

**PANACEA, PLACEBO, OR PAWN?
THE TEETHING PROBLEMS OF THE HUMAN RIGHTS
COMMISSION OF MALAYSIA (SUHAKAM)**

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Show Your Teeth, AIM Tells Suhakam

—Abolish ISA Movement (AIM), as reported by Yusof Ghani¹

I think you are dreaming, we have never planned to give any teeth to Suhakam.

—Deputy Prime Minister Nazri Aziz²

The Malaysian government will do well by taking immediate steps to implement some of Suhakam's recommendations, past and present. Manufacturing more excuses will only bring about more shame to the state of human rights here, and render Suhakam, a "toothless" tiger.

—Hakam (National Human Rights Society)³

Provide us with the teeth so that we can ensure that human rights are enforced.

—Suhakam commissioner Datuk N. Siva Subramaniam⁴

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1. Yusof Ghani, *Show your Teeth, AIM (Abolish ISA Movement) tells Suhakam*, MALAYSIKINI, Apr. 10, 2003, <http://www.malaysiakini.com/news/15129>.

2. Beh Lih Yi, *Govt: We don't intend to give Suhakam teeth*, MALAYSIKINI, Mar. 27, 2006, <http://www.malaysiakini.com/news/48965>.

3. Elizabeth Wong, National Human Rights Society (HAKAM), Press Release, Release the ISA-6 (Apr. 10, 2003).

4. *Suhakam wants more bite*, STAR ONLINE (Malay.), July 20, 2008, <http://thestar.com.my/news/story.asp?file=/2008/7/30/nation/21953900&sec=nation>.

I. NATIONAL HUMAN-RIGHTS INSTITUTIONS AS RIGHTS-PROTECTIVE
MECHANISMS WITHIN THE CONSTITUTIONAL ORDER
OF DEMOCRATIZING ASIAN STATES

What is the underlying motivation and effect of creating a national institution with a dedicated human-rights mandate in an Asian society that lacks a strong human-rights culture, despite the existence of justiciable formal rights guarantees entrenched in a constitutional or statutory bill of rights?

In creating a national human-rights institution (NHRI), states envisage law not as a limit on state power but as an instrument of effective governance. By empowering individuals and groups to bring claims against abuses of state power, human-rights law does limit state power. It also enjoins the state to incorporate human-rights perspectives and priorities in formulating public policy, for example by catering to vulnerable sectors of society in public-housing programs or adopting a gender-sensitive design in legislative institutions to address the low percentage of women in public office. Human rights constrain the state and can inform the content of the nebulous notion of “good governance,” an accepted aspiration among Asian states.⁵ When a state establishes an NHRI, it creates a focal point for good-governance concerns to be ventilated and addressed, which may be a precursor to a rights-oriented culture.⁶

The creation, by constitution or statute, of a national agency with an express human-rights mandate creates a base of public power, beyond the classic trichotomy of legislative, executive, and judicial branches. Indeed, as Raul Pangalangan observed in discussing the Philippines Commission on Human Rights (PCHR) created by the 1987 People’s Power Constitution,⁷ the creation of the PCHR marked the supremacy of “Third World and Asian reali-

5. Good governance is, for example, a central plank in World Bank poverty alleviation strategies. See DANIEL KAUFMANN & AART KRAAY, *THE WORLD BANK, GOVERNANCE INDICATORS: WHERE ARE WE, WHERE SHOULD WE BE GOING?* 2 (2007). Human rights have been explicitly recognized as a principle and purpose in the Charter of the Association of Southeast Asian Nations (ASEAN), to which Malaysia is a party. See Charter of the Southeast Asian Nations, arts. 1(7), 2(2)(j), available at <http://www.aseansec.org/21069.pdf>. For a commentary, see Li-ann Thio, *Human Rights and the Charter of ASEAN* (2007), 13 *ASIAN Y.B. OF INT’L L.* 285 (2007).

6. See generally BRIAN BURDEKIN, *NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION 1-2* (2007).

7. For a history and analysis of the Philippines Commission on Human Rights, see generally Aurora P. Navarete-Recina, *The Philippines Commission on Human Rights*, in *HUMAN RIGHTS AND THE NATIONAL COMMISSION* 76 (S. Sothi Rachagan & Ramdas Tikamdas eds., 1999).

ties” over transplanted U.S. notions of constitutionalism.⁸ The PCHR was adopted in reaction to excesses of constitutional authoritarianism practiced under the Marcos dictatorship, which saw widespread curtailment of civil and political rights, sometimes justified as trade-offs in favor of securing socioeconomic rights or welfare. Notably, the now defunct 1997 Thai Constitution, formulated under widespread political consultation and exemplary in its commitment to creating institutional checks and balances, provided for a Thai national human-rights commission. Through such mechanisms, the creators hoped to stave off the executive monopoly of power which bred frequent military coups.⁹

Not all countries create rights-protective mechanisms as a response to a history of authoritarian and military dictatorship which witnesses human-rights abuses, however. India’s motivation in creating its Human Rights Commission in 1993 was not so much a desire to check state power as the need to salvage international reputation after being severely criticized for committing acts of state-sponsored terrorism in conflict-ridden zones like Jammu-Kashmir, where Indian security forces committed rapes, custodial deaths, and torture.¹⁰ Where the perception is that the original motivation behind a rights-protective institution is “damage control” rather than requiring meaningful accountability for abuses of public power, legitimacy of the institution may be impaired. A subsequent robust discharge of its functions may remedy this, however.¹¹

8. See Raul Pangalangan, *Why a Philippine Human Rights Commission? Its Place in a Constitutional Order – An Inquiry into the Power and Limits of Liberal Constitutionalism*, in PERSPECTIVES OF CONSTITUTIONALISM IN ASIA – INTERNATIONAL SYMPOSIUM ON CONSTITUTIONALISM IN ASIA AND OCEANIA 285, 285-300 (Akira Osuka ed., 2003).

9. See Andrew J. Harding, *May there be Virtue: ‘New Asian Constitutionalism’ in Thailand* 3(3) AUSTL. J. ASIAN L. 236, 236 (2001) (detailing the history and continuous cycle of military coups and governments); VITIT MUNTARBHORN, *Human Rights in the era of “Thailand Inc.”*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 322-24, 343 (Randal Peerenboom et al. eds., 2006) [hereinafter HUMAN RIGHTS IN ASIA].

10. See Vijayashri Sripathi, *India’s National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT’L L. J. 1, 8-10 (2000). Despite its “window-dressing” origins, however, the Indian National Human Rights Commission has positively contributed to the human-rights cause. See *id.* 12-25 (detailing the Commission’s role in investigating civil liberties violations and the implementation of policies and signing of the U.N. Convention on Torture); see also Charles H. Norchi, *The National Human Rights Commission of India as a Value-Creating Institution*, in HUMAN RIGHTS: POSITIVE POLICIES IN ASIA AND THE PACIFIC RIM 114-16 (John D. Montgomery ed., 1998).

11. See SUARA RAKYAT MALAYSIA [SUARAM], MALAYSIA: HUMAN RIGHTS REPORT CIVIL AND POLITICAL RIGHTS 2003, at 206 (2004) [hereinafter SUARAM HUMAN RIGHTS REPORT 2003].

It does not automatically follow that adopting an NHRI will translate into practical human-rights gains at the grassroots level if the endeavor is merely cosmetic. The same criticism has been made of state ratification of human-rights treaties—it has been questioned whether this “progressive” measure effectively induces positive human-rights outcomes or is merely an exercise in tokenism.¹²

What, then, were the forces leading to the statutory establishment of the Human Rights Commission of Malaysia (Suhakam or Suruhanjaya Hak Asasi Manusia Malaysia) in 1999? Malaysian non-governmental organizations (NGOs) and civil-society groups had lobbied for a human-rights institution, and were somewhat aggrieved that they were not consulted in its conception and constitution, which was contrary to their view that NHRIs should be established “following an appropriate and inclusive process of consultation.”¹³ Various NGOs, welcoming in principle the proposed Suhakam, convened a forum in July of 1999 to discuss and make recommendations to strengthen it, which the government ignored.¹⁴ Suhakam was established by a bill heard before the July sitting of Parliament in 1999, where it was passed and gazetted on September 9, 1999, without ever being made public.¹⁵

12. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941, 2002-2006 (2002) (examining the dual role of human-rights treaties as expressions and commitments to alter behavior and protect rights).

13. See Conclusions of the Ninth Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asian-Pacific Region, Annex ¶ 21, U.N. Doc E/CN.4/2001/98 (Mar. 23, 2001) [hereinafter Conclusions of the Ninth Workshop]. Indeed, thirty-five NGOs and two political parties called for a public consultation by means of a “Memorandum on the Human Rights Commission,” which asked the government to make known its detailed proposal and called upon it to ensure that the design of the Commission conformed to Paris Principle standards.

14. See *National Human Rights Commission – Too Little too Late*, ALIRAN ONLINE, Apr. 13, 2000, <http://www.aliran.com/oldsite/hr/js13.html> (explaining the forum put together by various NGOs on the Human Rights Commission of Malaysia and the criticisms and discussions expressed therein). The NGOs Hakam, ERA Consumer, and Suaram also recommended that the government

demonstrate its commitment to and respect for human rights by: (a) Passing resolutions in both Houses of Parliament to annul all subsisting Proclamations of Emergency and ordinances thereunder; (b) Reviewing and repealing all laws inconsistent with fundamental liberties and universal principles of human rights; (c) Ratifying the international instruments relating to human rights and in particular: (1) The International Covenant on Civil and Political Rights[;] (2) The International Covenant on Economic, Social and Cultural Rights; and (3) The Convention against the Torture and Other Forms of Cruel Inhuman or Degrading Treatment or Punishment.

Id.

15. See Ramdas Tikamdas & S. Sothi Rachagan, *Introduction to HUMAN RIGHTS AND THE NATIONAL COMMISSION*, *supra* note 7, at 1, 4.

Suhakam was not the product of popular consultation but of a government initiative—was it then an institution conceived in cynicism, its birth greeted with varied reactions of skepticism and hope? Suaram, a local NGO, articulated this cynicism in observing that “[d]etractors view Suhakam’s role as merely justifying the authorities’ actions, serving as a source of deflection and providing the international community with a warped view of the state of human rights in the country.”¹⁶ In similar vein, some asked why Parliament, dominated by the Barisan Nasional party, which was “habitually sluggish in protecting civil liberties,” was rushing to establish a National Commission of Human Rights as an independent check on its powers.¹⁷ Critics speculated that this might be a whitewashing strategy or deflecting shield against the onslaught of mounting domestic and international criticism of various incursions on political freedom.¹⁸ In particular, the political maelstrom surrounding the controversial ouster of former deputy prime minister Anwar Ibrahim, tried initially for corruption and unnatural sex, had attracted widespread attention and given rise to the grass-roots *reformasi* movement demanding political and economic reform.¹⁹ The Anwar controversy had raised questions about the integrity and impartiality of the Malaysian judicial process and the treatment of Anwar in prison after infamous photos depicting Anwar with a black eye emerged.²⁰

16. SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 206.

17. See P. Ramakrishnan, *SUHAKAM: What Assessment, Whose Future?*, in PROCEEDINGS OF THE NATIONAL CONSULTATION ON SUHAKAM: AFTER 3 YEARS: RECOMMENDATIONS FOR PROMOTION AND PROTECTION OF HUMAN RIGHTS AND THE GOVERNMENT’S RESPONSE 32, 33 (ERA Consumer Malaysia ed., 2004), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/308_National%20Consultation%20on%20suhakam%20after%203%20years.pdf [hereinafter THIRD CONSULTATION].

18. As one activist has argued, “in its half-hearted but carefully scripted establishment of Suhakam, perhaps the BN government had hoped that setting up Suhakam would miraculously make public disgust over Anwar Ibrahim’s humiliation, Reformasi’s courageous response to lies and repression, and the electoral support for the Barisan Alternatif vanish overnight.” P. Ramakrishnan, *Suhakam: A Warehouse for Reports?*, ALIRAN MONTHLY (Malay.), Oct. 2003, at 23, 24, available at <http://www.aliran.com/oldsite/monthly/2003/7d.html> [hereinafter Ramakrishnan, *A Warehouse for Reports?*].

19. See Greg Felker, *Malaysia in 1998: A Cornered Tiger Bares Its Claws*, 3 ASIAN SURV. 43, 43-54 (1999); Meredith L Weiss, *Malaysia: Construction of Counterhegemonic Narratives and Agendas*, in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE 259, 281-284 (Muthiah Alagappa ed., 2004) (detailing the reformasi movement in Malaysia).

20. See Thomas Fuller, *Police Chief beat Anwar, Lawyer Confirms*, INT’L HERALD TRIB., Mar. 1, 1999, at 1, available at <http://www.nytimes.com/1999/03/01/news/01iht-malay.2.t.html>.

The cynical perspective about Suhakam's creation held sufficient sway in public opinion to attract rebuttal from Suhakam commissioners such as Tan Sri Harun Hashim, former supreme-court judge and vice chairman of Suhakam, who noted in a public meeting that "the coming into existence of this Commission has got nothing to do with Anwar Ibrahim."²¹ He instead delivered the orthodox version of Suhakam's birth, which is recounted in the Suhakam website.²²

A. *The Broader Context: The Rule of Law, Democracy, and Human Rights as a Good-Governance Package Deal*

The efficacy of an NHRI depends on a variety of formal and informal factors. The Paris Principles state a series of criteria for the institutional design of an NHRI, criteria which include ensuring NHRIs enjoy some measure of financial, personal, and institutional autonomy from the government; these principles also advocate conferring a comprehensive mandate and sufficient powers to effectuate it.²³ The sociopolitical environment and economic imperatives also condition an NHRI's performance and its effectiveness in advancing human rights.²⁴

An institution is a product of the sociolegal environment in which it operates, but may constitute that environment as well. The operation of an NHRI cannot be evaluated in isolation from other institutional mechanisms and the state of political freedom enjoyed in its society.

21. Tan Sri Harun Hashim, *Assessment Of Human Rights In Malaysia And The Role Of Suhakam In Promoting And Protecting Human Rights*, in PROCEEDINGS OF THE NATIONAL CONSULTATION ON SUHAKAM: AFTER ONE YEAR 5, 8-9 (ERA Consumer Malaysia & Suara Rakyat Malaysia eds., 2002) [hereinafter FIRST CONSULTATION].

22. Suhakam's website recounts the proposal and birth of the organization. See Human Rights Comm'n of Malaysia, SUHAKAM Official Website - History, <http://www.suhakam.org.my/info/profil> (last visited Nov. 22, 2009) [hereinafter History of SUHAKAM] (detailing Malaysia's participation in the United Nations Commission on Human Rights, the election of former Malaysian Deputy Prime Minister Musu Hitam, and Hitam's realization of the need for and advocacy for the adoption of a human-rights mechanism like Suhakam). After the 1994 proposal by Deputy Prime Minister Hitam to establish an NHRI, Suhakam was created five years later. See *id.*

23. Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 48/134, ¶¶ 2-3, U.N. Doc. A/RES/48/134 (Dec. 20, 1993); see also Brian Burdekin, *Human Rights Commissions*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 801, 829-31 (Dr. Kamal Hossain et al. eds., 2000) (setting forth recommended criteria and guidelines for human-rights commissions generally).

24. In the Malaysian context, see generally Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STAN. J. INT'L L. 59 (2003).

B. *Panacea, Placebo, or Pawn?*

The establishment of an NHRI is no panacea for human-rights violations. NHRIs are designed to operate as part of a larger political-legal framework in which various legal mechanisms, including courts and criminal-justice institutions, effectively function. In a country where human-rights violations are systemic rather than discrete, where state institutions commit egregious human-rights violations through acts of commission or omission,²⁵ there is a limit to what an NHRI can accomplish.

While NHRIs may play an important role in securing accountability of state actors, this alone is insufficient to protect human rights. As Linda Reif notes, the supervisory or oversight roles played by an NHRI in any given political society are affected by the democratic nature of that society.²⁶ In established democracies, NHRIs work in tandem with other institutions such as courts, ombudsman, a vibrant civil society, free press, etc.²⁷ In democratizing states, NHRIs “may play a more central role as they provide a viable forum for the investigation and resolution of human rights complaints in countries where the judicial system is weak, politicized, slow or otherwise incapacitated.”²⁸ NHRIs may further facilitate democratization by engaging civil-society participation to promote a stronger human-rights culture, complementing litigation with lobbying, and conducting a dialogue with the executive about rights.²⁹ NHRIs highlight the complementary role of judicial and nonjudicial approaches to protecting and promoting human rights.

No one thought Suhakam was a universal cure-all or panacea for governance woes in Malaysia, but institutions have a way of assuming a life of their own in ways not contemplated by their creators. NHRIs may function to bring human rights to the forefront as a facet of good governance, legitimizing human-rights discourse.³⁰ On the other hand, the fear in localizing human-rights institutions is that they will become pawns in the hands of powerful states, with

25. See Asian Human Rights Comm’n, *Asia: Effective protection of human rights: National human rights commissions and rule of law mechanisms* (Dec. 4, 2006), available at <http://www.ahrchk.net/statements/mainfile.php/2006statements/842/>.

