the land titles are awarded.

Gender Parity in Education

Girls do better than boys at all levels of the education. This has become a national concern as because fewer males get into matriculation and tertiary education. Female enrolment into public universities continues to increase significantly, from 61 per cent in 2000 to 63.4 per cent in 2005.[53]

According to a small study conducted in four northern schools in Peninsular Malaysia, Maria Chin Abdullah (2007) found that perhaps the socialisation process of how boys and girls have been brought up made the boys (in this study) to perceive and assume the role society has given to them as their right and privilege. However, they recognise the high academic achievement of the girls. Examples such as only boys can be appointed as head prefects and class monitors, expectations of young boys from lower income families to contribute economically and the liberal mobility and freedom to socialise/hangout with other boys, against girls having with responsibilities of household chores, have resulted in boys believing that even though they do not excel well in the academic field, society has confirmed that they are still head of households and "leaders".

Reproductive Health

Proportion of Contraceptive Demand

The Government's effort towards reproductive health has shifted from solely family planning activities to issues of current reproductive health. In 1995, the Women's Health Unit was formed to keep track of women's health issues, focusing on reproductive health.

[53] Ibid. Ninth Malaysia Plan, p. 284.

Table 2: Number of new family planning acceptors by type of methods, Malaysia, 2000-2004

Methods	2000	2001	2002	2003	2004
Pill	49,990	53,949	55,635	54,794	59,482
IUD	3,151	3,363	3,624	3,411	3,623
Condom	6,089	6,406	7,777	8,230	9,202
Injection	2,728	3,272	4,652	5,167	6,389
Sterilisation					
Tubaligation	4,231	3,679	3,457	2,666	3,162
Vasectomy	2	9	9	1	2
Others	1,235	1,056	979	1,203	1,104
Total	**67,426**	**71,734**	**76,133**	**75,472**	**82,964**

Source: National Population and Family Development Board (2005)

Table 2 shows the national data on contraceptives Malaysians use. The traditional contraceptive, the pill, appears to be more widely utilised, with women from Sabah and Sarawak making up a total of 27.7 per cent of its use in 2004. Condoms are more commonly used in Johor, Penang, Sarawak and Selangor. Contraceptive by injections are more commonly used in Kedah (13 per cent), Sabah (12.4 per cent) and Selangor (11.7 per cent) in 2004. In total, these contraceptive methods are only reflective of 82,964 users in Malaysia. It is difficult to gauge the sexual behaviour patterns of the males as such a breakdown is not available.

Lack of political will to implement sexuality programmes

Women's groups have long campaigned for the introduction of sexuality programmes into the school curriculum. "Currently there is no formal sex education in schools. The proposal of having sex education in schools has surfaced for public debate time and time again, especially when sexual crimes like incest, rape receive heightened media highlight."[54]

The Government claimed that it has prepared, in collaboration with the Ministry of Education, guidelines on sexual education to promote responsible and safe lifestyles

[54] Malaysian NGO CEDAW Shadow Report Group. 2005. "Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia: Reviewing Government Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)." Malaysian NGO CEDAW Shadow Report Group, Kuala Lumpur. p27.

and to encourage parents and teachers to participate. The guidelines touch on interpersonal skills, community, culture and health rather than just biological development. In addition, a guidebook called *Smart Start* had been produced for newlyweds and those intending to get married, to encourage the equitable sharing of tasks between husbands and wives. To date, the Malaysia is yet to honour its promise to implement sex education in schools.[55]

MDG 5: Improve Maternal Health

Maternal Mortality Rate

The Maternal Mortality Rate (MMR) in Malaysia tends to focus its attention on married women and their reproductive health and neglects women in other phases of the life cycle. Adolescents and young, single women often do not feel that they have ready access to available reproductive health services. Women are not considered to be part of mainstream society - migrants, drug users and sex workers have limited, and for some, expensive access to healthcare services. Poor women and rural women have to rely heavily on public healthcare services despite having to wait long hours. In addition, there is no data on the proportion of births attended to by health professionals. This is unfortunate because the absence of information and consultation on details of the scheme is causing alarm among civil society and health practitioners.

In recent years, the Government of Malaysia has been toying with the idea of introducing a Healthcare Insurance Scheme and one of the key ingredients was the privatisation and corporatisation of public healthcare services. A foreign consultant has been engaged to recommend a holistic approach for better, more efficient healthcare services. Unfortunately, moves toward corporatisation have been piecemeal, such as private wings in public hospitals, higher medical fees for migrants, growth of private hospitals, health tourism and so forth. The Coalition against Privatisation of Healthcare Services has raised concern that such schemes will escalate costs and, eventually, higher user charges and the people's ready access to affordable and quality universal healthcare.

[55] New Straits Times Online, *Ministry allocates RM20m for sex education.* 17 December 2005. Website: http: www.nst.com.my/

Conclusion and Recommendation

The Malaysian government and SUHAKAM have acknowledged that the MDGs can be an instrument for accountability for good governance. However, the MDGs are still considered to be indicators with the lowest denomination. It is in this light that advocacy for detailed data to be publicly presented has been moved. In particular, attention has to be given to providing adequate sex-disaggregated data and other gender-responsive indicators. Such accountability will provide a better platform for SUHAKAM to monitor the responsiveness of the government to the needs and rights of the people, especially women, its performance vis-à-vis its Ninth Malaysia Plan commitments, as well as through international treaties and agreements such as CEDAW and the Convention on the Rights of the Child. This will hold Government officials accountable to the people.

These are some recommendations and indicators for SUHAKAM's advocacy for the monitoring of the MDGs.

1. Eradicate Poverty

Strategies and policies to address equality between men and women in relation to poverty should reflect equal benefit. The 9th Malaysia Plan, and future national plans, should present the necessary disaggregated data for poverty and inequality to better identify the vulnerable groups, especially women and other vulnerable groups.

Some Indicators for consideration:

a. Number of training and literacy programmes for vulnerable groups, especially low income women and indigenous groups;
b. Amount of funds available for access of vulnerable groups to poverty alleviation – breakdown in terms of gender, ethnic background, income and location;
c. Number of people utilising physical infrastructure available for supporting community level activities;
d. Number or percentage of vulnerable groups identified to articulate on:
    i) Their understanding of poverty;
    ii) Their understanding of poverty reduction programmes; and

iii) Number or percentage of women who can independently appropriate funds they have access to.

e. The data required from the Statistics Department include:
   - Income share held by highest 10 and 20 per cent of the population. Income share held by lowest 10 and 20 per cent as well;
   - Proportion of population below minimum level of dietary energy consumption; and
   - Rural population growth (annual percentage).

These data need to have breakdown in terms of gender, ethnic background and location.

2. Achieving universal education

a. Gender stereotyping needs to be addressed and this demands a mindset change in the treatment of girls and boys.

b. Sex education has to be implemented immediately at all levels, including pre-school levels. This will help to educate children, especially boys, to respect one other, regardless of gender, ethnic and social background.

c. Intensified efforts are required to encourage the enrolment of children, especially boys, from vulnerable groups at all education levels and to sustain their participation. Access to education, especially for the vulnerable groups, needs to be identified and addressed. This includes the provision of an enabling environment, and adequate facilities and amenities, particularly in rural and remote areas.

d. Attention needs to be given to the high dropout rate of boys and the under-achievement of boys at primary, secondary and tertiary levels. The target should be to ensure that all children complete secondary schooling.

Some Indicators for consideration:

a. Dropout rate at primary and secondary levels;
b. Further breakdown of literacy and illiteracy rate to reflect ages 15 to 24 years; ratio of literate females to males and ethnic background among those 15-24 years old;

c. Persistence to Standard 6 (including percentage of females and ethnic backgrounds);
d. Pupil-to-teacher ratio for primary and secondary levels;
e. Primary and secondary teachers' required academic qualifications (including percentage of females);
f. Teachers' compensation (percentage of current education expenditure);
g. Expenditure per student, primary to tertiary level (percentage of GDP per capita); and
h. Expenditure on training and development per teacher, primary to tertiary level (percentage of GDP per capita);

3. Promoting gender equality and empowerment of women

a. Increasing women's right to participate in decision-making should be recognised with real commitment through affirmative actions to ensure that at least 30 per cent of decision-making positions at all levels are filled by women. Reviews need to be in place to remind policy makers and implementers that the 30 per cent quota is a temporary measure and a timeframe needs to be set.
b. Gender-based violence must be reduced with benchmark indicators established to monitor progress.
c. Relevant law reforms, civil and syariah, as proposed by women's groups need to be set in place to promote and to close the gap of discrimination against women.
d. All discriminatory practices against women should be monitored and addressed.
e. Improved childcare facilities, more flexi-working arrangements and better maternity and paternity benefits are required to increase female participation in the labour market as well as increase men's participation in reproductive roles.

4. Improving the health status

a. Policies and programmes, especially for young women, migrants, sex workers, and vulnerable groups need to be formulated and implemented.
b. The poor must be excluded from user charges as a result of increased privatisation of healthcare services.

c. Reproductive health targets, including those for adolescents, should be set to further improve healthcare for all.

Some Indicators for consideration:

a. Age dependency ratio (dependents to working - age population);
b. Contraceptive prevalence (including percentage of women aged 15-49 years);
c. Population to further reflect ages 65 and above, (including females and males; ratio of females to males)
d. Under-five mortality rate;
e. Proportion of births attended to by skilled health personnel;
f. HIV prevalence among those aged 15 to 24 years who are pregnant;
g. HIV prevalence among those above 24 years and pregnant; and
h. Number of children orphaned by HIV/AIDs.

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Review of the Annual Report 2006 of SUHAKAM on "Illegal Immigrants & Citizenship Issues in Sabah"

*By Dr Chong Eng Leong **

This review is based mainly on Chapters 4 (***Illegal Immigrants and Citizenship Issues in Sabah***) and 6 (***Reports from SUHAKAM Offices in Sabah and Sarawak*****)** of the Annual Report 2006.

This review attempts to draw attention to the extraordinary increase in Sabah's population since 1970, so as to appreciate the predicament faced by Sabah Malaysians and to evaluate SUHAKAM's work in respect of its Annual Report 2006 on this specific issue.