26. Linda Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 23-24 (2000).

27. See *id.* at 1-2.

28. *Id.* at 2.

29. See *id.* at 30.

30. See *id.* at 16-19.

no real autonomy.³¹ NHRIs may be double-edged swords in the human-rights cause when they serve as an instrument of or apologist for the government.³² NHRIs used as a window dressing by authoritarian governments will not translate into greater respect for human rights at ground level. As one activist notes, "Suhakam could well play the part of deflecting criticism, dissipating anger and re-channelling outrage so that its Commissioners, rather than Parliament and the Executive, end up facing public wrath and dissatisfaction."³³

Alternatively, an NHRI could become a placebo, a placatory device aimed at appeasing domestic and foreign critics. For example, although Suhakam was supposed to be an institution *of the people*, some feared that it was *of the government, by the government, and for the government*.³⁴ In protecting human rights, what is really important is not the mere existence of a domestic human-rights body, but the strength or authenticity of its engagement in human-rights issues, and its ability to positively influence human-rights-friendly outcomes while retaining cultural legitimacy. An NHRI's strength may be reflected in the degree of credibility it gains vis-à-vis civil society and whether the government treats it seriously and responds to it in good faith. Institutions can generate social expectations of real gains, even if they are meant as mere placebos.³⁵ If these expectations are unrealized, it might undermine the institution's legitimacy, entailing attendant political costs.³⁶

This Article examines the degree to which Suhakam has been able to promote and protect human rights in Malaysia and the operational constraints it encounters, given sociopolitical realities and economic imperatives. Part II examines the important role NHRIs can play in promoting human rights within Asian societies, where adversarial methods of rights protection are regarded with reticence. It considers the role of NHRIs as mediating institutions between the international and municipal legal order and between the government and nongovernmental bodies. Part III considers

31. *See id.* at 23.

32. *See* C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights*, 19 AM. U. INT'L. L. REV. 259, 265 (2003).

33. Ramakrishnan, *THIRD CONSULTATION*, *supra* note 17, at 36.

34. *See* Ramakrishnan, *A Warehouse for Reports?*, *supra* note 18, at 24 ("Could it be that in the name of creating a national human rights commission, the BN government was equipping itself with an institutional tool that would set back the cause of human rights protection?"); *see also* Ramakrishnan, *THIRD CONSULTATION*, *supra* note 17, at 33.

35. *See* Kumar, *supra* note 32, at 276-83.

36. *See id.* at 293.

the state of human rights within Malaysia, the history, rationale, composition, and powers of Suhakam, and the working methods Suhakam has adopted in discharging its human-rights mandate. In particular, Part IV discusses how Suhakam has liberally construed the scope of its mandate to include the consideration of socioeconomic-rights issues and how the Malaysian sociopolitical environment shapes human-rights discourse and activism. Part V evaluates Suhakam's effectiveness by considering the attitudes toward it of the government and the nongovernmental sectors of society. Part VI offers some concluding observations.

II. SITUATING THE DISCUSSION: HUMAN RIGHTS IN MALAYSIA, "TRULY ASIA"³⁷

A. *The International Dimension: The Importance of NHRIs in the Asian Context as a Constructive Mode of Engagement*

Strengthening national capacities for promotion and protection of human rights through national human-rights action plans and NHRIs are accepted methods in working toward regional human rights arrangements in the Asia-Pacific region.³⁸ This is particularly important in Asia, which remains the only region without a regional human-rights mechanism; at a subregional level, however, a mechanism has been set up under the auspices of the Association of Southeast Asian Nations (ASEAN).³⁹

37. Malaysia's tourism tagline is "Malaysia Truly Asia." See Eileen Ng, *Truly Asia: Malaysia melds modern, ancient and natural wonders*, USA TODAY, Feb. 6, 2007, available at http://www.usatoday.com/travel/destinations/2007-02-06-malaysia_x.htm.

38. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Report of the Secretary-General, *Effective Functioning of Human Rights Mechanisms: National Institutions and Regional Arrangements*, Regional Arrangements for the promotion and protection of human rights in the Asian and Pacific region, U.N. Doc. E/CN.4/2001/98 (Mar. 23, 2001) (explaining the step-by-step and building block approach for the region and regional arrangements); see also *Conclusions of the Ninth Workshop*, *supra* note 13, annex.

39. See Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 407, 408-09 (1998) (analyzing history of human rights in Asia); Working Group for an ASEAN Human Rights Mechanism, *ASEAN Adopts action plan to protect women's and children's rights*, *HUM. RTS. HERALD*, June 2005, at 1 (detailing discussions and plan to create an ASEAN Women and Children's Commission for human rights), available at http://www.aseanhrmech.org/downloads/Human_Rights_Herald_Issue2.pdf. ASEAN's efforts are sometimes criticized. See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go before I Sleep,"* 2 *YALE HUM. RTS. & DEV. L. J.* 1, 1 (1999) ("ASEAN has marginalized human rights and has consistently opposed the use by foreign states or international organizations of economic or other forms of pressure to induce change in human rights practices."). Article 14 of the 2007 Charter of ASEAN provided for "an ASEAN human rights body." Charter of the Association of Southeast Asian Nations, art. 14(1). In October 2009, the ASEAN Intergovernmental Commission on Human Rights was launched. See Kor Kian

The introduction of NHRIs in various Asian countries may be viewed as a positive trend, given the institutional deficit in terms of human-rights enforcement. Although most Asian states are engaged in the U.N. human-rights regime and participate minimally in state reporting, international supervisory mechanisms are weak and cannot generate genuine improvement in human rights without the good faith and political resolve of national governments.⁴⁰ This may be difficult to obtain in countries lacking a human-rights culture and/or the infrastructure to promote and protect human rights.

Asian states seized the opportunity to criticize contemporary approaches to human-rights protection in the 1993 Bangkok Declaration, which preceded the World Conference on Human Rights held in Vienna that same year.⁴¹ While the Declaration accepts the universality of human rights in general, albeit with the qualification that international norms are subject to historical, cultural, and religious particularities,⁴² the issue of acceptable enforcement methods remains politically sensitive.⁴³ Countries have expressed concerns that human-rights enforcement may breach the principle of nonintervention in the internal affairs of states.⁴⁴ The Bangkok Declaration criticized the selectivity in the implementation and

Beng, *Asean human rights body launched*, STRAITS TIMES (Sing.), Oct. 24, 2009, available at <http://www.pmo.gov.sg/News/Transcripts/Prime+Minister/Asean+human+rights+body+launched.htm>. The terms of reference, which will be reviewed every 5 years, are available at <http://www.aseansec.org/publications/TOR-of-AICHR.pdf>.

40. For a detailed discussion of the involvement of Asian states in the U.N. human-rights regime and state reporting, see generally JOSHUA CASTELLINO & ELVIRA DOMÍNGUEZ REDONDO, *Empirical Analysis of Asian States' Participation in the UN Human Rights Machinery, in MINORITY RIGHTS IN ASIA: A COMPARATIVE LEGAL ANALYSIS* 26, 26-42 (2006).

41. See World Conference on Human Rights, Mar. 29 - Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, ¶ 8, U.N. Doc A/CONF.157/ASRM/8 (Apr. 7, 1993) [hereinafter Bangkok Declaration].

42. See *id.* ¶ 8 ("Recognize that while human rights are universal in nature, they must be considered in the context of dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."); see also Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/24 (July 12, 1993) ("All human rights are universal, indivisible and interdependent and interrelated While the significance of national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of States . . . to promote all human rights and fundamental freedoms.").

43. See Bangkok Declaration, *supra* note 41, ¶ 5 ("Emphasize the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure.").

44. See *id.*

politicization of human rights,⁴⁵ and imposed conditions on development assistance.⁴⁶ While recognizing that states bear the “primary responsibility” for promoting and protecting human rights “through appropriate infrastructure and mechanisms,” and that “remedies must be sought and provided primarily through such mechanisms and procedures,”⁴⁷ the Declaration expresses willingness “to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia.”⁴⁸ The lack of concrete developments more than a decade later suggests political indifference in the matter, however.⁴⁹ Despite the rhetorical swordplay of the Asian values debate conducted in diplomatic and academic circles, there have been genuine institutional human-rights gains in Asian countries, including Malaysia. The Bangkok Declaration welcomed the “important role played by national institutions in the genuine and constructive promotion of human rights” while stating that “the conceptualization and eventual establishment of such institutions” was “best left for the States to decide.”⁵⁰

The Bangkok Declaration reflects Asian states’ concerns about adversarial models of human-rights protection, noting that promoting human rights “should be encouraged by cooperation and consensus” rather than “through confrontation and the imposition of incompatible values.”⁵¹ Asian states seem to envisage adopting an NHRI as an appropriate mechanism,⁵² constructive rather than destructive and genuine rather than politicized. This may well constitute an apology for power, however, insulating human rights from the glare of external scrutiny within the four walls of the state.

45. See *id.* ¶ 7 (“Stress the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that no violation of human rights can be justified.”).

46. See *id.* ¶ 4 (“Discourage any attempt to use human rights as conditionality for extending development assistance.”)

47. See *id.* ¶ 9.

48. See *id.* ¶ 24.

49. See Joshua Castellino, *Asian Regional Systems*, in *THE ESSENTIALS OF HUMAN RIGHTS* 16, 16-18 (Rhona Smith & Christien van den Anker eds., 2005).

50. See Bangkok Declaration, *supra* note 41, ¶ 24; see also Vienna Declaration and Programme of Action, *supra* note 42, ¶ 36 (affirming the importance of national institutions in promoting and protecting human rights, while recognizing the right of each state to select a framework appropriately suited to its national needs).

51. Bangkok Declaration, *supra* note 41, ¶ 24

52. See generally Philip Eldridge, *Emerging Roles of National Human Rights Institutions in Southeast Asia*, 14 *PACIFICA REV.* 209, 209-226 (2002).

B. *The Domestic Dimension: Human Rights in the Malaysian Legal Order*

Many Asian countries, including Malaysia, lack what might be called a “human-rights culture.”⁵³ The components of a human-rights culture include a popular consciousness or awareness of human rights, formal processes for initiating rights claims, public perception that these processes as meaningful and useful methods for securing rights and interests, and the regular utilization of such processes. If people do not stand up for their rights, however, courts or other rights-protective institutions are not apt to do so either.

The Malaysian government is based on the colonial legacy of the Westminster system of parliamentary democracy, and has been under the continuous government of a multiparty coalition known as the *Barisan Nasional* (BN) since Malaysia’s independence in 1957.⁵⁴ The chief component of BN is the United Malays National Organisation (UMNO), a strong champion of Malay nationalism and of special economic privileges for *bumiputerans* (sons of the soil) by dint of indigenoussness.⁵⁵

An NHRI in Malaysia must contend with certain factors militating against the development of a human-rights culture. These factors involve the political system, social realities, economic imperatives, and a general lack of understanding or sensitivity to human-rights concerns and priorities. First, the Malaysian government enjoys and seeks to continue enjoying hegemonic rule buttressed by repressive colonial-era laws like preventive-detention laws, which can be used to suppress legitimate political dissent and generate a culture of fear that chills critical speech and debate on

53. See Randall Peerenboom, *What’s Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM RTS. J. 29, 35 (1993) (“Perhaps most importantly, for human rights to be respected, there must be rights consciousness, a culture of rights, an attitude among the people that the government cannot do to them as it wishes. The people must learn to stand up to the government and insist on their rights. They must demand that the judiciary and the body responsible for constitutional review perform their designated functions in the face of opposition from political powers.”).

54. See H.P. Lee, *Human Rights in Malaysia*, in HUMAN RIGHTS IN ASIA, *supra* note 9, at 191, 191 [hereinafter Lee, *Human Rights in Malaysia*]. Notably, the *Barisan Nasional* suffered heavy losses in the 2008 general elections in losing, for the first time since independence, its two-thirds parliamentary supermajority, with opposition parties securing 82 seats (out of 222 seats in parliament) or 36.9 percent of parliamentary seats. See Malaysia 12th General Elections Resource Page—Election 2008, <http://www.mycen.com.my/malaysia/election2008.html>.

55. See H.P. Lee, *Competing Conceptions of Rule of Law in Malaysia*, in ASIAN DISCOURSES OF RULE OF LAW 225, 233-35, (Randall Peerenboom ed., 2004).

public issues.⁵⁶ Under this type of regime, the rule of law is apprehended in formalist terms as rule *by* law, which poses no real limit to state power, and courts may valorize public order in rights adjudication by construing public goods, rather than rights, as “trumps.”⁵⁷

Second, Malaysia is a plural society threatened by racial-religious fissures, and maintaining public order is of paramount importance.⁵⁸ The Malaysian government considers maintenance of social harmony and stability integral to a secure financial-investment environment, and may translate this into corresponding restrictions on rights and political liberties where they consider their exercise disruptive to public order.⁵⁹ Indeed, Foreign Minister Badawi stated at the 1993 Vienna Conference on Human Rights that “the rights of the individual are certainly not in splendid isolation from those of the community,” rejecting excessive individualism as an agent of moral decay which weakens the social fabric.⁶⁰

Third, the logic that prioritized economic growth at the expense of political liberties has been validated by a large measure of empirical success.⁶¹ This success has fuelled the articulation, in diplomatic circles, of an “Asian values” model of law and development based on economic without political liberalization, as a challenge to Western-liberal-democratic notions of law and society.⁶² This model assumes that development and democracy are not mutually reinforcing, and makes development imperative and human rights contingent upon attaining a developed state.⁶³ The model thinly disguises an apology for power, allowing states to maintain broad executive powers which may be exercised in the interest of development to subjugate civil society through the control of trade unions and other associational and speech rights.

56. See Lee, *Human Rights in Malaysia*, *supra* note 54, at 197-203.

57. See generally Li-ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN. L. 428 (2006).

58. See Lee, *Human Rights in Malaysia*, *supra* note 54, at 216.

59. See *id.* at 195-219.

60. *Statements by Representatives of Asian Governments at the Vienna World Conference on Human Rights*, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC 213, 236 (James T.H. Tang ed., 1995) [hereinafter *Vienna World Conference Statements*] (reporting statements of then-Malaysian Foreign Minister Abdullah Badawi).

61. See Lee, *Human Rights in Malaysia*, *supra* note 54, at 209-14.

62. See Michael C. Davis, *The Price of Rights: Constitutionalism and the East Asian Economic Development*, 20 HUM. RTS. Q. 303, 308-313 (1998).

63. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 1-11 (1999) (arguing that political participation and dissent are constitutive parts of the process of development).

How does an NHRI fit into this state ideology, one in which human welfare is promoted without recourse to human rights as justiciable entitlements, and economic success justifies or at least excuses extensive government intervention in the public and private sector? NHRIs certainly have a role in shaping development discourse in developing states through the incorporation of a human-rights perspective, pointing out the danger of development without equity. Vulnerable sectors of society, such as indigenous peoples, may find themselves governed by a state still shackled to a colonial mindset, in a state of "internal colonialism" characterized by economic neglect, the imputation of inferiority toward their cultures, and assimilation attempts.

Where a state is democratizing rather than democratic, promoting rather than protecting human rights will take center stage, as the practice of human rights rests on the socialization of human-rights norms and perspectives.⁶⁴ NHRIs can play an important role in this process. Unlike judicial review, which is retrospective and centered on remedies for a particular case, an NHRI can address human-rights situations that implicate cultural systems, such as gender discrimination, and socioeconomic rights, which may be considered nonjusticiable. NHRIs can also proactively seek to articulate benchmarks and translate international standards into the domestic context.

C. *NHRIs as Mediating Institutions between the International / Municipal and State / Civil-Society Divides: Going Global by Going Local*

NHRIs operate as mediating institutions at various levels. They translate international human-rights norms into the municipal legal system by seeking harmonization of domestic and international norms. For example, an NHRI may recommend ratification of various treaties or conduct human-rights training for police and military forces to promote the internalization of these norms. By encouraging dialogue about global and local human rights, an NHRI may emphasize the universality of human rights as a minimal standard of humane governance, underscoring the principle of respect for human dignity as a factor in evaluating the legitimacy of governments.