The following shows the population increase in Sabah, with comparisons with that in Sarawak and Peninsular Malaysia as a whole (with the percentage increase from the preceding figures indicated in brackets):

Year	Sabah	Sarawak	Peninsular Malaysia
1970	648,693	976,269	10,439,430
1980	1,013,003 (56%)	1,235,553 (27%)	13,136,109 (26%)
1991	1.808,848 (78%)	1,642,771 (33%)	17,563,420 (34%)
2000	2,603,485 (44%)	2,012,616 (23%)	22,202,614 (26%)
2005	(3,000,000	2,300,000 – extrapolated)	

Sabah recorded a 362 per cent increase in population growth and Sarawak, 135 per cent, from 1970 to 2005.

This is the racial breakdown of the increase in Sabah's population:

Year	KDM	Other Bumiputera	Total Bumiputera	Foreigners
1960	167,993	141,840	309,833	–
1970	215,811	221,264	437,075	–
1980			(Pribumi) 838,141	–
1991	397,287	606,253	1,003,540	464,786
2000	564,600 1	,036,700	1,601,300	614,800
2005 (extrapolated) 600,000	1,200,000	1,800,000	?	
Increase 1970 to 2005: 178%	442%	312%		

(KDM = Kadazan-Dusun-Murut)

The figures are from the Department of Statistics Malaysia, Sabah, which also revealed that from 1970 to 2000, the Bajau and Iranum communities increased by 344 per cent (77,271 to 343,200), Malays increased by 1,552 per cent (18,362 to 303,500), and KDM increased by 162 per cent (215,811 to 564,600). The Statistics Department provided inconsistent classifications of new residents in Sabah in the 1970, 1980, 1991 and 2000 population surveys.

This shows that the extraordinary increase in Sabah's population from 1970 to 2005 was due to the "Bumiputeras", other than the KDM group. The new "Bumiputeras" (Project IC holders) numbered 600,000 by 2005, including their children. This means that one third of the Sabah "Bumiputeras" in 2005 were in fact those illegally given Malaysian citizenship.

Illegal immigrants mean foreigners without documents, with fake or expired ones **and** Project IC holders. IMM13 document holders are the so-called "refugees" from Southern Philippines. By 2005, there were more foreigners than locals in Sabah and this tells a lot about the future of Sabah within Malaysia.

SUHAKAM had received memoranda and complaints from 2001 to 2006 on the presence of a large number of "refugees", illegal immigrants and stateless persons. SUHAKAM was well informed and had first hand knowledge of foreigners in possession of Malaysian identity cards, claiming citizenship and registered as voters in the Sabah electoral roll – facts clearly elaborated in the memoranda, besides the complaints filed. One complaint was from a non-citizen possessing a Malaysian IC issued by NRD's Special Unit and had voted in the 1999 Sabah

general election, but was denied the replacement of his old IC with MyKad by the same NRD.

One incident not in this Report but revealed by Commissioner Datuk Dr Denison Jeyasooria during a dialogue at Kampung Maang was that while visiting the Detention Camp at Telipok, there was a Pakistani sundry shop proprietor in possession of a Malaysian passport and MyKad with the number coded 12, indicating he was born in Sabah. However, he told the visiting commissioners that he was born in Peshawar, Pakistan.

The Director of NRD and the Director of Immigration, Sabah, were invited by SUHAKAM to present papers at Roundtable Discussion on Illegal Immigrants and Citizenship, but neither turned up "as if there is something to hide", as opined by the Deputy Chairman of SUHAKAM.

Following submissions by NGOs and individuals in Sabah to the Parliamentary Select Committee on Integrity on the issues of illegal immigrants and Project ICs in the state, the committee requested the NRD to clarify. Initially the NRD came, but at later stage it wrote a letter to the Committee, saying that it would not be attending the ongoing hearing anymore. This led to the resignation of the Committee Chairman, Tan Sri Bernard Dompok.

On SUHAKAM's Recommendations as stated in Chapter 4 of the Report

SUHAKAM's recommendation **"that the Home Ministry immediately conducts a thorough investigation into the allegation of issuance of false ICs"** is unlikely to be considered in view of what was stated in the preceding paragraph. Would SUHAKAM look for any other avenue? It is greatly hoped so, as this has already reached a stage where foreigners, including Project IC holders illegally registered as voters, have disturbed significantly the harmonious demography of Sabah. The sense of being marginalised is already there and locals feel that one day, they would become refugees in their own land.

One would expect SUHAKAM to call for a public inquiry at least, if not recommend a Royal Commission of Inquiry, for after all these were the Roundtable Discussion

participants' recommendations, among others. SUHAKAM's terms of reference empowers it to call for a public inquiry into any issue considered necessary, call any person to testify and subpoena those who refuse to do so.

The requirements for a Royal Commission of Inquiry to be considered are a specific issue of importance to the general public, and has the element of urgency – as stated by Dewan Rakyat Deputy Speaker Datuk Juhar Mahirudin in 1993. The specific issue here is about illegal immigrants and illegal citizenship to foreigners in Sabah by issuing them the "Project ICs". It is an issue of paramount importance to the people of Sabah, for the bottomline is the loss of Sabah's sovereignty within Malaysia. It is a matter of extreme urgency, recognised as a "big and serious problem" by our Deputy Prime Minister in 2005 that has become "critical", as expressed by Home Affairs Minister Datuk Seri Radzi Sheikh Ahmad in 2006. It appears that SUHAKAM does not think the problem of illegal immigrants and citizenship in Sabah satisfies these requirements.

Another SUHAKAM recommendation is that **"the government strengthens the mechanism for issuing citizenship in Sabah to address the problem of false ICs".** Addressing the problem of **false ICs** and addressing problem of **genuine ICs** are two different matters. **Project ICs are genuine ICs** and holders claim citizenship and are registered in the electoral roll. Possession of a Malaysian IC does not necessarily mean one is a Malaysian citizen.

In Sabah, the registration of births is governed by the Sabah Registration of Births and Deaths Ordinance 1953, which has not been repealed as claimed by some quarters. Section 4 of the National Registration Regulations 1990 provides that NRD officers should collect specific particulars from an applicant before issuing the IC. One such detail is the applicant's full name, as appearing in his Certificate of Birth. The birth certificate issued as a result of registration after 42 days of the birth (so-called Late Registration Birth Certificate) is not a legal document if the particulars as stated in the register are not verified by a magistrate's court.

At the moment, JPN Sabah has been going around the state issuing Late Registration Birth Certificates and ignoring calls by concerned citizens and the Sabah Law Association that the Mobile Court Unit does the verification on-the-spot as JPN does the registration. Late Birth Certificates without verification by a magistrate's court are useless in law. Project IC holders were issued ICs through this modus

operandi after 1990. Before 1990, it was through the Sijil Akuan, based on the National Registration Regulations 1972, which were repealed by the 1990 regulation.

SUHAKAM has the power to advise and assist the Government in administrative directives and procedures in furthering the protection and promotion of human rights in Malaysia. SUHAKAM therefore can help here by taking proactive measures to advise and assist the Government by ensuring that "Late Registration Birth Certificates" **are verified** by magistrates' courts in Sabah.

SUHAKAM also recommends **"that the Election Commission (EC) ensures voters on the electoral rolls are true citizens of Malaysia".** How is EC going to do this when it passes the buck to NRD? And how will the NRD respond?

The 1999 Likas election petition challenged the legality of the electoral roll used for the 1999 general election and the verdict, among others, stated that the roll was tainted with the names of non-citizens and those not qualified. Until today, the names of these non-qualified and non-citizens are still in the electoral roll for reasons best known to the EC and NRD. This prompted Parliament to amend the Election Act, whereby the electoral roll once gazetted cannot be challenged in any court of law. This is not only wrong but also bad in law.

The election law before it was amended in 2002 stated that the verdict of an Election Court cannot be appealed, but the application for stay of execution of the verdict of the 1999 Likas election petition was granted pending appeal to a higher court, so that the appellant could again stand as a candidate in a by-election. The Court of Appeal gave a two-to-one verdict against the appeal. And the dissenting judge is now a SUHAKAM Commissioner! Perhaps SUHAKAM should take the case to court to challenge the legality of the amended Election Act 2002 on grounds that:

Article 113 (5) of the Malaysian Constitution expressly provides, "So far as may be necessary for the purposes of its functions under this Article, the Election Commission may make rules, but any such rule shall have effect subject to the provisions of federal law."

And Article 119(1) states that only **citizens** have the right to vote. In other words, if it is alleged that an electoral roll is illegal because it carries the names of non-citizens, then the court may inquire into the alleged illegality of the roll.

Project IC holders are foreigners dubiously issued Malaysian ICs that state they were born in Sabah despite they being born outside Malaysia. This clearly is against our laws and our Constitution. It is greatly hoped that SUHAKAM will challenge the EC on this non-challengeable clause.

Likewise, SUHAKAM should file for a Writ of Mandamus to compel the JPN to display the original Sijil Akuan used for issuance of the Project ICs for public scrutiny. After all, the crux of this contention is to safeguard sovereignty of Sabah within Malaysia.

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Preventive Detention in Malaysia

*By Jayaselan Anthony **

Preventive detention has been described as "not a punitive but a precautionary measure as it restrains a man from committing a crime he may commit but has not yet committed …"[56] In Malaysia today there are three laws providing for preventive detention – the Internal Security Act 1960 or ISA as it is better known; the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DDA).

These laws, although said to be draconian in nature, have nevertheless received the blessings of the Federal Constitution and are therefore not unconstitutional.[57] The ISA was enacted for the sole purpose of combating the militant and subversive activities of communists. Although the threat of communism in Malaya is a subject of history lessons today, the ISA continues to be used unabated. The EPOPCO was enacted amidst the 1969 racial riots, to stop the spread of violence and destruction that plagued certain parts of Malaysia. However the law was not abolished even after the hostilities ended.