Emphasizing the universality of human rights is particularly important in Asian states, where some sectors of government and

64. See Thio, *supra* note 39, at 29, 32.

society, influenced by memories of colonial rule, may view human rights with suspicion and as alien and imperialistic norms imposed by Western liberal societies.⁶⁵ One immediate virtue of creating an NHRI is the legitimization of rights discourse as local discourse.⁶⁶ Even if human rights are not indigenous, an NHRI imports the norms, and they form an aspect of the dynamic culture of a modern state, which, in this era of globalization, is not immune to exogenous influences. An NHRI renders moot the tired relativist rhetoric⁶⁷ that human rights are products of the West⁶⁸ and inconsistent with Asian culture or “Asian values”⁶⁹ because, among other reasons, many Afro-Asian states had no significant role in drafting foundational human-rights documents such as the 1948 Universal Declaration of Human Rights.⁷⁰ The increasing engagement of Asian countries with the U.N.-human-rights-treaty regime further strengthens acceptance of human rights as a facet of good governance.⁷¹

Human rights are not culturally neutral, but are predicated on the principle of normative individualism. The development of human-rights regimes was spurred by the spectre of the European barbarism that gave birth to the Holocaust, which demonstrated

65. See Thio, *supra* note 39, at 6-10.

66. In response to being asked whether Malaysia perceives human rights to be a western concept, Suhakam Chair Abu Talib Othman stated:

[i]t's not a western concept. Our human rights principles are based on the Universal Declaration of Human Rights 1948. It's a question of perception because a country can have its own laws to suit the circumstances of that country so long as it does not contravene basic human rights principles.

Anis Ibrahim, Leslie Andres & Koh Lay Chin, *Call for Freer Judiciary*, NEW STRAITS TIMES (Malay.), Sept. 10, 2006, at 6, available at <http://www.highbeam.com/doc/1P1-128576200.html> [hereinafter *Call for Freer Judiciary*].

67. See generally ANTHONY J. LANGLOIS, *THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST THEORY* (2001).

68. See Makau Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L LAW 512, 592-601 (1996); Farish A. Noor, *Beyond Eurocentricism: The Need for a Multicultural Understanding of Human Rights*, in *DEALING WITH HUMAN RIGHTS: ASIAN AND WESTERN VIEWS OF THE VALUE OF HUMAN RIGHTS* 50-51 (Martha Meijer ed., 2001).

69. See Randall Preenboom, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia,"* IND. INT'L & COMP. L. REV. 1, 6-7 (2003); MICHAEL D. BARR, *CULTURAL POLITICS AND ASIAN VALUES: THE TEPID WAR* 4-5 (2002). Onuma Yasuaki, *Quest of Intercivilizational Human Rights: "Universal" vs. "Relative" Human Rights Viewed from an Asian Perspective*, 1 ASIA PAC. J. HUM. RTS. & L. 53, 58-59 (2000); Yash Ghai, *Human Rights and Governance: The Asia Debate*, 1 ASIA PAC. J. HUM. RTS. & L. 9, 29-36 (2000).

70. But see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 224-25 (2001) (highlighting the involvement of a large number of persons from diverse backgrounds in the drafting, deliberation, and adoption processes).

71. CASTELLINO & REDONDO, *supra* note 40, at 26.

the prudential necessity of installing strong rights regimes to protect against the excesses of centralized and coercive state powers.⁷²

The 1993 Bangkok Declaration expressed concern about the overemphasis of civil and political human rights in current human-rights regimes.⁷³ At the time of the Declaration, Malaysian Foreign Minister Badawi criticized the preoccupation with civil-political rights and stated that Malaysia took a more holistic, all-encompassing view of human rights.⁷⁴ The Declaration emphasizes meeting the basic needs of people in their "daily struggle" for food, shelter, education, and health, and considers civil and political rights to have little meaning without this socioeconomic underpinning.⁷⁵

By giving attention to the indivisibility of economic, social, cultural, civil, and political rights, NHRIs may correct the overemphasis of civil and political human rights. NHRIs may promote human rights in an integrated manner by bringing socioeconomic rights to the forefront, assuming this falls within the parameters of their mandate. Promotion of socioeconomic human rights is particularly important in jurisdictions that do not recognize justiciable socioeconomic rights.

At another level, NHRIs possess the potential to serve as bridges between the government and nongovernmental sector. NHRIs are distinct from nongovernmental organizations (NGOs) because they are government-created and state-funded bodies, and are therefore vulnerable to the pressures of government control. The same official status allows NHRIs greater access to government bodies, however, and possibly greater influence in shaping policy. NHRIs may partner with civil society in their monitoring, educational, and investigative functions, facilitating the process of democratization by enlarging the democratic space for rights discourse. NHRIs empower individuals and other organs of civil society to articulate human-rights claims in a formal setting that serves as a focal point for human-rights discourse. In the absence of institutionalization, domestic human-rights discourse may be somewhat diffused.⁷⁶ Institutionalization promotes awareness not only of

72. See MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 79-86 (Princeton University Press 1999) (2001) (analyzing the impact the Holocaust has upon the prevailing notions of human-rights regimes).

73. See Bangkok Declaration, *supra* note 41, pmbl.

74. See *Vienna World Conference Statements*, *supra* note 60, at 231 (reporting statements of then-Malaysian Foreign Minister Abdullah Badawi).

75. See Bangkok Declaration, *supra* note 41, pmbl.

76. See Li-ann Thio, *Taking rights seriously? Human Rights law in Singapore*, in *HUMAN RIGHTS IN ASIA*, *supra* note 9, 158, 158-62, 171-74 (arguing that the fact that dedicated

human-rights norms, but of the existence of regular procedures and permanent channels for vindicating human-rights claims. This may alter the culture of a society that gravitates around informal methods of dispute resolution and emphasizes personal kinship ties and duties rather than rights.

D. *Watchdog or Lapdog? Institutional Capacity and Supportive Environment in Evaluating NHRI Performance*

One of an NHRI's functions is to mainstream human-rights concerns, perspectives, and priorities in the workings of government; the formulation of public policy; and the consciousness of society. Various factors, both institutional and environmental, are relevant in evaluating the efficacy and role of an NHRI as a mechanism dedicated to promoting and protecting international human-rights law and government accountability within a domestic constitutional order. The institutional competence of an NHRI and the government motivation in creating it is particularly important where NHRIs lack enforcement power and their ability to effectively function depends significantly on government good will and good faith.

Government and civil-society interactions with and attitudes toward NHRIs provide useful insights in evaluating the impact and performance of NHRIs. Other relevant criteria in evaluating an NHRI include the extent to which they safeguard and advance the universality and indivisibility of international human-rights standards and the extent to which people consider the institution to be accessible, representative, and legitimate. One should ask: Is the NHRI of practical utility or does it merely provide another level of bureaucracy? Does the NHRI meet public expectation and empower civil society, and is it itself accountable and transparent in its processes? Can the NHRI be made responsible where it is seen to be in dereliction of duty, e.g., through public-law claims for breach of statutory duties?

III. THE HUMAN RIGHTS COMMISSION OF MALAYSIA: HISTORY, RATIONALE, AND FRAMEWORK OF POWERS

A. *Human Rights within the Malaysian Political-Legal Order*

Johan Saravanamuttu, an informed commentator, has noted that since Malaysia gained its independence in 1957, the practice of

human-rights mechanisms are apt to solidify human rights consciousness is probably why Asian states like Singapore refuse to create them).

human rights in the Federation of Malaysia has “steadily slid downhill.”⁷⁷ There are three primary causes of this regressive trend.⁷⁸ First, weak exercise of judicial-review powers, characterized by general deference to executive discretion, has led to the erosion of constitutional liberties, particularly after the 1988 constitutional crisis, which impaired judicial independence when the highest judicial officer was fired from his post.⁷⁹ Recently, Malaysian civil courts have abdicated their responsibility as guardians of such fundamental liberties, particularly in religious-freedom disputes concerning religious conversion, by disavowing jurisdiction in favor of religious courts.⁸⁰

The second cause of Malaysia’s human-rights regression is the truncation or elimination of judicial review of preventive detention orders—including via writs of habeas corpus—following the 1988/1989 amendments to the Internal Security Act of 1960.⁸¹ The third cause is the steady centralization of powers in the strong parliamentary executive that has taken place through constitutional amendments reducing local state powers and diminishing the legal and symbolic role of the constitutional monarchy and Malay sul-

77. See Johan Saravanamuttu, *Report on Human Rights in Malaysia*, ALIRAN ONLINE, <http://www.aliran.com/oldsite/hr/js1.html> (last visited Nov. 22, 2009). In 2005, the U.S. State Department’s country report on Malaysia identified the following human rights issues: (a) abridgement of citizens’ right to change their government; (b) incomplete investigation of detainee deaths and prisoner abuse; (c) overcrowded prisons; (d) detention of persons without trial or adequate access to legal representation; (e) lengthy confinement of immigrants in detention camps in poor and overcrowded conditions; (f) corporal punishment (caning) of illegal migrants and other prisoners; (g) restrictions on freedom of the press; (h) restrictions on freedom of assembly and association; (i) increased constraints on the ability of Muslims to change their religion; (j) violence against women; (k) treatment of trafficking victims as illegal migrants; (l) ethnic discrimination; (m) minimal labor law protection for household workers. U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005, at 894 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61615.htm>.

78. See Saravanamuttu, *supra* note 77.

79. See Wu Min Aun, *The Malaysian Judiciary: Erosion of Confidence*, 1 AUSTL. J. ASIAN L. 124, 131 (1999) (“The judicial sackings and events surrounding them were a major blow to judicial independence.”); see also H.P. LEE, CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA 43-77 (1995).

80. See Li-ann Thio, *Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation*, 2 MALAYAN L.J. i, xvii-xviii (2006).

81. See HUMAN RIGHTS WATCH, CONVICTED BEFORE TRIAL: INDEFINITE DETENTION UNDER MALAYSIA’S EMERGENCY ORDINANCE 8 (2006), available at <http://www.hrw.org/en/node/11224/section/1> (“Judicial review of EO orders is circumscribed. A 1989 amendment eliminated judicial review of the merits of EO determinations and section 7(C) of the law now specifically prohibits a court from reviewing such challenges.”); see also Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia’s Internal Security Act*, 27 FORDHAM INT’L L.J. 1345, 1396-97 (2003).

tans.⁸² Through a wide array of coercive laws like the Societies Act, the Sedition Act, the Newspaper Printing and Presses Act, the Trade Unions Act, the University and University Colleges Act, etc., the government has given itself various societal-control mechanisms, accoutrements of a semiauthoritarian state which operate to restrict fundamental liberties such as personal liberty and freedom of speech, assembly, and association under a broad construction of “public order.”⁸³ Systemic human-rights violations, like police violence and custodial deaths, also occur, often without redress.⁸⁴

On the positive side, certain judges have begun to adopt more rights-expansive approaches to judicial review,⁸⁵ and marginalized indigenous communities have been able to secure some measure of judicial protection through the recognition of native title.⁸⁶ Malaysia has also ratified several human-rights treaties, most notably the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of

82. See H.P. Lee, *The 1983 Constitutional Crisis, in CONSTITUTIONAL LANDMARKS IN MALAYSIA: THE FIRST 50 YEARS 1957-2007*, at 241 (Andrew Harding & H.P. Lee eds., 2007) [hereinafter *CONSTITUTIONAL LANDMARKS IN MALAYSIA*].

83. See Lee, *Human Rights in Malaysia, supra* note 54, at 195-209.

84. See *id.* at 204-08; SUARA RAKYAT MALAYSIA [SUARAM], *Detention Without Trial, in MALAYSIA: HUMAN RIGHTS REPORT CIVIL AND POLITICAL RIGHTS 2004*, at 21, 21-47 (2005) [hereinafter *SUARAM HUMAN RIGHTS REPORT 2004*]. But see Abd Malek bin Hussin v Borhan bin Hj Daud & Ors [2008] 1 MLJ 368, 370-71, 373 (Malay.) (finding maltreatment during preventive detention and awarding exemplary damages upon such a finding).

85. See generally Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary, in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 78-80* (Donald Jackson & C. Neal Tate eds., 1992); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 498-99 (1989). There have been attempts to import Indian jurisprudence construing the right to life clause broadly to encompass the right to livelihood. See generally Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, 288-89 (Malay.). Malaysia, however, has not adopted the broad construction of liberal standing rules akin to the Indian public interest litigation model which seeks to ensure broad judicial access to all communities, particularly disadvantaged ones. For example, when Suhakam was sued for breach of statutory duty for allegedly not investigating the Kampung Medan incident (involving ethnic violence and the death and injury of members of the minority Indian community), the courts held that the plaintiff, who did not suffer injury or financial loss from the incident, did not to possess the requisite standing to bring the suit. See *Subramanian Vythilingam v Human Rights Comm'n of Malay.* [2003] MLJU 94, at *46 (Malay.).

86. See *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, 300-01 (Malay.) (discussing native and customary title); see also Ramy Bulan, *Native Title as a Proprietary Right Under the Constitution in Peninsula Malaysia: A Step in the Right Direction?*, 9 ASIA PAC. L. REV. 83, 85-87 (2001); Cheah Wui Ling, *Sagong Tasi and Orang Asli Land Rights in Malaysia: Victory, Milestone or False Start?*, 2 LAW SOC. JUST. & GLOBAL DEV. J. § 2.1.3 (2004), available at http://www2.warwick.ac.uk/fac/soc/law/elj/Igd/2004_2/cheah/; Santha Oorjitham, *Sagong Tasi breaks ground on human rights*, NEW STRAITS TIMES (Malay.), Feb. 6, 2006, at 16.

the Child (CRC) in 1995, albeit with reservations.⁸⁷ Despite the fact that Malaysia was then a leading proponent of the “Asian values” school, this engagement with positive human-rights law indicated clearly that human-rights issues could not be summarily dismissed by the old dogma that it fell within the domestic jurisdiction of the state. Malaysia’s nascent engagement with the U.N. human-rights treaty, however, has thus far only yielded two state reports in relation to CEDAW⁸⁸ and CRC⁸⁹ obligations. Malaysia, like most common-law countries, subscribes to a dualist model which requires that international treaty obligations be incorporated by legislation before they have effect within the municipal legal system. CEDAW has not been given statutory expression, and although invoked in court, courts have held that human-rights treaties do not have “horizontal” effect and do not affect private parties.⁹⁰

In the nongovernmental sector, Malaysia is witnessing a burst of human-rights activism in the form of active NGOs⁹¹ and in cyber-

87. See Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; see also HUMAN RIGHTS COMM’N OF MALAYSIA, [SUHAKAM], ANNUAL REPORT 2005, at 22, 101 (2006) [hereinafter SUHAKAM ANNUAL REPORT 2005] (noting that Malaysia had not enacted legislation incorporating CEDAW into law).

88. See Office of the High Comm’r for Human Rights, Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Malaysia, ¶ 45, U.N. Doc. CEDAW/C/MYS/1-2 (Apr. 12, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/d9ae63be9d155c09c125728500459cb6/\\$FILE/N0430980.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/d9ae63be9d155c09c125728500459cb6/$FILE/N0430980.pdf) (“Article 8 of the Federal Constitution clearly embodies the spirit of Article 7 of the Universal Declaration of Human Rights. The principle of non-discrimination contained in CEDAW was incorporated into the Federal Constitution with the amendment of Article 8(2) to state that no discrimination is to be made on the ground of gender.”).

89. See generally Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Malaysia*, U.N. Doc. CRC/C/MYS/1 (Dec. 20, 2006).

90. Concerning the dismissal of a pregnant air stewardess by a private employer, the Malaysian Federal Court held that “Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual’s legal right by another individual.” *Beatrice Fernandez v Sistem Penerbangan* [2005] 3 MLJ 681, 688 ¶ 14 (Malay.).

91. For example, in 1994, 50 NGOs got together and endorsed a Malaysian Human Rights Charter. See Malaysian Non-Governmental Organizations, *Malaysian Charter on Human Rights* (1994). Its 20 articles relate to (1) the universality of human rights (2) the indivisibility of economic, social, cultural, civil and political rights (3) women’s rights (4) the right to holistic development (5) the right to participatory democracy (6) the right to access to, and redress by international institutions (7) the right to a sustainable environment (8) to right to equality and non-discrimination (9) acknowledgement of basic needs and equal access (10) rights to employment and fair working conditions (11) rights to

space,⁹² although restricted associational rights and the prospect of defamation suits curtail it somewhat.⁹³

B. *The Birth of Suhakam: Great Expectations or the Great Pretender?*

Notably, the informed commentator Saravanamuttu, mentioned above, cites the creation of the Human Rights Commission of Malaysia (Suhakam) as a positive state-initiated development.⁹⁴ Suhakam's effectiveness may depend, however, on which particular human right is involved, the method of promotion or protection adopted, and the level of official resistance encountered. The nature of its powers and the method of composing Suhakam are relevant factors, as an NHRI and its members need sufficient powers to monitor human rights as well as expertise.

1. Powers and Functions of Suhakam: Promotional and Monitoring Rather than Protective

The powers of Suhakam are more oriented toward promotional than protective activities, and include advisory, educative, and impartial investigatory functions.⁹⁵ Section 4(1) of the Suhakam Act stipulates Suhakam's functions:

- (a) to promote awareness of and provide education related to human rights;
- (b) to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;
- (c) to recommend to the Government subscription or accession of treaties and other international instruments in the field of human rights; and

education, one's own language, culture and religion (12) rights to personal safety (13) rights to freedom of association and assembly (14) rights to freedom of expression and access to information (15) rights of children (16) rights of indigenous people (17) rights of the disabled (18) rights of refugees and foreign workers (19) human-rights training and education (20) the limiting of emergency powers and the support of an independent judiciary.

92. See Tang Hang Wu, *Let a thousand flowers bloom Let a Hundred Flowers Bloom: Digital Speech in Malaysia*, 1(1) *ASIAN J. COMP. L.* art. 12, at 4-5 (2006), available at <http://www.bepress.com/asjcl/vol1/iss1/art12>.

93. See e.g., Pauline Puah, *NST sues Jeff Ooi, Rocky for defamation*, SUN WEB EDITION (Malay.), Jan 18, 2007, <http://www.sun2surf.com/article.cfm?id=16725>.

94. See Saravanamuttu, *supra* note 77. Suhakam was created by created by legislative act in 1999. See Human Rights Commission of Malaysia Act 1999, Act 597, L. MALAY. vol. 12 (2006), available at <http://www.agc.gov.my/agc/Akta/Vol.%2012/Act%20597.pdf> [hereinafter SUHAKAM Act].

95. See Mahadev Shankar, *Suhakam: The National Human Rights Commission*, in *CONSTITUTIONAL LANDMARKS IN MALAYSIA*, *supra* note 82, at 241, 249-50.

- (d) to inquire into complaints regarding infringements of human rights referred to in section 12.⁹⁶

To enable Suhakam to discharge these functions, Section 4(2) provides that it may undertake research activities through conducting seminars, programs, and workshops, advise government bodies against whom complaints have been made to take appropriate measures, study and verify human-rights infringements, visit places of detention, issue public statements on human rights, and conduct any other appropriate activity.⁹⁷ To carry out its duties and functions more effectively, Suhakam has formed specific working groups on education; law reform; treaties and international instruments; economic, social, and cultural rights; and complaints and inquiries.⁹⁸

a. Access and Accessibility

One of the virtues of an NHRI is that it is more accessible to the public of the state than a human-rights body in Geneva or New York. Originally, and perhaps quite symbolically, Suhakam's first home was a container located outside of the Ministry of Foreign Affairs.⁹⁹ Eventually, it rented premises in a central location in Kuala Lumpur to facilitate public access.¹⁰⁰ Suhakam has also set up branch offices in the East Malaysian states of Sabah and Sarawak to ensure readier access by indigenous communities. Suhakam was later placed under the wing of the Ministry of Defence and subsequently, in the Prime Minister's Office under the watchful eye of deputy prime minister Mohamed Najib, a strong proponent of national-security laws.¹⁰¹

Access to Suhakam does not mean merely physical access; there is little point in having a commission if the local population is unaware of it or its work. To this end, some have expressed concerns that Suhakam's annual report ought to be published not only in English but also in the Malay language, to reach a wider public.¹⁰²

96. See SUHAKAM Act, *supra* note 94, § 4(1).

97. See *id.* § 4(2).

98. See Human Rights Commission of Malaysia [SUHAKAM], Working Groups/Committees, <http://www.suhakam.org.my/152> (last visited Nov. 30, 2009).

99. *History of SUHAKAM*, *supra* note 22.

100. It moved into its current premises on the 29th and 30th floors of Menara Tun Razak at Jalan Raja Laut, Kuala Lumpur on November 24, 2000. See *id.*

101. See SUARAM HUMAN RIGHTS REPORT 2004, *supra* note 84, at 168 (detailing the history of SUARAM's placement within the Malaysian governmental structure).

102. Marimuthu Nadason, *Welcome Address*, in THIRD CONSULTATION, *supra* note 17, at 1-4.

b. Receiving Complaints

Under Section 4 of the Suhakam Act, Suhakam may inquire into complaints concerning human-rights infringement to verify the claims.¹⁰³ The very act of issuing complaints requires some knowledge of the law and rights consciousness. The complaints form lists six specific questions designed to solicit adequate information from the complainant:

- (1) What rights are being infringed (if you can identify the rights)?
- (2) Whose rights are being infringed?
- (3) Who is infringing the rights?
- (4) How are the rights being infringed?
- (5) Where and when did the infringement take place?
- (6) What remedy do you seek?¹⁰⁴

The Suhakam Complaints and Inquiries Working Group holds dialogue sessions with stakeholders and undertakes site visits. The 2005 Annual Report shows a marked increase in the number of complaints received—the 1342 complaints received in 2005 represented an all-time high and a 118.6 percent increase over the 614 complaints received in 2004, and an even greater increase over the 152 complaints received in Suhakam’s first year of operation.¹⁰⁵ The content of these complaints relate primarily to government agencies (police inaction, violence, death in custody, application for assembly permits), the Internal Security Act, and increasingly, land disputes.¹⁰⁶ The “dramatic escalation” in the number of complaints received is attributed to “a high level of human rights awareness in recent years.”¹⁰⁷

c. Investigations and Inquiries

Section 12 of the Suhakam Act empowers Suhakam to inquire into alleged human-rights infringement upon receiving a complaint from an aggrieved person or on its own motion.¹⁰⁸ Pursuant to Section 14, Suhakam can receive all necessary written or oral evidence and summon any person resident in Malaysia to a Suhakam meeting.¹⁰⁹ Where an inquiry yields no finding of an

103. See SUHAKAM Act, *supra* note 94, § 4.

104. Human Rights Commission of Malaysia [SUHAKAM], eComplaint, http://www.suhakam.org.my/en/complaints/form_online.asp.

105. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 65-66.

106. See *id.* at 65-67 (providing a breakdown of types of claims in 2005).

107. See *id.* at 65.

108. See SUHAKAM Act, *supra* note 94, § 12.

109. See *id.* § 14

infringement, the complainant must be duly informed; if otherwise, Suhakam can make recommendations to the relevant authority.¹¹⁰

To prevent an overlap with the judicial function, Sections 12(1) and (2) provide that no inquiry shall be made into any complaint which is the subject matter of pending judicial proceedings or final judicial determination.¹¹¹ The courts reciprocate this respect for jurisdictional boundaries. In *Vythilingam v. Human Rights Commission of Malaysia*, the High Court in Malaya (Kota Bharu) recognized that Suhakam had discretion whether to hold an inquiry and stated that “this court cannot interfere with the discretion of Suhakam when it decides not to hold an inquiry.”¹¹² The court found that no writ of mandamus lay against Suhakam.¹¹³ Nevertheless, the court suggested that Suhakam could hold a watching brief to indicate its interest in continued monitoring of an incident for which it suspended its investigation in anticipation of it becoming the subject of court proceedings.¹¹⁴ After the court proceedings end, Suhakam can resume its investigations without intruding into the judicial province. Subsequently, Suhakam held a watching brief in the associational-freedom case of *Dr. Mohd. Nasir bin Hashim v. Menteri Dalam Negeri Malaysia*.¹¹⁵

2. Composition of Suhakam

The Paris Principles recommend that the composition of an NHRI should be broad and afford “all necessary guarantees to ensure the pluralist representation of the social forces (of civil society) involved in the protection and promotion of human rights.”¹¹⁶ Indeed, the legitimacy of an institution largely resides in the popular perception that its personnel is independent, possesses a commitment to and expertise in human rights, and holds sufficient powers to effectively discharge the institutional mandate, without fear or favor.

110. *See id.* § 13.

111. *See id.* § 12

112. *Vythilingam v Human Rights Comm'n of Malay*. [2003] MLJU 94, at *34 (Malay).

113. *Id.* at *68 (dismissing the plaintiff's case).

114. Vice-Chairman of SUHAKAM, Tan Harun Hashim, agreed to make this part of the standard operating procedure. *See* Tan Harun Hashim, *Question and Answer Session, in* THIRD CONSULTATION, *supra* note 17, at 15, 19 [hereinafter Hashim, THIRD CONSULTATION].

115. *Mohd Nasir bin Hashim v Menteri Dalam Negeri* [2006] 6 MLJ 213 (Malay.).

116. This would include NGOs engaged in human-rights activism, leaders in philosophical or religious thought, universities and qualified experts, parliament and government departments.

The Suhakam Act provides for a maximum of twenty commissioners.¹¹⁷ Commissioners enjoy immunity from legal prosecution for acts done in their official capacity.¹¹⁸ Unlike other commissions, Suhakam, pursuant to the Suhakam Act, does not require its commissioners to have legal training or human-rights expertise: Section 5(3) provides that commissioners “shall be appointed from amongst prominent personalities including those from various religious and racial backgrounds” for two-year renewable terms.¹¹⁹ This indicates that Suhakam should be multiracial without stipulating a racial quota. Commissioner appointments are essentially made by the executive, through appointment by the king on the prime minister’s recommendation.¹²⁰ There is a lack of gender sensitivity in the criteria, and prominence is prized more highly than ability, which is perhaps indicative of the feudal nature of Malaysian society and the importance it places on status. This also hints at the informality of approach that is sometimes adopted to address disputes.

The commissioners are appointed for renewable two-year terms and enjoy no security of tenure.¹²¹ The prime minister effectively decides who to appoint or reappoint, so commissioners are subject to the sanction of nonappointment.¹²² Indeed, some have criticized the government for penalizing active Suhakam commissioners by not reappointing them.¹²³ For example, when the terms of two respected commissioners, Anuar Zainul Abidin and Mehrun Siraj, were not renewed, some perceived it as retaliation for the robust manner in which they discharged their duties, specifically with regard to the Kemas Highway inquiry, in which Suhakam produced a critical report finding that the police had committed human-rights violations against peaceful demonstrators.¹²⁴

117. See SUHAKAM Act, *supra* note 94, § 5(1). This is a large number in comparison to other commissions; for example, the Philippines Commission on Human Rights has only 5 commissioners. See CONST. REP. PHIL. § 17(2) (1987) (creating the Commission on Human Rights).

118. See SUHAKAM Act, *supra* note 94, § 18(1).

119. *Id.* § 5(3).

120. *Id.* § 5(2).

121. See *id.* § 5(4).

122. See *id.* §§ 5(2), 5(4).

123. See *No Engagement with Suhakam for 100 Days*, ALIRAN MONTHLY (Malay.), Apr. 2002, <http://www.aliran.com/oldsite/monthly/2002/4j.html>.

124. See generally HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], INQUIRY 2/2000: INQUIRY ON ITS OWN MOTION INTO THE NOVEMBER 5TH INCIDENT AT THE KEMAS HIGHWAY (2001), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23908&folderId=26457&name=DLFE-703.pdf [hereinafter SUHAKAM, KEMAS HIGHWAY INQUIRY].

Commissioners lacking human-rights expertise cannot hit the ground running, but must be socialized into an understanding of human-rights norms, approaches, and priorities. A senior member of the Suhakam secretariat¹²⁵ noted that commissioners have gleaned human-rights knowledge from such standard textbooks as Steiner & Alston's *International Human Rights in Context: Law, Politics, Morals*.¹²⁶

Thus far, Suhakam commissioners have included academics, civil-society activists, retired judges, and what some have criticized as a disproportionate number of representatives from the corporate sector or bureaucracy "with little or no background in human rights advocacy."¹²⁷ Indeed, some commissioners were thought to view their appointment as "prestigious and comfortable part-time retirement jobs."¹²⁸

A particular appointment in 2002 greatly disconcerted civil-society groups—that of former attorney general Abu Talib Othman.¹²⁹ As attorney general, Othman had executed repressive government measures such as Operation Lallang and preventive detention of opposition leaders.¹³⁰ Aggrieved, thirty-two NGOs disengaged with Suhakam for one hundred days to protest the appointment and scant respect the government had shown for Suhakam recommendations.¹³¹ After this period, the NGOs noted the lack of "positive change" in the government's manifest indifference toward Suhakam reports.¹³²

Othman appears to have made an about-turn on certain issues in relation to the access to justice, however, calling for the repeal of ouster clauses (which he had drafted) which precluded judicial review of preventive-detention cases.¹³³ He stated this was neces-

125. See Interview with Long Seh Yih, in Kuala Lumpur, Malay. (Nov. 31, 2006).

126. INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (Henry Steiner et al. eds., 2008).

127. SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 206.

128. *Id.*

129. See Aliran Executive Committee, Letter to the Editor, *Farewell to Suhakam?*, ALIRAN ONLINE, Apr. 13, 2002, <http://www.aliran.com/oldsite/ms/2002/0413.html>.

130. Operation Lallang was an internal security operation effected under the Internal Security Act in 1987 under which 106 persons, including opposition politicians and prominent activists were detained. See Lee, *Human Rights in Malaysia*, *supra* note 54, at 207 (explaining and discussing Operation Lallang).

131. See Ramakrishnan, *supra* note 18, at 26; *No Engagement with Suhakam for 100 days*, *supra* note 123.

132. See *We Will Be Vigilant: NGOs end 100 days of disengagement with SUHAKAM*, ALIRAN ONLINE (Malay.), Aug. 2, 2002, <http://www.aliran.com/oldsite/monthly/2002/8a.html> [hereinafter *We Will Be Vigilant*].

133. See *Call for Freer Judiciary*, *supra* note 66.

sary to secure the right of citizens to have access to justice, a “fundamental nonnegotiable right.”¹³⁴ While he said the provisions were “relevant” fifteen years earlier when he was attorney general, as the press was reporting irresponsibly and security issues abounded, he stated that Malaysia “should repeal them now because they are against human rights.”¹³⁵

3. Delineating Jurisdictional Spheres: Courts and Suhakam

Guideline Three of the Suhakam Inquiries Guidelines directs Suhakam to adopt a “fair procedure,” although the inquiry is “not a proceeding in a Court of Law.”¹³⁶ Suhakam proceedings are meant to be less formal than a judicial setting; inquiries are presumptively to be held in public unless there are “reasonable grounds” for holding it *in camera*.¹³⁷ Suhakam may allow representation by legal counsel and has the power to examine witnesses and receive sworn affidavit evidence.¹³⁸

While courts are better able to secure justice for the individual, NHRIs like Suhakam have the ability to investigate or study “situations” or systemic defects, including cultural stereotypes, and this can be useful when they possess some measure of initiatory powers. Suhakam relies on informal “name and shame” methods of spurring compliance with human-rights norms,¹³⁹ but the strength of this sanction depends on the state of democracy in a country. NHRIs also provide a forum for grievance ventilation, and are more accessible and less costly than litigation. Suhakam does not observe strict rules of standing, but allows anyone to make a complaint to it, either as victim or on behalf of one.¹⁴⁰ Suhakam’s role goes beyond reviewing a particular case to auditing laws, making recommendations about treaty accessions, training public officials,

134. *Id.* This was rebuffed by Minister Nazri who said judicial review of ministerial decisions was “unnecessary because ministers must be given the confidence to make decisions in the interests of the public.” June Ramli & Shahrul Hafeez, *Nazri against court reviews*, NEW STRAITS TIMES (Malay.), Sept. 11, 2006, at 6.

135. *See Call for Freer Judiciary*, *supra* note 66.

136. *See* Human Rights Commission of Malaysia [SUHAKAM], SUHAKAM Inquiries Guidelines, <http://www.suhakam.org.my/en/complaints/procedure.asp>.

137. *See id.*

138. *See id.*

139. Suhakam has no power to issue binding judgments, but is empowered to issue public statements on human rights as and when necessary. *See* SUHAKAM Act, *supra* note 94, § 4(2)(e).

140. *See id.* § 12(1).

educating the general public, monitoring and investigating human-rights situations, and handling complaints.¹⁴¹

C. *Suhakam and Working Methods*

The nature of the sociopolitical and economic environment in which an NHRI operates contains informal constraints which affect the *modus operandi* of such institutions. Consonant with prioritization of consensus instead of contention, and for nonadversarial methods of dispute resolution, Suhakam adopts a nonconfrontational approach in its dealings and dialogue with government bodies, as much depends on harnessing the cooperation of relevant government agencies.¹⁴² Indeed, the Suhakam Inquiries Guideline stipulates that Suhakam-initiated inquiries pursuant to Section 12(1) of the Suhakam Act¹⁴³ “will be inquisitorial and not adversarial in nature.”¹⁴⁴

Suhakam lacks formal enforcement powers aside from the “soft” enforcement techniques of persuasion and education, which are more associated with the promotional than protective aspects of human rights. Suhakam relies heavily on “soft” sanctions like publicity and “carrot and stick” approaches, rather than formal legal sanctions, in seeking compliance with human-rights norms. This has somewhat disappointed those who assumed that Suhakam would be a quick fix to human-rights woes.¹⁴⁵ The “name and shame” tactic does not work well in a strong authoritarian state with a relatively tame judiciary and controlled media, however; instead, an approach grounded in quiet diplomacy helps to keep the channels of communication open.

Although Suhakam is a formally established state institution, the commissioners employ informal methods in discharging their tasks

141. *See id.* § 4.

142. *See* SHANKAR, *supra* note 95, at 251 (“The role of Suhakam . . . is not a confrontational one, but [it] complement[s] government efforts in ensuring a stable and just society.”); *see also* SUHAKAM Act, *supra* note 94, § 4(1).