Over the years the EPOPCO has been used to detain violent criminals and suspected gangsters who cannot be formally charged in court due to lack of evidence. The EPOPCO has been in criticised severely by civil society groups for alleged abuse by the police in arresting and detaining individuals in cases where there is no clear evidence to charge them formally in court, and for using the Act as an "easy way out" in order dispense with police investigations and to search for evidence. Over the years, many young people (some as young as 20 or 21 years) have been detained at the Simpang Renggam Rehabilitation Centre, Johor, under the EPOPCO.

As to whether these detainees are released rehabilitated is a big question mark, since a number of them end up going back to the centre after committing crimes again. Some graduate to commit even more serious crimes and end up being thrown back into the centre. It is for these reasons that the EPOPCO should be reviewed, and possibly repealed. The Dangerous Drugs Act, on the other hand was introduced

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[56] Rv Halliday [1917] AC 260

[57] Article 149 and 150 of the Federal Constitution

to quell the drug menace in the country and many suspected drug traffickers have been detained without trial under this law. There have also been many instances where those freed by the court after due processes have been arrested again and detained indefinitely under the Act. The implementation of the Act has been criticised because there have strong allegations that the persons arrested under it are actually "small fish", that they are merely runners or agents for the big fish, the drug lords.

Exclusion of Judicial Review

These three legislation have gained notoriety, since they exclude any prospect of judicial review of the Executive's decision to detain a person without trial. This means that the reasons or merits of the Home Minister's decision to detain a person without trial cannot be questioned in court. The decision to detain is the absolute discretion of the Executive. Any challenge to a detention order can only be made on grounds of procedural impropriety.

It used to be that the initial 60 days' detention[58] by the police under the ISA could not questioned in court.[59] However, the Federal Court in the Mohd Ezam Mohd Noor vs Ketua Polis Negara & Others[60] recently ruled that although it would not question the decision of the Executive as to what national security requires, it will nevertheless examine whether such detentions are in fact based on national security considerations. This was hailed as landmark decision as far as fundamental liberties are concerned. However this decision can also be criticised for reasons we will discuss later.

In so far as ministerial order of detention issued under Section 8 of the ISA is concerned, the Federal Court in Kerajaan Malaysia & 2 Others v Nasharuddin bin Nasir[61] has affirmed that there will be no judicial review of the minister's order of detention made under Section 8, stressing that the subjective test is accorded to the Minister when he is exercising his discretion under Section 8, and that the court's power to question the decision of the Minister is ousted by virtue of Section 8B of the ISA. This decision has been criticised as an affront to the rule of

58 Section 73 of the ISA.

59 Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293

60 [2002] 4 MLJ 449

61 Criminal Appeal No: 05-75-2002(B) (Unreported)

law and in fact, it strengthens and perpetuates the rule of the Executive rather than the rule of law. The same provisions are also contained in EPOPCO[62] and the DDA.[63]

The exclusion of judicial discretion over the Minister's detention order has always been subject of controversy and it is this state of affairs that makes the ISA different from other preventive detention laws in other countries. In essence, it gives the Executive "carte blanche" powers to detain anyone without trial and the courts are only supposed to be seen, not to be heard. This is to say the least, draconic, as it may give rise to abuse of power.

Post-9/11

The aftermath of Sept 11, 2001 saw the emergence of preventive detention laws all over the world. In fact, the United Nations Security Council passed Resolution 1373 on the Sept 28, 2001 requiring all member states to take immediate legislative measures to counter the threat of terrorism.

i. United States of America

The US was a vehement opponent of preventive detention laws which it saw as a serious breach of human rights and individual liberty. However, the terrorist attacks on the World Trade Center in September 2001 forced the US to change its stance. In October 2002, it adopted the PATRIOT Act, which provides for preventive detention of suspected terrorists. The Act provides for initial detention without charge of up to seven days, otherwise the Attorney-General shall release the detainee. The Act also provides for detention of up to six months if it is found that the release of the detainee will threaten US national security. The A-G is empowered to certify that a detainee is a terrorist and is likely to be engaged with activities that might threaten national security. However the A-G's certification will be reviewed every six months. *One salient feature of the Act is that judicial review of any action or decision, including its merits, is available via habeas corpus.*

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62 Section 7(C) (1)

63 Section 11 C

ii. Australia

Australia enacted the Australia Security and Intelligence Organisation Amendment Act 2003 in response to Resolution 1373[64]. It provides for detention of up to seven days without charging a person, even if not suspected of a terrorist or any other criminal offence, since the Minister need only be satisfied that his detention will substantially assist in the collection of intelligence that is important in relation to a terrorism offence. One striking feature of the Australian Act is that the detainee is permitted to seek legal representation at least once in every 24-hour period during his detention period. The detainee is also given the right to seek remedy from the Federal Court relating to the warrant of detention or the treatment he is receiving during detention. A review of the Act is also conducted to gauge its effectiveness and implications.

iii. Canada

Here, it is the Anti-Terrorism Act 2001[65] that allows for preventive detention. The scope of the Act is well defined as it only applies to persons suspected of terrorism and terrorist groups. Thus it does not apply to persons who are involved in legitimate political activity. The Act allows for detention of a person who is suspected to be involved terrorist activities for 24 hours, extendable for a further 48 hours but only allowed upon judicial review. Other protections provided are that the A-G's consent is required for the prosecution of the financing of terrorism offences; the Solicitor-General must review the list of terrorists every two years; persons can apply to be removed from the list; and it also addresses cases of mistaken identity. More importantly, the Act is subject to parliamentary review.