143. *See* SUHAKAM Act, *supra* note 94, § 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 allegation of the infringement of the human rights of such person or group of persons.”).

144. SUHAKAM, *Suhakam Inquiries Guideline*, *supra* note 136.

145. *See* Marimuthu Nadison, *Foreword to SUHAKAM AFTER 6 YEARS: ARE WE, HONESTLY, MAKING ANY HEADWAY* 1, 3 (ERA Consumer Malaysia ed., 2007), *available at* http://www.digitallibrary.my/dmdocuments/malaysiakini/310_suhakam%20after%206%20years.pdf [hereinafter *SIXTH CONSULTATION*] (“My own disappointment is over the speed with which SUHAKAM responds to human rights violations. It is too slow, and many a time the Commission has moved only when civil rights organisations kicked up a fuss.”).

and rely on personal contacts and standing to get things done, reflecting a culture of patronage.¹⁴⁶ Suaram has characterized Suhakam's nonconfrontational approach and action within the government's bureaucratic framework as "one step forward and two steps back."¹⁴⁷ By relying on their informal networks, the commissioners are not exercising institutional muscle, which is necessary to strengthen the institutional capacity of Suhakam as an actor to be reckoned with within the public-law landscape.¹⁴⁸

1. Education and the Indigenization of Human Rights

The ultimate test of the acceptability of human-rights law lies in its appropriation by the local population.¹⁴⁹ This requires altering perceptions that human-rights law is somehow Western, alien, and irrelevant to the daily lives of Malaysians. Government officials also need to be socialized into human-rights values.¹⁵⁰

In its first year of operation, Suhakam encountered government officials, such as the Prisons Department and director of Medical Service, who did not see the relevance of human rights for their department.¹⁵¹ Commissioners like Tan Sri Harun Hashim "would have to go through all 30 articles of the [Universal Declaration of Human Rights]" with them.¹⁵² Clearly, human-rights culture is still in its infancy in Malaysia, and much work needs to be done in terms of promoting awareness of human-rights norms and procedures.

Suhakam certainly has launched headlong into its educational function and prides itself on raising public awareness of human-rights issues.¹⁵³ In its annual report assessing Suhakam, Malaysian NGO Suaram was critical of the unbalanced preference of

146. See SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 205.

147. *Id.* at 206.

148. See *id.* at 205-06.

149. See IGNATIEFF, *supra* note 72, at 70 (discussing how Pakistani local groups, not international agencies, are leading the charge to defend poor rural women from so-called honor killings.)

150. To promote this the leaning and adoption of human-rights values amongst government officers, Suhakam has held human-rights workshops for police officers, for example. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 90.

151. See Hashim, FIRST CONSULTATION, *supra* note 21, at 7.

152. *Id.*

153. See generally HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], *Report of the Human Rights Education and Promotion Working Group*, in ANNUAL REPORT 2004, at 119 (2005) [hereinafter SUHAKAM ANNUAL REPORT 2004].

Suhakam in the educational aspects of human rights,¹⁵⁴ rather than working “towards intervening in actual human rights violations.”¹⁵⁵

a. Recommendations for Treaty Accession

In the interests of harmonization and ensuring that domestic laws comply with international norms and to promote the universal ratification of the major U.N. treaties,¹⁵⁶ Suhakam has been selective in recommending which human-rights treaties the government should ratify.¹⁵⁷ It has focused on the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture, and the two Optional Protocols to the CRC.¹⁵⁸ In its 2000 Annual Report, Suhakam noted that the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁵⁹ was “crucial to protection of human rights,”¹⁶⁰ but made no clear recommendation that it be ratified.¹⁶¹ NGOs considered CERD “very crucial for a multi-ethnic country like Malaysia,” and suggested it be included on this list.¹⁶²

Suhakam has held forums to discuss Malaysia’s reservations to CRC and CEDAW, and has recommended the removal of some reservations which inhibit the human-rights protections provided for by these international instruments.¹⁶³ Where reservations impli-

154. See SUARAM HUMAN RIGHTS REPORT 2004, *supra* note 84, at 169 (“SUHAKAM seems to favour educational aspects of human rights by holding workshops, consultations, forums, and conferences.”).

155. *Id.*

156. See SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 208.

157. See HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], ANNUAL REPORT 2007, 122 (2008), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23907&folderId=23964&name=DLFE-307.pdf [hereinafter SUHAKAM ANNUAL REPORT 2007] (urging Malaysia to ratify specific listed treaties).

158. *See id.*

159. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. TREATY DOC. 95-18, 660 U.N.T.S. 195.

160. See HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], ANNUAL REPORT 2000, at 28 (2001) [hereinafter SUHAKAM ANNUAL REPORT 2000] (identifying the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) as one of nine crucial major instruments for the protection of human rights).

161. *See id.* at 30 (recommending ratification as soon as possible of three instruments, not including CERD).

162. Rashid Kang, *Malaysia’s commitment to international human rights instruments and mechanisms: A review of Suhakam’s roles, approaches and impact*, in SUHAKAM AFTER 5 YEARS: STATE OF HUMAN RIGHTS IN MALAYSIA 3, 5 (ERA Consumer Malaysia ed., 2007) [hereinafter FIFTH CONSULTATION].

163. See HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], CONVENTION ON THE RIGHTS OF THE CHILD: REPORT OF THE ROUNDTABLE DISCUSSION 10 (2005), available at <http://www.>

cate Islamic laws and principles, however, Suhakam has been cautious in not asking that Malaysia's reservation be lifted yet, preferring to conduct further research into the matter.¹⁶⁴ In relation to the impact of treaty law on domestic law, one of the triumphs Suhakam claims is its role in securing a 2001 constitutional amendment to Article 8 of the Malaysian Constitution (the antidiscrimination clause), to include gender in the list of prohibited grounds of discrimination.¹⁶⁵ Article 2(a) of CEDAW urges state parties to "[e]mbody the principle of the equality of men and women in their national constitution" and otherwise facilitate the practical realization of this principle.¹⁶⁶ While Malaysia's constitutional amendment bears symbolic importance, this has not translated into more egalitarian practices. For example non-Muslim wives often lose custody of their children when their estranged spouses convert to Islam and invoke Islamic personal law.¹⁶⁷

b. Public Inquiries and Media Statements

In utilizing publicity to urge compliance with human-rights norms, Suhakam has employed the "carrot and stick" approach, both criticizing bad government policy or gaps in the law and encouraging positive developments by highlighting advancements.

Suhakam applauded a provision in Malaysia's 2004 budget designed to encourage the disabled to continue working by raising the minimum monthly income (from RM 500 to RM 750) which makes one eligible for the RM 2000 per month Disabled Workers Allowance.¹⁶⁸ Suhakam also commended the Transport Ministry for their move to introduce special counters to serve disabled peo-

suhakam.org.my/218 (explaining that round table discussion had several objectives: "to discuss ways to improve the implementation of the CRC, to improve the consistency between the CRC, the Child Act 2001 and other domestic laws and to recommend to the Government to withdraw the reservations to the CRC"); HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], REPORT OF THE ROUND TABLE DISCUSSION ON CEDAW 26 (2005), *available at* http://www.suhakam.org.my/c/document_library/get_file?p_l_id=14661&folderId=24513&name=DLFE-305.pdf [hereinafter SUHAKAM CEDAW ROUNDTABLE] ("It is timely that Malaysia's reservations to CEDAW be re-examined, particularly reservations premised on Syariah law."). *See also* FIFTH CONSULTATION, *supra* note 162, at 5-6.

164. *See* SUHAKAM CEDAW ROUNDTABLE, *supra* note 163, ¶ 8.2, at 26.

165. *See* SUHAKAM ANNUAL REPORT 2000, *supra* note 160, at 37 (recommending "Article 8(2) of the Federal Constitution be amended to include 'sex' as a prohibited ground for discrimination").

166. *See* CEDAW, *supra* note 87, art. 2(a).

167. *See, e.g.,* Shamala Sathiyaseelan v Jeyaganesh C. Mogarajah [2004] 2 MLJ 648, 648-49 (Malay.).

168. *See* SUHAKAM ANNUAL REPORT 2004, *supra* note 158, at 98-106 (describing the status of rights for the disabled and Suhakam's recommendations).

ple.¹⁶⁹ Suhakam has issued commendatory statements when government decisions—such as Malaysia's decision not to deport eight Achenese refugees, which cited CRC provisions and the principle of non-refoulement,¹⁷⁰ and the issuance of revised Police Rules on Body Searches, designed to avoid a repeat of the notorious naked squat incident—are respectful of human rights.¹⁷¹

Suhakam releases media statements which serve various purposes in facilitating human-rights discourse in Malaysia. For example, Suhakam called on authorities to remedy human-rights abuses in relation to land disputes and indigenous peoples¹⁷² and urged respect for human rights in relation to internal security detainees.¹⁷³ These statements throw the public spotlight on government action. Suhakam also issues statements containing commentary on legislation raising human-rights concerns, although it would be more useful if Suhakam's views were solicited prior to the adoption of the legislation.¹⁷⁴

Pursuant to its investigative function, Suhakam holds public inquiries over custodial deaths and alleged breaches of associa-

169. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], ANNUAL REPORT 2003, at 22 (2004), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/441_annual%20report%202003.pdf [hereinafter SUHAKAM ANNUAL REPORT 2003].

170. See Media Statement, Human Rights Comm'n of Malay. [SUHAKAM], Suhakam: Deportation of Eight Achehnese put on hold (Nov. 29, 2003), *reprinted in* SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 159-60.

171. See *Suhakam lauds police rules on body searches*, NEW STRAITS TIMES (Malay.), Mar. 5, 2006, at 2.

172. See Media Statement, Human Rights Comm'n of Malay. [SUHAKAM], Suhakam: Resolve Land Disputes of the Semai Orang Asli (Nov. 10, 2003), *reprinted in* SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 155-56.

173. See Media Statement, Human Rights Comm'n of Malay. [SUHAKAM], Suhakam: Ensure Human Rights of 13 Students Arrested under the ISA are Protected (Nov. 11, 2003), *reprinted in* SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 157.

174. SUHAKAM ANNUAL REPORT 2003, *supra* note 169 at 167-69. In response to Suhakam's complaint that draft legislation had never been referred to it, the Attorney General's Chambers (AGC) replied that the relevant government departments were free to consult relevant parties, including Suhakam, before submitting the bills to the AGC. Furthermore, upon the first reading, such bills became public documents. In response, Suhakam noted that it and most NGOs were not aware that new bills were being drafted, and that in the interest of giving parties an opportunity to adequately express their views, the legislative process should be made more transparent and publicized to allow for a more in-depth examination. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 192-93.

tional rights.¹⁷⁵ Suhakam also exercises its visitational powers.¹⁷⁶ Section 4 of the Suhakam Act provides that the person in charge of a place of detention shall not refuse a visit by Suhakam “if the procedures provided in the laws regulating such places of detention are complied with.”¹⁷⁷ In practice, this has meant that Suhakam requests to visit detention centers have not been given expeditious treatment, and Suhakam has been denied access to detainees, as noted in *Haroon v. Ketua Polis Negara*.¹⁷⁸

Suhakam has applied pressure on political authorities who are tardy in their investigations, for example, to underscore the urgency of investigating custody deaths and to galvanize the police into taking action and conducting their own inquiry.¹⁷⁹ Suhakam stated in 2005 that it would hold a public inquiry into every custodial death, pursuant to its Section 12(1) power.¹⁸⁰ Commissioner Hamdan stated that the court of public opinion is “more powerful than any court,” in pressuring the police to act.¹⁸¹ This apparently spurred police action in the case of A. Ravindran, in which Suhakam commissioner Datuk Choo Siew Kioh noted the “unexpected keenness” on the part of the police to conduct an inquiry into a long-overdue case of sudden death in custody.¹⁸² As a result,

175. See generally SUHAKAM, KESAS HIGHWAY INQUIRY, *supra* note 124; HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], REPORT OF SUHAKAM PUBLIC INQUIRY INTO THE DEATH IN CUSTODY OF S. HENDRY 17 & 18 FEBRUARY 2006 (2006), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23908&folderId=26457&name=DLFE-647.pdf.

176. Suhakam commissioners have undertaken prison visits from which detailed knowledge about deplorable prison conditions have been obtained, for example overcrowding, skin conditions stemming from a frequent diet of salted fish, lack of medical personnel, and gang formation. See generally *Top gangs formed in detention centre*, NEW STRAITS TIMES (Malay.), Sept. 20, 2006, at 7. Suhakam has also dispatched a team of officers to investigate whether there was any foul play in relation to custodial deaths and to write a report for Suhakam and Internal Security Ministry. See *Injured death row inmate dies*, NEW STRAITS TIMES (Malay.), May 9, 2006 at 6; *Suhakam to probe police death*, NEW STRAITS TIMES (Malay.), Apr. 10, 2006, at 13.

177. See SUHAKAM Act, *supra* note 94, § 4.

178. Abdul Ghani Haroon v Ketua Polis Negara [2001] 6 MLJ 198 (Malay.). From the day of arrest until the last day of the hearing (Tuesday, May 22, 2001), the family members, lawyers, and Suhakam were denied access by the police department, notwithstanding the clear provisions of the Human Rights Commission of Malaysia Act 1999, in particular, Section 4(2)(d). See *id.* at 689-91 (detailing denial of access and violation of federal Constitution).

179. See Sharanjit Singh, *Suhakam move fires up police*, NEW STRAITS TIMES (Malay.) Feb. 23, 2006, at 17.

180. See SUHAKAM Act, *supra* note 94, § 12(1).

181. See SUARA RAKYAT MALAYSIA [SUARAM], MALAYSIA: HUMAN RIGHTS REPORT CIVIL AND POLITICAL RIGHTS 2005, at 135 (2006) [hereinafter SUARAM HUMAN RIGHTS REPORT 2005].

182. See Singh, *supra* note 179.

Suhakam took a backseat role and sent an observer to the police-inquiry proceedings.¹⁸³ Suhakam has continued to threaten public inquires where the authorities fail to complete their investigations, for example, into alleged beatings, within a stipulated time limit.¹⁸⁴ Although Suhakam cannot take action based on its findings, the inquiries are a useful form of pressure when judiciously applied to motivate authorities to act swiftly on matters of public concern.

When the police refused to respond to a formal letter and reminder inquiring about their interference with political liberties in the forceful breakup of protestors outside the Kuala Lumpur Convention Centre (KLCC) on May 28, 2006, Suhakam decided to hold a public inquiry.¹⁸⁵ Actions like this demonstrate the supplementary role of Suhakam when other government organs are in dereliction of duty.

Suhakam can also bring moral pressure to bear on government authorities by issuing public statements, as it did when it publicly criticized the police decision to rearrest the detainees from Simpang Renggam Detention Centre whom the High Court had freed.¹⁸⁶ In its statement, Suhakam declared that “an arrested person should be brought to court and not detained under the Emergency Ordinance.”¹⁸⁷

c. Handling Complaints and Receiving Symbolic Memoranda: The “Sayang” Factor¹⁸⁸

Former Suhakam Commissioner Mahadav Shankar noted that Suhakam played a “therapeutic” role, as people needed to “bleat” or express their grievances in the hope that these would be heard, if not attended to.¹⁸⁹ Submitting complaints has a stabilizing function because it sustains hope that a matter will find resolution within the legal order.

183. *See id.*

184. *See* Andrew Ong, *Suhakam trashes Samy's claim*, MALAYSIAKINI, Feb. 7, 2007, www.malaysiakini.com/news/63109.

185. *See* Leslie Andres, “We’ll hold public inquiries,” NEW STRAITS TIMES (Malay.), Dec. 14, 2005, at 11.

186. *See* *Suhakam slams police decision to re-arrest*, NEW STRAITS TIMES (Malay.), June 30, 2006, at 21.

187. *See id.*

188. Malay for ‘comfort’ or ‘love.’

189. *See* Interview with Mahadav Shankar, Former Suhakam Commissioner, in Kuala Lumpur, Malay. (Nov. 29, 2006).

Civil society has developed the convention of handing over memoranda of complaints in the glare of publicity.¹⁹⁰ This reflects the popularization of human rights and shifts attention away from a statist human-rights discourse confined within government or intergovernmental bodies. Human rights becomes a language the average citizen achieves fluency in, rather than a strange tongue. Where there is no forthcoming response, however, this may breed great frustration.

D. *Scope of Suhakam's Mandate and Rights Emphasis*

1. Exceeding the Boundaries of its Mandate?

While emphasizing the indivisibility of human rights, Suhakam appears in general to be more comfortable with socioeconomic rights, perhaps because political liberties pose a threat to the status quo and elicit greater executive or bureaucratic resistance.

This is significant because Suhakam's mandate is somewhat narrow, defining "human rights" by referring to the "fundamental liberties as enshrined in Part II of the Federal Constitution."¹⁹¹ The fundamental liberties in Part II of the Constitution are limited primarily to civil and political rights as follows:¹⁹² liberty of the person (Article 5); prohibition against slavery and forced labor (Article 6); protection against retrospective criminal laws and repeated trials (Article 7); equality, which allows for affirmative action in some instances (Article 8); prohibition of banishment and freedom of movement (Article 9); freedom of speech, assembly, and association (Article 10); freedom of religion (Article 11); education-related rights prohibiting discrimination of stipulated groups and affirming the right of religious groups to establish educational institutions (Article 12); and property rights (Article 13).

There have been some marginal judicial attempts to construe the constitutional liberties broadly, for example, by reading the right to livelihood into the right to life.¹⁹³ Section 4(4) of the Suhakam Act provides that "regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not

190. *See Malaysian stand-off ends peacefully*, BBC News, Nov. 14, 2001, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1276762.stm>.

191. *See* SUHAKAM Act, *supra* note 94, § 2.

192. CONST. MALAY. pt. II.

193. *See* Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, 284 (Malay.) (finding Article 8 of the Malaysian constitution is "a dynamic concept with many aspects and dimensions . . . [and] cannot be imprisoned within traditional and doctrinaire limits").

inconsistent with the Federal Constitution.”¹⁹⁴ Notably, this provision seeks to subordinate international to domestic law. With reference to customary human-rights law, courts have treated the Universal Declaration of Human Rights (UDHR) provisions as an optional guide rather than enforceable law.¹⁹⁵

2. Socioeconomic Rights and Calibrating Human-Rights Priorities

Suhakam has not confined itself to the liberties stipulated in Part II of the Constitution, however.¹⁹⁶ Suhakam, in adopting an expansive approach toward the human rights under its purview, has broadened and presented a more comprehensive vision of rights as understood in the Malaysian constitutional order. Suhakam considers a broad range of issues, such as torture, discrimination, environmental protection, land rights, employment rights, and pension rights.¹⁹⁷ By taking these rights into consideration, Suhakam affirms the indivisibility of human rights. It is important that Suhakam includes the consideration of economic, social, and cultural rights within its operational ambit, as such rights are not considered justiciable in Malaysia.¹⁹⁸ Suhakam has

194. See SUHAKAM Act, *supra* note 94, § 4(4).

195. See *Merdeka Univ. Bhd v Gov't of Malay*. [1981] 2 MLJ 356, 366 (Malay.) (“[The Universal Declaration of Human Rights] is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.”); *Mohamad Ezam bin Mohd Noor v Ketua Polis Negera* [2003] 2 MLJ 364, 514 (Malay.) (“Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on member states.”). *But see* *Nor Anak Nyawai v Borneo Pulp Plantation* [2001] 6 MLJ 241, 297 (Malay.) (concluding that the Draft Declaration on the Human Rights of Indigenous Peoples “provide[d] valuable insight as to how we should approach matters concerning the natives”).

196. For example, Suhakam has organized seminars and published reports relating to rights such as the right to adequate housing, drawing on international standards contained in the UDHR. See Media Statement, Human Rights Comm'n of Malay. [SUHAKAM], SUHAKAM: Government's Obligation to Ensure the Human Rights to Adequate Housing (Nov. 9, 2004), available at <http://www.suhakam.org.my/157> [hereinafter SUHAKAM Adequate Housing Statement].

197. See generally SUHAKAM ANNUAL REPORT 2007, *supra* note 157. See also *id.* at 75-78 (employment); *id.* at 86-88 (environment); *id.* at 96-97 (healthcare); *id.* at 102-04 (poverty).

198. See generally YASH GHAI & JILL COTTRELL, *The Role of the Courts in the Protection of Economic, Social and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE: THE ROLE OF JUDGES IN IMPLEMENT ECONOMIC, SOCIAL AND CULTURAL INTEGRITY 58 (Yash Ghai & Jill Cottrell eds., 2004). Malaysia's approach may be contrasted with, for example, the activist jurisprudence of the Supreme Court of India. See Vijayashri Sripati, *Human Rights in India – Fifty Years after Independence*, 26 DENV. J INT'L L. & POL'Y 93, 94-95 (1997)

begun a dialogue with the executive branch on economic and social rights, raising public awareness of them and promoting a human-rights culture that goes beyond the notion of rights as justiciable entitlements.¹⁹⁹ Suhakam's activity in this area illustrates the virtue of a multilevel, rather than exclusively judicial, approach towards rights.²⁰⁰

To promote the fulfillment of basic needs, Suhakam has held a series of forums on socioeconomic rights, referencing Article 25(1) of the UDHR²⁰¹ in targeting such rights as the right to health,²⁰² the right to housing,²⁰³ and the rights of older persons.²⁰⁴ Suhakam has linked these rights to issues of poverty eradication and the Millennium Development Goals (MDG).²⁰⁵ This link is important because human rights must prioritize the issue of poverty if they are to have resonance in a developing country. Linking

199. See, e.g., *Suhakam Wants EPU To Review Methodology For Identifying Hardcore Poor*, MALAYSIAN NAT'L NEWS AGENCY (BERNAMA), Sept. 19, 2008, <http://www.bernama.com.my/bernama/v5/newsgeneral.php?id=360125>.

200. See The Int'l Covenant on Econ. Social & Cultural Rights (ICESCR) Comm., *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, ¶ 3, U.N. Doc. E/C.12/1998/25 (Dec. 14, 1998) ("National institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.")

201. See Universal Declaration of Human Rights (UDHR), art. 25(1), G.A. Res. 217 A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.")

202. See generally HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], REPORT ON THE PUBLIC FORUM ON THE RIGHT TO HEALTH: ACHIEVING HEALTH MDGs (2006).

203. See generally HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], ADEQUATE HOUSING: A HUMAN RIGHT: A REPORT OF SUHAKAM'S SEMINAR ON HUMAN RIGHTS PERTAINING TO BASIC NEEDS (2004) [hereinafter ADEQUATE HOUSING: A HUMAN RIGHT].

204. Suhakam held a forum which produced a report on *Ageing with Dignity*, which was a call to reawaken a sense of personal and social responsibility toward citizens growing old and living longer due to better medical care. See Human Rights Comm'n of Malay. [SUHAKAM], Report on the Public Forum on Ageing with Dignity: Rights of Older Persons vii (2005), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/525_ageing%20with%20dignity-rights%20of%20older%20persons.pdf [hereinafter SUHAKAM REPORT ON RIGHTS OF OLDER PERSONS]. Suhakam recommended that a study be conducted "on the feasibility of establishing Social Pension Schemes" and that the retirement age be increased to 60, due to a longer life expectancy. *Id.* at vii-iv. See also *Preparing for old age*, NEW STRAITS TIMES (Malay.), Jan. 22, 2006, at 18.

205. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], REPORT: SEMINAR ON HUMAN RIGHTS AND THE MILLENNIUM DEVELOPMENT GOALS 12-13 OCTOBER 2004, at 1-3 (2006), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/539_seminar%20on%20human%20rights%20and%20the%20millennium%20development%20goals.pdf.

the MDGs with human rights and defining poverty from a human-rights perspective²⁰⁶ helps cultivate a rights-based approach toward development, extending the focus beyond mere economic growth to encompass participatory and equitable distribution values.²⁰⁷ Without this link, development is likely to be conceived only as an aspiration to be implemented by government programs. In incorporating human-rights priorities, development projects should be structured to secure concerns of the most vulnerable sectors of society, and benchmarks should be formulated to evaluate progress.

In discussing socioeconomic rights, Suhakam regularly and unselfconsciously refers to international norms as normative guidelines, even referencing treaties to which Malaysia is not a party.²⁰⁸ For example, in discussing housing rights, Suhakam referenced Article 25(2) of the UDHR, Article 11(1) of the ICESCR, Article 14(2)(g) of CEDAW, and Article 27(3) of the CRC, as well as the seven core components of the right articulated in General Comment No. 4 of the ICESCR Committee, including security of tenure, availability of services, access, habitability, and cultural adequacy.²⁰⁹ Some have criticized Suhakam's approach to housing rights, however, as falling below universal human-rights standards.²¹⁰ At a seminar on housing rights, some criticized Suhakam's recommendations for not being "based on a rights perspective," and appearing "mainly to protect the interest of house builders."²¹¹ The critics' perception was that the problems of

206. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], THE HUMAN RIGHTS APPROACH TO THE MILLENNIUM DEVELOPMENT GOALS: GOAL 1: ERADICATE EXTREME POVERTY AND HUNGER 2 (2005), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=30507&name=DLFE-2115.pdf ("Poverty eradication entails taking into account the non-quantifiable factors such as active involvement of the poor and the civil society which enhances the implementation of any poverty reduction strategy.").

207. See generally Li-ann Thio, *Taking Development Seriously: Beyond the Statist Rhetoric of the Human Right to Development in ASEAN States*, in HUMAN RIGHTS AND DEVELOPMENT: APPROACHES TO THE REFORM OF GOVERNANCE IN ASIA 47, 49-51 (C. Raj Kumar & D.K. Srivastava eds., 2003).

208. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], ACCESSIBILITY TO BASIC NEEDS: A REPORT OF SUHAKAM'S SEMINAR ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 8 (2003) [hereinafter ACCESSIBILITY TO BASIC NEEDS] (mentioning the International Covenant on Economic, Social and Cultural Rights).

209. See ADEQUATE HOUSING: A HUMAN RIGHT, *supra* note 208, at 1-7 (noting "[s]ince the proclamation of the UDHR in 1948, the right to adequate housing has found explicit recognition as a basic human right among a wide range of other . . . instruments in the field of human rights" and referencing these instruments).

210. See S. Arutchelvan, *A review of the Economic, Social and Cultural Rights Working Group's report*, in FIFTH CONSULTATION, *supra* note 162, at 40, 44.

211. See *id.*

squatters, urban poor, transit house dwellers, and other vulnerable groups received short shrift, only cropping up in the final session, “giving an impression that these issues were either too sensitive to discuss in earlier sessions or they were not as important.”²¹² Suaram criticized the particular model of development applied in relation to the right of housing, which if felt was motivated not by human rights but by realizing “a squatter-free market and profit-drive agenda.”²¹³

Certain Suhakam commissioners, furthermore, have appeared to espouse a utilitarian concept of human rights, one which downplays the intrinsic worth of individuals in favor of an instrumentalist approach that sees people in terms of their ability to make social contributions.²¹⁴ For example, the chair of the Economic Social and Cultural Working Group, Tan Sri Ramon Navaratnam, spoke of the elderly not as a burden, but as knowledgeable and valuable to Malaysia’s economic development.²¹⁵

Suhakam plays an important role in highlighting pressing needs and urging the allocation of resources to address them, such as those relating to indigenous peoples, migrant workers, and the trafficking of women and children. With respect to the latter, Suhakam has underscored the “urgent need” to study this problem, which was drawn to its attention after its visit to the Kajang Women’s Prisons, where it discovered that many young girls were detained following raids on entertainment centers.²¹⁶ Following this visit, Suhakam formed a subcommittee which conducted interviews with detained girls, who told of promises of lucrative jobs in Malaysia and their coercion into sex work.²¹⁷ Suhakam also sought the cooperation of the Prisons and Immigration Department and Police in its assessment of this problem, and held a forum to raise awareness of it in 2004, which government officials, NGOs, civil society, and members of the diplomatic corp attended.²¹⁸ The forum sought to facilitate networking and identify best practices for state governments and NGOs with regard to trafficking from the varied perspectives of migration, criminal justice, and general

212. *Id.*

213. See SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 206.

214. See, e.g., SUARAM HUMAN RIGHTS REPORT 2005, *supra* note 181, at 74-79; SUHAKAM REPORT ON RIGHTS OF OLDER PERSONS, *supra* note 204.

215. See SUARAM HUMAN RIGHTS REPORT 2005, *supra* note 181, at 74-79; see also SUHAKAM REPORT ON RIGHTS OF OLDER PERSONS, *supra* note 204.

216. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 22.

217. See *id.*

218. See SUARAM HUMAN RIGHTS REPORT 2005, *supra* note 181, at 135.

human rights. Suhakam produced a report that listed a series of recommendations,²¹⁹ including the ratification of the 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the need for Malaysian anti-trafficking legislation.²²⁰ Human trafficking is a transboundary problem, so Suhakam could also potentially cooperate with other NHRIs through the Asia-Pacific Forum of National Human Rights Institutions.²²¹

Institutional focus on economic, social, and cultural rights became evident when the Economic, Social and Cultural Rights Working Group (ESCRWG) came into operation in 2003.²²² An activist pointed out the shift in focus by noting that Suhakam's 2002 Annual Report only allocated 6 of 132 pages, about 4.6 percent of the report, to discussion of economic and social rights.²²³ In its 2004 Accessibility to Basic Needs Report, Suhakam noted that "[t]he Human Rights discourse in Malaysia seems to focus more on civil-political rights. The imbalance needs to be redressed, as both sets of rights need to be treated with equal importance."²²⁴ The ESCRWG chair, Navaratnam, also reportedly told the media that "[h]uman rights should not be viewed from the Western perspective because of their personal agenda."²²⁵ Subsequent statements seem contradictory, however, as Suhakam has accorded primacy, not equality, to socioeconomic rights.²²⁶

Where socioeconomic rights have political overtones or implicate vested interests, however, Suhakam's enthusiasm to deal with them is somewhat diminished.²²⁷ Conspicuously, Suhakam appears to have declined to investigate an incident, the Kampung

219. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], TRAFFICKING IN WOMEN AND CHILDREN, REPORT OF THE HUMAN RIGHTS COMMISSION OF MALAYSIA 47-61 (2004), available at <http://www.suhakam.org.my/213>.

220. Irene Fernandez, *A Review of Suhakam's Report on Migrant Workers*, in FIFTH CONSULTATION, *supra* note 162, at 78, 90-91.

221. Asia Pacific Forum, <http://www.asiapacificforum.net/about/> (last visited Nov. 30, 2009).

222. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 11.

223. See Charles Santiago, *Economic, Social and Cultural Rights*, in THIRD CONSULTATION, *supra* note 17, at 38, 38.

224. ACCESSIBILITY TO BASIC NEEDS, *supra* note 213, at 7.

225. See V. Anbalagan, *Suhakam: Marginalised groups need help*, NEW STRAITS TIMES (Malay.), Jan. 3, 2004, at 13.

226. See Amanda Whiting, *In the Shadow of Developmentalism: the Human Rights Commission of Malaysia at the Intersection of State and Civil Society Priorities*, in HUMAN RIGHTS AND DEVELOPMENT: LAW, POLICY AND GOVERNANCE 383, 393-94 (C. Raj Kumar & D.K. Srivastava eds., 2006).

227. See, e.g., Prasana Chandran, *Remembering Kampung Medan: one year after*, MALAYSIAKINI.COM (Malay.), Mar. 8, 2001, <http://www.malaysiakini.com/news/10633>.

Medan riots, in part because it implicated “socio-economic concerns” that should instead be “brought up by the relevant agencies.”²²⁸ While the immediate issues were the race riots and the alleged failure of the police to sufficiently investigate them, the cause of the problem had to do with the economic backwardness of an ethnic minority, a socioeconomic issue *par excellence*. Yet Suhakam seemed to disclaim competence to handle such issues.²²⁹ Suhakam’s inaction was derided by thirty-two NGOs, who criticized its failure to inquire into the incident as denoting a lack of courage in confronting difficult human-rights matters related to race relations.²³⁰ Critics called Suhakam “no different from the police” and a “human rights omission” rather than commission.²³¹

Suhakam appeared to ignore another significant issue related to the right of housing and the Selangor state government zero-squatter target, which it sought to accomplish by 2005.²³² In 2004, the Selangor government pursued heavy-handed forced eviction, despite not having built enough housing for the poor.²³³ Suhakam did not even raise the issue of housing rights, giving the appearance “it did not want to take on the government on critical or sensitive issues.”²³⁴

IV. OF RESISTANCE, REBUFFAL, AND RECEPTIVITY: THE SOCIOPOLITICAL ENVIRONMENT AND THE IMPACT IT HAS ON HOW VIGOROUSLY HUMAN-RIGHTS ISSUES ARE DEFENDED

We would rate our economy as good compared with many other countries. If our economy was not that good, we would not have these thousands and thousands of people coming from all over the region trying to find work in Malaysia. . . . Socially . . . human rights are fair. . . . [O]verall, we do not have serious ethnic problems. Socially I think we also rate as fair and culturally, yes *boleh tahan* (can do). You can read you can discuss and

228. *Id.*

229. See *We Will Be Vigilant*, *supra* note 132.

230. See *id.*

231. See R.N. Rajah, *Deaths in Police Custody*, in PROCEEDINGS OF THE NATIONAL CONSULTATION ON SUHAKAM: AFTER 4 YEARS: CHANGING THE HUMAN RIGHTS PARADIGM IN MALAYSIA 38, 38-39 (ERA Consumer Malaysia ed., 2005), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/309_National%20Consultation%20on%20suhakam%20after%204%20years.pdf [hereinafter FOURTH CONSULTATION]; see also HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], ANNUAL REPORT 2007, at 122 (2007), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23907&folderId=23964&name=DLFE-307.pdf [hereinafter SUHAKAM ANNUAL REPORT 2007] (urging Malaysia to ratify specific listed treaties).