iv. India

The main legislation providing for preventive detention in India is the Prevention of Terrorism Act 2002[66]. It provides for detention of up to a maximum of 90 days. Only the "Special Court" created under the Act may extend the detention up to 180 days and the Public Prosecutor must indicate the progress of the investigation and the reasons for detention of the accused beyond 90 days. The detainee has the right to consult a lawyer and

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64 The Act was passed on 26th June 2003

65 The Act came into force on 24th December 2001

66 Enacted in 28th March 2002.

information relating to his arrest must be immediately communicated by the police officer to his family member or relative.

The Malaysian position

The element of reasonableness and fair play seems to be missing in the ISA, EPOPCO and the DDA. Unlike the preventive detention laws in the developed countries, Malaysian laws do not provide for judicial review of the Executive's decision to detain at some point of the detention. There is also no such thing as am ouster clause. The right to legal representation, especially during the initial detention period, also does not exist in the Malaysian laws on preventive detention.

The ISA stands out as an arbitrary law as its application is not clearly defined, it seems to apply to all and sundry and this explains why it has been used against members of the opposition political parties, social activists, currency counterfeiters, security document forgers and persons smuggling illegal immigrants. The use of the ISA today has been diverted from its initial purpose, which is to counter militant activities and subversion, unlike legislation in the countries examined above, where such a law only applies to terrorists and persons who may be associated with terrorist activities.

Judicial pronouncements have indicated that the detainee has no right to counsel when under police detention for the initial 60-day detention period[67] under the ISA. The detainee also has no right to be present at hearing of his/her habeas corpus application[68]. As far as detention per se is concerned, the position seems unclear. In the Mohd Ezam case, the Federal Court decided that Section 73 and Section 8 of the ISA are separate and independent of each other. It is for this reason that detention was deemed lawful, even though the court found that the initial detention by police under Section 73 was unlawful as it found that the purpose of the detention was for intelligence gathering and had nothing to do with national security. The appellants were not interrogated on their militant actions but were instead questioned on their political activities.

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67 Refer cases of Theresa Lim Chin Chin and Mohd Ezam bin Mohd Noor.

68 The Federal Court decision in Ketua Polis Negara v Abdul Ghani Hassan 2001 4 MLJ 11

Although, the court's reasoning in the Mohd Ezam case is laudable as far as the initial 60 days of detention is concerned, it is respectfully submitted that the court's decision in holding that Sections 73 and 8 of the ISA are independent of each other is fundamentally flawed. This is because if the court holds that initial police detention is unlawful, then it should follow that the Minister's decision to detain is also unlawful, since the root of the detention order by the Minister stems from the initial arrest and detention by police. The purpose of Section 73 is clearly laid down in Theresa Lim Chin Chin & Ors v Inspector-General of Police[69] :

"Looking at the provision relating to preventive detention, we cannot see how the police power of arrest and detention under Section 73 could be separated from the ministerial power to issue an order of detention under Section 8. We are of the opinion that there is only one preventive detention and that is based on the order to be made by the Minister under Section 8. **However, the Minister will not be in a position to make that order unless information and evidence are brought before him, and, for this purpose, the police is entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain a person, in respect of whom the police have reason to believe that there exists grounds which would justify the detention of such person under Section 8.** There can be no running away from the fact that police power under Section 73 is a step towards the ministerial power of issuing an order of detention under Section 8, which the Attorney-General referred to as the initial stage in the process leading to preventive detention."

In light of the decision of the then Supreme Court in the Theresa Lim case, it is clear that Section 73 of the ISA is an important safeguard provided to the detainee in order to prevent the Executive from making any arbitrary detention order. It is unfortunate that the Federal Court in the Mohd Ezam case chose to ignore this important point. In essence, the decision in Mohd Ezam strengthens the Executive's discretionary power, particularly when it comes to preventive detention. This is evident in the arrest and detention of five members of HINDRAF under the ISA recently, where the Minister made an order to detain these individuals under Section 8 of the ISA even though the police made no arrest under Section 73. The High Court decided that their detention was lawful.

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[69] Supra n.4

The way forward

The world has witnessed dramatic acts of terrorism in recent years and as the saying goes, "Terrorism has no border, and it does not choose it victims". The reality is that we do not live in a state of Utopia. We do not know when terrorists may strike, but what we do know is that society at large should be protected and that the rule of law and freedom should prevail. Hence, the need for preventive detention laws. The pertinent question that arises here is, how does one balance the need for such laws to protect society from tyranny and mayhem on the one hand and on the other, ensure that such laws are not abused by the State to perpetuate its own agenda?