232. See Arutchelvan, FIFTH CONSULTATION, *supra* note 210, at 44.

233. See *id.*

234. *Id.*

there are cultural dances and even philharmonic orchestras
When it comes to political affairs, it is a bit more susah
(difficult).²³⁵

—Tan Sri Harun Hashim

Owing to various religious, social, economic, and political sensitivities, Suhakam has directed its work mainly toward what Dato Michael Yeoh has labeled “soft issues” in relation to education and changing “mindsets.”²³⁶ This is not to say that Suhakam has not tackled hard-core issues pertaining to political freedoms; it has, but with little result apart from attracting government antagonism. Government antagonism is less likely to be aroused where Suhakam deals with politically weak or disenfranchised sectors of the community, such as indigenous peoples and migrant workers.

The typical problems facing Asian constitutionalist states relate to the imperatives of maintaining social stability within a plural society and generating economic growth, which in turn shapes the nature of democratic development.²³⁷ Certainly, the need to address these pressing concerns is central to the economic agenda of postcolonial states like Malaysia. Postcolonial governments thought applying techniques of political control and fostering a unifying new nationalism was crucial to maintaining political stability and managing ethnoreligious diversity. They considered a strong state armed with coercive tools and the political will to effectuate national development projects essential to addressing pressing issues of poverty and to managing the “politics of envy” fueled by growing wealth and income disparity. In postcolonial governments concerned with these issues, democracy translates into majority rule, and political freedoms may be curtailed in the name of security, communitarianism, and development.

A. *Civil and Political Rights*

Suhakam has pushed for enhanced political freedoms in challenging government mechanisms of control and instances of abusive action, but has made little headway in the face of government resistance.

235. See Hashim, FIRST CONSULTATION, *supra* note 21 at 8-9.

236. See Interview with Dato Michael Yeoh, Asian Strategy & Leadership Inst., in Kuala Lumpur, Malay. (Nov. 30, 2006).

237. See Yash Ghai, *The Theory of the State in the Third World and the Problematics of Constitutionalism*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 191 (Douglas Greenberg et al. eds., 1993).

1. Freedom of Assembly

When Suhakam takes a contrary stance in relation to civil-political rights, it meets with less success as “the Commission’s recommendations are rarely followed and its initiatives are met with bureaucratic resistance.”²³⁸ In its 2001 Annual Report, Suhakam noted that the Constitution guaranteed freedom of assembly, recommended that the police ease up in issuing permits for gatherings, and called for a review of restrictive legislation.²³⁹ It recommended police restraint in using water cannons and stipulated guidelines that the police should order the crowd to disperse every ten minutes, with three warnings within each ten-minute interval, and give the crowd time to disperse.²⁴⁰ Suhakam’s guidelines have been disregarded in practice, however.²⁴¹

In its more robust dealings with the Malaysian executive, Suhakam has exercised its power of initiative in inquiring after the limits to free assembly, producing a critical report on the KESAS Highway incident which found that the police had infringed assembly rights.²⁴² A commissioner opined that despite this finding, which upset the police, some change in attitude seemed apparent, as a policeman had been heard to remark that “he had to record complaints, no matter how trivial, for fear of being reported to Suhakam.”²⁴³ The Malaysian government’s response to the report was hostile and dismissive, however, and a Committee²⁴⁴ headed by a minister concluded that the police had acted correctly and that the Suhakam report was biased.²⁴⁵ Notably, in 2003 Suhakam affirmed it was “pleased” to receive “two substantial responses” in relation to its annual and specific reports, even if they undermined

238. See SUARAM Human Rights Report 2005, *supra* note 181, at 130.

239. See HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], ANNUAL REPORT 2001, at 9-10 (2002), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23907&folderId=23964&name=DLFE-309.pdf [hereinafter SUHAKAM ANNUAL REPORT 2001].

240. See *id.* at 11.

241. See *id.* at 50.

242. See SUHAKAM, KESAS HIGHWAY INQUIRY, *supra* note 124, at 18-19 (finding insufficient warning and time to disperse given); *id.* at 20-44 (finding problems with crowd dispersal procedures, namely damage caused by use of canes, tear guns, and water cannons and by excessive police force); *id.* at 44-53 (analyzing and criticizing treatment of persons arrested or in detention).

243. Chiam Heng Keng, *Human Rights Commission – The Malaysian Scenario*, ASIA-PACIFIC NEWS, Dec. 2001, http://www.hurights.or.jp/asia-pacific/no_26/04malaysia.htm.

244. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 92-93.

245. Ramdas Tikamdas, *Government’s Response to Suhakam Reports and Recommendations to Protect and Promote Human Rights*, in FOURTH CONSULTATION, *supra* note 231, at 17, 25.

its conclusions, because they reflected a modest apprehension of its role.²⁴⁶

2. Freedom of Speech and Free Press

Flowing from its research on media freedom, Suhakam has recommended that the government ratify the ICCPR, especially Article 19 on freedom of expression.²⁴⁷ Suhakam has also targeted for review provisions in legislation like the Printing Presses and Publications Act (1984), particularly licensing provisions and ouster clauses.²⁴⁸ Suhakam's proposals, together with a call for a Freedom of Information Act to ensure media freedom, have yet to bear fruition.²⁴⁹ Indeed, Suhakam's lack of intervention in some instances of media control have led some to opine that Suhakam is "more of a detached bystander than a human rights protector," avoiding political controversy in cases such as the one in which Malaysian police raided the offices of Malaysiakini, a popular internet news site, and seized 19 computers.²⁵⁰

3. Detention without Trial

Suhakam consistently has maintained that detention without trial infringes UDHR standards and has regularly reiterated its 2000 call to repeal the Internal Security Act (ISA) and replace it with more carefully tailored legislation.²⁵¹ A Suhakam review of the ISA concluded that the two-year detention period was a long time and unfair, noting that even in the post-9/11 era of heightened safety concerns, security legislation should comport with

246. See SUHAKAM ANNUAL REPORT 2003, *supra* note 69, at 22.

247. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], A CASE FOR MEDIA FREEDOM: REPORT OF SUHAKAM'S WORKSHOP ON FREEDOM OF THE MEDIA 8 (2003) [hereinafter SUHAKAM, A CASE FOR MEDIA FREEDOM] ("SUHAKAM further recommends that the Printing Presses and Publications Act 1984 should be reviewed with a view towards repealing provisions which impose excessive restrictions on Freedom of the Press.").

248. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], ANNUAL REPORT 2002 (2003), available at http://www.suhakam.org.my/c/document_library/get_file?p_l_id=23907&folderId=23964&name=DLFE-302.pdf [hereinafter SUHAKAM ANNUAL REPORT 2002].

249. See *Hamdan: Act vital to protect freedom of information*, NEW STRAITS TIMES (Malay.), Feb. 7, 2006, at 11.

250. See Steven Gan, *SUHAKAM Fails in Fine Print*, in THIRD CONSTULTATION, *supra* note 17, at 48, 49.

251. See HUMAN RIGHTS COMM'N OF MALAY. [SUHAKAM], REVIEW OF THE INTERNAL SECURITY ACT 1960, at 83-97 (2003), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/438_review%20of%20the%20internal%20security%20act%201960.pdf [hereinafter REVIEW OF ISA 1960].

human-rights principles.²⁵² Suhakam recommended repealing the ISA, which it considered “not a necessary evil to combat the threat of terrorism,” because a balance between national security and respect for human rights “is possible” through a more narrowly tailored law.²⁵³ In 2005, the Malaysian government threatened to use ISA to detain people who “cause public alarm by spreading false news” and who manipulate the supply of diesel, causing a country-wide shortage.²⁵⁴ Suhakam observed that such matters could be dealt with under criminal law.²⁵⁵

Suhakam’s ISA review also expressed concern that the “slapping of detainees, forcible stripping of detainees for nonmedical purposes, intimidation, night interrogations, and deprivation of awareness of place and the passage of time” constituted cruel and inhumane treatment.²⁵⁶ Despite these concerns, the number of people detained under ISA increased from forty in 2000 to seventy-eight in 2001.²⁵⁷ Suhakam released a press statement on April 11, 2001, urging the government to charge all detainees in open court or to release them.²⁵⁸

Suhakam shares the concern of opposition leaders and NGOs that internal-subversion laws have been misused against political opposition, depriving them of their right to fair trial.²⁵⁹ In 2003, Suhakam publicly urged the government to release six detainees from the Keadilan political party and to revise the ISA to ensure the government did not use it against political opponents.²⁶⁰

252. See *id.* at 38-41, 69-71 (discussing the detention period and detention procedures under the Internal Security Act); see also *id.* at 90 (recommending that Section 8(1) of the Internal Security Act be amended to reduce the period of detention from two years to three months).

253. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 107-08 (detailing how the ISA was used for collateral purposes unrelated to national security as well, including purposes such as coin counterfeiting, falsifying documents, and human trafficking).

254. See *id.*

255. See *id.*

256. See REVIEW OF ISA 1960, *supra* note 251, at 50.

257. See SUHAKAM ANNUAL REPORT 2000, *supra* note 160, at 12 (“At the end of 2000, 40 persons remained detained under the ISA.”); SUHAKAM ANNUAL REPORT 2001, *supra* note 239, at 5 (“The number of those detained . . . almost doubled from 40 at the end of 2000 to 78 by the end of 2001.”).

258. See Asia-Pacific Human Rights Network, *Suhakam: The Malaysia Human Rights Commission Finding Its Feet*, HUMAN RIGHTS FEATURES, July 2, 2001, <http://www.hrdc.net/sahrhc/hrfeatures/HRF40.htm>.

259. See SUHAKAM urges Govt to make changes to ISA, MALAY. NAT’L NEWS AGENCY, Sept. 16, 2008, available at http://www.suhakam.org.my/docs/press_room/suhakam_urges_govt.pdf.

260. See Human Rights Comm’n of Malay. [SUHAKAM], *Release of ISA Detainees*, in SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 143.

Suhakam also urged incorporation of stronger procedural guarantees for the right of access to counsel and family within stipulated time periods.²⁶¹ Suhakam's 2003 Annual Report detailed human-rights violations flowing from the conditions of ISA detainees and outlined eighteen recommendations for improving conditions.²⁶² The minister for legal affairs replied that the government was reviewing ISA and would incorporate Suhakam's recommendations into its report.²⁶³ Some observers credit Suhakam for the release from ISA detention of six opposition activists in 2003 and for calling for the repeal of the ISA generally.²⁶⁴

When ten opposition leaders and activists were detained under ISA in April of 2001, however, Suhakam appeared "either unable or reluctant to exercise [its] authority" to visit any place of detention, some thought it was not "an institution that is fully committed to human rights."²⁶⁵ Civil-society activists considered Suhakam's inaction during the thirty-five days of the detention, in the face of police abuses of ISA detainees, proof that Suhakam was "not only helpless but regrettably useless."²⁶⁶ Suhakam effectively had to await the permission of the police before being allowed to meet the detainees and ensure they were not subject to police brutality or torture. Activists thought Suhakam should "walk that extra mile to convince the public that SUHAKAM is truly pro-human rights. The commissioners of SUHAKAM should march to Bukit Aman and demand to visit the detainees. . . [rather than] tolerate this inordinate delay."²⁶⁷ Activists further criticized Suhakam for backtracking from its original pledge to conduct a public inquiry into the complaints raised in the memorandum of April 10, 2002, in relation to six Reformasi detainees.²⁶⁸ These implicated fundamental issues relating to ISA, such as its misuse against political dissidents, its arbitrariness, and the application of torture during detention.²⁶⁹ Suhakam, however, decided to limit its inquiry to the

261. See REVIEW OF ISA 1960, *supra* note 251, at 91-92 (proposing changes to lock-up rules).

262. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 135-38.

263. See *id.*

264. Johan Saravanamuttu, *Reformasi Activists Under Detention*, ALIRAN MONTHLY (Malay.), Issue 3, 2001, available at <http://www.aliran.com/oldsite/monthly/2001/3f.html>.

265. P. Ramakrishnan, *Suhakam Shackled and Rendered Ineffective*, ALIRAN MONTHLY (Malay.), May 14, 2001, <http://www.aliran.com/oldsite/monthly/2001/4f.html>.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* ("There are valid reasons for believing that SUHAKAM hasn't been effective in the face of the gross violation of the rights of the ISA detainees.")

narrow issue of the conditions of detention, with the result that the six Reformasi detainees shunned the inquiry.²⁷⁰

B. *Suhakam and Avoidance: Religion, Sedition, and the Valorisation of the Public Order*

1. Race and Sedition and Ultrasensitivity

Although free speech is constitutionally entrenched in Article 10 of the Malaysian Constitution, it is subject to broad subject-matter restrictions on topics of political sensitivity such as race and religion in the face of a growing Malay ethnic nationalism and the politicization of Islam within the multicultural Malaysian context.²⁷¹ The executive has threatened and unleashed preventive-detention laws and the Sedition Act on those speaking on this topic, invoking an expansive construction of public order to justify limitations on rights.²⁷² For example, words with a “seditious tendency” are those which raise “discontent or disaffection among the country” or promote “feelings of ill-will and hostility” among Malaysians, or stir up disaffection, hatred, or contempt for the government.²⁷³

Malaysian courts have stated that with respect to the Sedition Act, which in Malaysia transcends the “common law concept of sedition,” the chief duty of the courts was to uphold legislation rather than ascertain whether the government was using sedition laws to prop up its own power by stifling legitimate political criticism—the High Court held that the latter issue is one which the court should not pass judgment and should instead leave the matter to the legislature and the people.²⁷⁴ In an ode to particularism, the High Court, in disavowing a robust role for judicial review,

270. See *We Will Be Vigilant*, *supra* note 132.

271. See generally Shad Faruqi, *Free Speech and the Constitution*, 4 CURRENT L.J. lxiv (1992); Mohd Azizuddin Mohd Sani, *Freedom of Speech and Democracy in Malaysia*, 16 ASIAN J. POL. SCI. 85 (2008).

272. On free speech, race and religion and sedition in Malaysia, see *Pub. Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108, 110 (Malay.) and *Fan Yew Teng v Pub. Prosecutor* [1975] 2 MLJ 235, 235-38 (Malay.).

273. See *Fan Yew Teng*, 2 MLJ at 235-36 (Malay.).

274. See *Pub. Prosecutor*, 2 MLJ at 84 (Malay.); *Id.* at 112 (“Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion Parliament and the people, and not the courts, should pass judgment.”); see also *Melan bin Abdullah & Anor v Pub. Prosecutor* [1971] 2 MLJ 280, 283-84 (Malay.) (“By virtue of the 1970 amendment of the Sedition Act, ‘sedition’ no longer requires the same judicial approach as the misdemeanour at common law. . . . The duty of the court is to interpret and uphold the law as passed by parliament. . . . I can only hope express the hope that, as and when the justification no longer exists for banning fair comment on matters of public interest, the 1970 amendments to the Sedition Act will be removed.”).

noted that Malaysian sedition law may “not necessarily be apt for other people,” but “it is a law which suits our temperament.”²⁷⁵ In *Public Prosecutor v. Ooi Kee Saik*, the High Court stressed the qualified nature of free expression, holding that speech was seditious where it questions “any of the four sensitive issues—citizenship, national language, special rights of the Malays and the sovereignty of the Rulers.”²⁷⁶

Recently, Malaysian police arrested a prominent opposition politician, Lim Kit Kiang, for distributing leaflets about the “Merdeka Constitution” and “Islamic State”²⁷⁷ in relation to revisionist attempts to undermine the secular nature of the Malaysian social compact spurred by Malay ethnic chauvinism.²⁷⁸ Groups disagreeing with the new educational policy to use English as the medium of instruction for all primary schools in teaching mathematics and science were faced with the threat of control under the draconian ISA.²⁷⁹

The courts have effectively ceded the questioning of laws like the ISA to the spheres of democratic accountability or political checks, but Suhakam has followed the lead of courts in preserving reticence. Despite the view of civil-society activists that there is an “urgent” need for Suhakam to inquire into persistent abuses of sedition law to stifle legitimate dissenting opinion on matters of public concern,²⁸⁰ Suhakam has remained silent.²⁸¹ This is not surprising, given the inflammatory nature of race and religious issues

275. *Pub. Prosecutor*, 2 MLJ at 112 (Malay.).