The answer lies in the fact that a comprehensive legislation should be drawn up to balance the competing interests. The new legislation that should replace the ISA, EPOPCO and the DDA must address the following issues:

(i) The scope of its applicability should be clearly defined, which is to detain terrorists in order to prevent terrorist acts;
(ii) There must be judicial review of the Executive decision to detain;
(iii) There should be no ouster clause whatsoever;
(iv) There must right to counsel and the right to appear in court to challenge the detention order;
(v) The grounds and particulars of detention must be stated clearly to support the basis of the detention;
(vi) The courts must be given the power to look into the merits of detention and not just procedural impropriety or technicalities;
(vii) Therefore, the test should be an objective one, not subjective;
(viii) There must full and frank disclosure of all facts relating to the arrest and detention to enable the court to make an informed decision; and
(ix) There must be parliamentary review at certain intervals, perhaps every two to three years, to assess the operation, effectiveness, relevancy due to changing circumstances politically and socially, and the impact and implications of such a law on human rights.

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"Rights of Vulnerable Groups: Indigenous Peoples"

*By Melvin Goh **

SUHAKAM's 2005 report on the "Rights of vulnerable groups: Indigenous peoples" by Ramy Bulan is reflective of the concerns for indigenous peoples of the country, especially the Orang Asli in Peninsular Malaysia and natives in the states of Sabah and Sarawak. The report highlights the multifaceted issues facing these people, in particular problems relating to land, education and poverty, tracing these issues to the nation's Constitution. These concerns have been raised in past annual reports of SUHAKAM over the years, and many recommendations made to address them.

However, these problems remain contentious despite attempts to find solutions. The suggestion that SUHAKAM may perhaps initiate a thorough study of the laws to address difficulties in matters concerning these groups of people is a good proposal, provided the final draft is acceptable to the people. It remains to be seen how receptive the public will be to any amendment of the Constitution in these matters, since changes to the nation's laws are a complicated process that are also time consuming and costly – and the question remains as to whether, by then, such changes would be timely in assisting the native peoples.

As the report states, numerous recommendations have been made by SUHAKAM over the years but most have yet to be acted on; and ample proof is provided that the powers that be operating in the various ministries and departments of the Government, at both Federal and State levels, are aware of the issues. However, it goes without saying that initiating any change to the State's rights, especially those relating to Sabah and Sarawak, is highly unlikely to succeed given the protective nature of the people in these two states to their intrinsic rights as enshrined in the Constitution. From past records and experience, it is safe to conclude that going along this route will once again lead to failure in trying to bring about changes. Therefore, more practical steps need to be considered.

There is little doubt that the public supports the various initiatives put forward by SUHAKAM towards bringing about a just society among native populations.

Tapping into this support is bound to produce positive results and a show of force to induce changes in the system. One consideration could be the formation of working committees in the various states and areas where issues that generate strong response from the people in the affected areas. These committees, if formed within the legal framework of the Constitution, could in turn engage the relevant authorities in a win-win situation in trying to find solutions to particular issues before resorting to the courts for decisions.

In order to be transparent and authoritative, the heads of these working committees need to be local people with support from the communities concerned, since local authorities are wary of dealing with "outsiders", who are often seen as trouble-makers out to make a name for themselves or their organisations. There is no certainty of success as the relevant authorities might not even consider lending an ear, or allowing these groups to enter into a dialogue. Nevertheless, these are the most practical and affordable alternatives to regular reports proposing solutions to problems in the country that take aim at particular authorities.

On matters of land rights relating to aborigines and natives of Sabah and Sarawak, the report rightly raises the difficulties of finding solutions, since jurisdiction over land matters rests with the State governments. Aboriginal customary titles beg consideration on many interpretations of "aboriginal areas". The report makes five recommendations that seek to exempt indigenous peoples' customary land from provisional leases, review of need for indigenous peoples to produce documentary evidence to prove ownership of land, clarification of legal terms involving Native Customary Rights, recognition of mapping boundaries as used by these groups and consultations with indigenous groups prior to planning development projects in these areas.

These are sound ideas for the authorities to consider. In fact, some have been in practice already in Sarawak, such as a consultation process and exemption from provisional leases. The setting up of the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) is one example of utilising native customary lands for development purposes in partnership with the landowners in various parts of the State. This has benefited the parties involved and further promotes trust and cooperation between the people and the authorities concerned.

However, the legal process in the clarification of Native Customary Rights, initiated by some people in Sarawak, is still waiting the court's ruling. This issue will not end there, even with decisions following any ruling, as further redress is expected to be sought by the parties involved. Documentary evidence sought by the authorities for land claims seek to address contentious claims by many quarters and to avoid abuse of the system, which unfortunately also burdens the native peoples, as seen in cases in Sabah and Sarawak. The main difficulties lie in the fact that native peoples are often illiterate and reside in remote areas. This, and the fact that most native people resort to oral records to prove land claims, aggravate the situation.

Based on SUHAKAM's "Grassroots visits", the report specifically points to the alarming fact that in both Sabah and Sarawak, land issues have been predominant in the number of complaints made to the Commission, giving figures of up to 95 per cent in some areas visited. On the surface, these are of concern and point to the serious nature of land issues. However, it should also be noted that at times, figures alone do not tell the true picture. What is needed are actual figures of the number of such cases referred to the courts for solution, as these represent real contentious cases that warrant decisions by the court. In addition, some of the complaints relating to adequate compensation for relocation, as cited in a case in Miri, Sarawak, and encroachment of land by loggers in Lundu, need further clarification from the authorities concerned. In almost all cases in the country, relocation compensation has never be seen as adequate by those affected by the exercise as "values" are very personalised and may not be reflective of the real value as calculated by the evaluators.

On the encroachment by loggers, there is a need to look into the legal aspect of the case, since logging requires special permits from the authorities concerned and some are often illegal, operating on the basis of quick monetary gains. One particular issue raised in this section of the report was the destruction of traditional foraging areas of the Penans by loggers in the interior of Sarawak. It also noted that these native peoples have difficulty in claiming land rights as most of them had just moved into the area. This is clearly a case in point that warrants checks with the authorities, such as the local Resident's office and the Land and Survey Department, as well as the Office of the Chief Minister that deals with Penan issues.

There have been cases where claims made by some native groups in Sarawak, with the intention of getting compensation without proof of their land rights, have been

used as a front by unscrupulous groups to make monetary gains. Overall, land issues and claims of rights are still more contentious in the states of Sabah and Sarawak and generally cover large tracts of land, unlike in Peninsular Malaysia. And with different sets of laws affecting such claims in Sabah and Sarawak, the legal issues can only be solved by engaging the relevant authorities in the two states.

Educational issues highlighted in the report point to the difficulties of reaching native peoples and providing such facilities in Sabah and Sarawak, where the population is scattered in remote and sometimes inaccessible jungle areas. Orang Asli communities cited show that poverty and lack of education go hand in hand to further worsen the situation. These, together with the language barrier, subjects taught and feelings of alienation among the Orang Asli children, often lead to failure of the educational goals for the Orang Asli that the government envisages. Lack of facilities and trained personnel contribute to the endless vicious circle of providing education to these communities.

Suggestions that a flexible approach is adopted, such as allowing learning in the mother tongue, involve a massive exercise of personnel and financial consideration – which are unlikely to get the nod from the Education Ministry. In this respect, it may be better to have Orang Asli studies in institutions of higher leaning to develop a core group of educators that will be able to initiate future strategies to bring education to these groups. As for Sarawak, despite its size, education has managed to reach many rural communities in the State, especially those where timber roads and riverine waterways are accessible. Many native groups of various ethnic origins have managed to record steady increase in number of graduates in their communities, with the notable exception of some nomadic Penans that continue to follow their traditional lifestyle, making it difficult to provide them with educational services.

Education is a national issue under the purview of the Federal Government and requires much discussion on the groundwork before innovative methods of reaching these groups of people in the country can be implemented. For the foreseeable future, any change in the system of implementing the goals of education goals in areas where these groups live remain unlikely to be fulfilled without dramatic changes to the system itself.

Regrettably, as the report states, those living below the poverty line in Malaysia comprise mainly Orang Asli and the indigenous peoples of Sabah and Sarawak. Their fate is worsened by the shrinking areas of their land due to development. Rural-urban migration of these vulnerable groups has caused the emergence of urban poor within the town and city centres. More importantly, the nation and its people need to view this trend as a loss of the national heritage as the disappearance of these groups of people will make us "poorer" in our cultures and traditions and invariably, in the knowledge of some of these peoples. SUHAKAM's report on these matters point to the growing gap of alienation faced by some native peoples in their own homeland and bleak future for some small minority groups - whose cultures and traditions may well disappear within the next century if the trend continues.

To try and find solutions to many of the issues raised in the report, SUHAKAM listed a few recommendations for the relevant authorities to ponder, particularly for those in Sabah and Sarawak. It calls for a review and amendment of the laws relating to land issues in Sabah, including the appointment of an independent mediator to settle disputes, an ad hoc independent inquiry committee to check on rejected applications for land rights and making the Valuation Section of the Land and Survey Department a separate department altogether.

Though sound in theory, these recommendations are likely to face problems in the implementation stage, since legally, these are not binding and hence ineffective in the context of the State's Land Ordinances. Operating the State valuation sections as a separate department will be ideal but again, impractical as it will further pile up the paperwork for claimants and others, while it does not guarantee transparency in the execution of powers.

The recommendations for Sarawak include calls for greater caution from the Government on approval for the use of native customary lands, with greater participation by indigenous groups in areas that concern them. These are practical and useful in solving issues relating to land rights, which will benefit all parties concerned and bring about better understanding of the issues raised. Educational issues recommended include calls for both globalisation and human rights to be incorporated into every subject and that the "rights-based approach" is used in policy making. It is unlikely that these recommendations will be incorporated into the system soon as education is a federal matter and if acceptable, will be part of

the whole education system and not meant for implementation in particular areas only.

In conclusion, the report remarked on the prevalent issues relating to land rights of indigenous peoples of the country and called on the Government to ensure that these groups of people are not deprived of their rights due to the ambiguity of the interpretation of the Constitution and other laws of the country. There is widespread support for these recommendations by SUHAKAM on the issues raised, as seen from the active participation of people in places the Commission visited. It remains to be seen how receptive the Government is towards these refreshing ideas, and how the particular states will react to them.

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* Melvin Goh is currently with the Sarawak Tribune and a keen activist on Indigenious peoples rights.

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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