276. *Id.*

277. See Ramdas Tikamdas, *Evaluation of Suhakam*, in PROCEEDINGS OF THE NATIONAL CONSULTATION ON SUHAKAM: AFTER 2 YEARS: HOW HAS THE COMMISSION PLAYED A ROLE IN PROMOTING AND PROTECTING HUMAN RIGHTS IN MALAYSIA? 35, 38 (ERA Consumer Malaysia ed., 2003), available at http://www.digitalibrary.my/dmdocuments/malaysiakini/307_National%20Consultation%20on%20SUHAKAM%20After%202%20Years.pdf [hereinafter SECOND CONSULTATION]. Suhakam has recommended setting up an interreligious council and asked the government to clarify whether Malaysia was an “Islamic state.” The government replied in the affirmative on the basis that Muslims established Malaysia and that government was held by Muslims. This discounts the role of the other ethnic races in the formation and government of Malaysia. Some criticized Suhakam for merely printing the government’s response in its Annual Report without critique or further analysis. See Angela Thas, *Suhakam’s role in furthering women’s rights*, in FIFTH CONSULTATION, *supra* note 162, at 69, 73-74.

278. Note that in this context, the constitutional definition of “Malay” is a person professing Islam. See CONST. MALAY. art. 160.

279. Asia-Pacific Human Rights Network, *Malaysia’s ISA: No Limits*, HUMAN RIGHTS FEATURES, Dec. 30, 2002, <http://www.hrhc.net/sahrhc/hrfeatures/HRF70.htm>.

280. See e.g., Steven Gan, *Press Freedom: Three Things SUHAKAM Can Do*, in SECOND CONSULTATION, *supra* note 277, at 45, 48-49.

281. See Tikamdas, SECOND CONSULTATION, *supra* note 277, at 38.

in Malaysia.²⁸² For example, there are troubling human-rights issues regarding affirmative action that, through faulty implementation, have produced new imbalances in the Malay community.²⁸³ Characterizing this problem, however, is a matter of great political sensitivity. United Malays National Organisation (UMNO) politicians have issued fiery nationalistic and chauvinistic statements threatening bloodshed upon those who challenge Malay privileges, the Malay character of the state, and the paramount position of Islam in a Constitution which is officially secular.²⁸⁴ By holding its peace, Suhakam cedes the ability to positively influence rights discourse in this sensitive area.

2. Religion, Apostasy, and the Politicization of Islam

In the words of a senior member of the Suhakam secretariat, Suhakam is “a tad cautious” when it comes to matters of religion.²⁸⁵ For example, on September 25, 2000, twenty-nine persons professing Islam filed a complaint with Suhakam with respect to how the proposed Restoration of Faith Bill and establishment of Faith Rehabilitation Centres for Muslim apostates infringed the Article 11 religious liberty clause of the Constitution and Article 18 of the UDHR.²⁸⁶ By 2002, there was still no response to the complaint.²⁸⁷

Nowhere is Suhakam’s cautious approach more apparent than in the case of religious conversions or apostasy—when a Muslim wishes to convert out of Islam—which is a politically volatile issue. The sensitivity of the issue is apparent in the fact that civil courts have abdicated responsibility for it, finding that it should be determined by syariah courts, applying syariah law, notwithstanding the

282. See Carolyn Evans, *Human Rights Commissions and Religious Conflict in the Asia-Pacific Region*, 53 INT’L L. & COMP. L.Q. 713, 731-27 (2004).

283. See *id.*

284. On the unravelling secular, multi-ethnic constitutional compact, see generally Jaclyn Ling-Chien Neo, *Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia*, 13 INT’L J. MINORITY & GROUP RTS. 95 (2005); Andrew Harding, *The Keris, The Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia*, 6 SING. J. INT’L & COMP. L. 154 (2002); IS MALAYSIA AN ISLAMIC STATE? SECULARISM AND THEOCRACY – A STUDY OF THE MALAYSIAN CONSTITUTION (Abdul Razak Baginda & Peter Schier eds., 2003).

285. See Interview with Long Seh Yih, *supra* note 125.

286. See Poh-Ling Tan, *Paying the Price for Religious Freedom – A Non-Muslim Perspective*, in PUBLIC LAW IN CONTEMPORARY MALAYSIA 134, 162-65 (Wu Min Aun ed., 1999).

287. See Evans, *supra* note 282, at 721-27.

fact that the case implicates the constitutional guarantee of religious freedom.²⁸⁸

Civil-society groups have noted it was “very disheartening” that Suhakam kept silent on high-profile cases splashed in the media,²⁸⁹ such as the *Shamala* case where a Hindu husband tried to unilaterally convert his two children to Islam without his wife’s consent.²⁹⁰ Suhakam’s 2005 Annual Report did note, in discussing the CRC, that cases like *Shamala* highlight the need to address the effect of restrictive laws on the religious freedom of children,²⁹¹ and for this end Suhakam organized a forum to discuss Malaysia’s reservations to the CRC.²⁹² The forum merely identified the problems, which were already well known, with the conclusion that the reservations to the CRC reinforced rather than resolved the problems.²⁹³

Suhakam has also held its peace when courts have interpreted the religious-freedom clause in a manner inconsonant with human-rights standards.²⁹⁴ For example, Article 18 of the UDHR provides that “[e]veryone 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.” In several apostasy cases, however, such as the High Court decision of *Daud bin Mamat v. Majlis Agama Islam*, judges have held that exiting a religion “is certainly not a religion” and in the absence of an express right to renounce religion, to infer that Article 11(1) of the Constitution²⁹⁵

288. See generally Li-ann Thio, *Jurisdictional Imbroglia: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution*, in CONSTITUTIONAL LANDMARKS IN MALAYSIA, *supra* note 82, at 197, 197-226.

289. See Marimuthu Nadason, *Welcome Address*, in FOURTH CONSULTATION, *supra* note 231, at 1, 1-3.

290. *Shamala Sathiyaseelan v. Jeyaganesh C. Mogarajah* [2004] 2 MLJ 648, 648-49 (Malay.).

291. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 105.

292. See Shazeera Ahmad Zawawi, *Children have rights, too*, NEW STRAITS TIMES (Malay.), July 18, 2008, at 29 (detailing the history of the CRC and Suhakam’s involvement with its impact in Malaysia, including Convention on Rights of the Child: Tackling social perceptions and addressing local realities, including hosting a forum for discussion).

293. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 105-07 (reiterating the problems with the Malaysian reservations to Article 14 of the Convention on the Rights of the Child, declaring that they will only be applicable if they conform to the national laws, policies and constitution of Malaysia). The Annual Report also noted the cautious attitude of the courts in Muslim conversion cases and the lack of procedures when Syariah courts were faced with apostasy related cases. See *id.*

294. See, e.g., *Daud bin Mamat v. Majlis Agama Islam* [2001] 2 MLJ 390 (Malay.).

295. See CONST. MALAY. art. 11(1) (“Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.”); MALAY. CONST. art 11(4) (provid-

protected this “would stretch the scope of Article 11(1) of the Federal Constitution to ridiculous heights, and rebel against the canon of construction.”²⁹⁶ Similarly, in the notorious apostasy case of *Lina Joy*, the High Court suggested that public order would be threatened if a Muslim was allowed to unilaterally convert out of Islam without first gaining the approval of the requisite religious authority.²⁹⁷ Suhakam has made no statements recognizing that the religious-freedom guarantee protects freedom of conscience.

Suhakam was obviously reluctant to enter into the political fray when the highly politicized case of Moorthy Maniam was raised before it in the form of a memorandum of protest against his forced conversion authored by opposition political groups.²⁹⁸ Moorthy, a Malaysian of Indian ethnicity, was a Hindu and a national hero for being a member of the Malaysian team that scaled Mount Everest.²⁹⁹ He was paralyzed after an accident in 1998, and in 2005 he injured his head, fell into a coma, and died. His wife, Kaliammal was informed that Moorthy had converted to Islam and was to be given an Islamic burial.³⁰⁰ Accordingly, the Majlis Agama Islam (Islamic Religious Affairs Council) sought to collect his body, and Kaliammal challenged the Council in High Court, stating that Moorthy was Hindu and should be buried according to Hindu rites.³⁰¹ Various evidence was presented to show he was a Hindu, including his attendance at Hindu temples and participation in Hindu festivals.³⁰²

The High Court stated it lacked power to decide whether Moorthy was a Hindu at the time of his death because it lacked jurisdiction on the basis of Article 121(1)(A) of the Malaysian Constitution, which provides that the two Federal High Courts “shall have no jurisdiction in respect of any matter within the juris-

ing that state law “may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”).

296. Daud bin Mamat [2001] 2 MLJ at 392.

297. *Lina Joy v. Majlis Agama Islam Wilayah* [2004] 2 MLJ 119, 119-20 (Malay.).

298. See Youth Movement & Peoples Justice Party, Memorandum of Protest Against Forced to Converted Islam (Jan. 4, 2006) (on file with author).

299. For a discussion of Moorthy’s case, see Amanda Whiting, *Desecularising Malaysian Law?*, in EXAMINING PRACTICE, INTERROGATING THEORY: COMPARATIVE LEGAL STUDIES IN ASIA 223, 237-39 (Penelope Nicholson & Sarah Biddulph eds., 2008). See also Article 11 Coalition, A Look at the Article 11 Coalition, <http://www.article11.org/Resources/art11coalition.html> (last visited Nov. 30, 2009).

300. See Whiting, *supra* note 299, at 237-39.

301. See *id.*

302. See *id.*

diction of the Syariah courts.”³⁰³ The syariah court had, on application of the Federal Territory Islamic Council, made an order that Moorthy was Muslim at time of death and was to be buried accordingly.³⁰⁴ As a non-Muslim, Kaliammal lacked standing to testify before the syariah court.³⁰⁵ This discriminatory treatment of a religious minority precipitated a public outcry, resulting in candlelight vigils and placing the spotlight on the role of the civil court in such matters.³⁰⁶ There was great dissatisfaction over the judiciary’s abdication of responsibility where non-Islamic issues were concurrently at stake.³⁰⁷ The situation was not helped when Suhakam commissioner Siva Subramaniam, speaking personally, stated that Moorthy’s family should cease legal action, noting that Suhakam did not deal with issues which the courts had decided.³⁰⁸ He stated that Moorthy’s family could raise their plight before Suhakam, which would inquire whether human-rights principles had been violated, but stressed that “the laws of the nation are important . . . and there is a need for us to live together as a multi-racial society.”³⁰⁹

The memorandum of protest for Moorthy’s case asked the government to review Article 121(1)(A), a cry echoed by many inter-faith and civil-society groups as well as non-Muslim ministers, to settle the legal ambiguity.³¹⁰ Indeed, Suhakam chair and former attorney general Abu Talib Othman said at a public roundtable on

303. MALAY. CONST. art. 121(1)(A). See Ahmad Ibrahim, *The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law*, 2 MALAYAN L.J. xvii, xx-xxi (1989) (analyzing the jurisdiction of the Syariah Courts following the amendment of the Federal Constitution).

304. See Whiting, *supra* note 299, at 238-39.

305. MALAY. CONST. sched. 9, list II (“Syariah courts, . . . shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.”).

306. See Devinder Singh & A. Hafiz Yatim, *Moorthy buried as a Muslim*, NEW STRAITS TIMES (Malay), Dec. 29, 2005, at 4.

307. See, e.g., *Inter-faith group: Amend Constitution*, NEW STRAITS TIMES (Malay.), Dec. 29, 2005, at 4.

308. See Beh Lih Yi, *Move on, Everest hero’s family told*, MALAYSIKINI, Dec. 29, 2005, www.malaysiakini.com/news/45099.

309. *Id.*

310. See *Inter-faith group: Amend Constitution*, *supra* note 307 (“In a statement, the [Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism] said it took the view that it was wrong for the Syariah court to have ‘assumed’ jurisdiction over persons who do not profess Islam. . . . It called on the government to amend Article 121(1)(A) of the Constitution, which states that all matters pertaining to Islam should be handled by the Syariah court.”).

Article 121(1)(A) that the intention behind the clause was never to deprive non-Muslims of the right to seek justice in civil courts, and that the courts lacked moral courage to interpret Article 121(1)(A) as per the intent of the framers, as it clearly had competence to adjudicate questions of constitutionality.³¹¹ The call to amend Article 121(1)(A), which many Muslims view as assaulting the legitimacy of religious courts and hurting Islamic prestige, sparked a politically explosive situation.³¹²

Suhakam's reluctance to address the problems of religious minorities in the face of aggressive political demands for an Islamic state is evident in its non-response to a letter dated January 6, 2006, from the Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS) to the Suhakam chairman.³¹³ The letter was prompted by the Moorthy case and registered concern over the insensitive manner in which state religious authorities were enforcing Islamic law; it noted that MCCBCHS had sent Suhakam a "very comprehensive Memorandum detailing the problems faced by Malaysians from the minority faiths in professing and practicing their religion" in April of 2002, requesting a public inquiry.³¹⁴ To date, no response to this request was forthcoming. Suhakam could, by taking an official stand, influence the political discourse with an informed perspective and enhance the protection of religious freedom rights.

Not all human-rights issues involving religion are equally politically volatile. For example, when the Kelantan government announced a RM 10,000 reward to Muslim preachers who converted and married indigenous Orang Asli women, Suhakam denounced that this "utilisation of state resources as a motivation for preachers to convert [O]rang [A]sli women by marriage is an abuse of power and violation of the basic right[s], especially the

311. The former attorney general said that "[t]he courts have failed to [interpret boldly] for the slightest unreasonable reasons in many cases where Islam is merely seen on the surface. . . . Judges are not complying with the constitutional oath they had taken. The courts today are taking the easy way out, either due to incompetence or under threat." See Claudia Theophilus, *Interpret constitution boldly, former AG tells judges*, MALAYSIAKINI, Jan. 5, 2006, www.malaysiakini.com/news/45387.

312. See Press Release, Lim Guan Eng, DAP Malay., Hishammuddin is Wrong to Say that Article 121(1A) Makes Malaysia an Islamic State (July 25, 2006), www.dapmalaysia.org/english/2006/july06/lge/lge404.htm.

313. See Letter from Malay. Consultative Council of Buddhism, Christianity, Hinduism and Sikhism, to Tan Sri Abu Talib Othman, Chairman, Human Rights Comm'n of Malay. (Jan. 6, 2006) (on file with author).

314. See *id.*

freedom of thought, conscience and religion.”³¹⁵ Suhakam further stated that these state-sanctioned assimilationist measures violated the right of indigenous peoples to their cultural and spiritual differences.³¹⁶

C. *Making Headway? Speaking Up for the Politically Weak and Marginalized Communities*

1. Suhakam and Indigenous Communities: Whose Right to Development?

Suhakam has begun to champion the concerns of indigenous groups and offered itself as a “mediator” between natives and the government.³¹⁷ It has drawn attention to the plight of indigenous peoples as a disadvantaged sector of society, and today, Suhakam’s annual reports specifically list native customary rights as an item of concern.³¹⁸ In 2004, Suhakam released a report on “The Human Rights of Orang Asli,” calling for an amendment to the Constitution recognizing Orang Asli as *bumiputera*, who are entitled as “first peoples” to special privileges.³¹⁹

Initially, activists promoting the rights of indigenous peoples had to educate Suhakam on the nature of the problems faced by these communities. The coordinator of the Centre for Orang Asli Concerns noted that Suhakam’s finding in its annual report discounted the situation of the Orang Asli and many other indigenous peoples in Sabah and Sarawak (East Malaysia) who went hungry.³²⁰ Further, while national levels of poverty had declined, the poverty rate among indigenous groups like the Orang Asli had actually

315. See *Suhakam says Money incentives to convert Orang Asli an Abuse of Power*, MALAYSIAN NAT’L NEWS AGENCY, June 28, 2006, available at <http://the-malaysian.blogspot.com/2006/06/suhakam-says-money-incentives-to.html>.

316. See *id.*

317. See Tikamdas, SECOND CONSULTATION, *supra* note 277, at 41.

318. See SUHAKAM ANNUAL REPORT 2007, *supra* note 157, at 83-93, 156.

319. “Orang Asal” refers to all indigenous peoples in West and East Malaysia whereas “Orang Asli” specifically refers to the indigenous peoples of Peninsula Malaysia. The Constitution accords *bumiputera* status only to Malays and the indigenous peoples of East Malaysia. CONST. MALAY. § 153(1).

320. See Colin Nicholas, *Suhakam and the Indigenous People’s Question*, ALIRAN MONTHLY (Malay.), May 5, 2001, <http://www.aliran.com/oldsite/monthly/2001/4i.html> (“SUHAKAM, in its annual report, stated that ‘for increasingly larger segments of Malaysian society, a full stomach is no longer enough. On the contrary, its citizens now crave for fundamental rights. . . . [But] 81% of Orang Asli and equally many native peoples in Sabah and Sarawak still worry daily about filling their stomachs.’”).

increased.³²¹ Indigenous peoples disproportionately suffered high rates of stillbirth, malnutrition, and certain diseases.³²² Their concerns are closely allied to native land, which is a source of livelihood and an expression of cultural identity.³²³ Because indigenous peoples or Orang Asli do not have registered title, land disputes arise when, for example, loggers encroach upon their traditional lands or their activities by developing oil palm plantations, which, in the name of development, degrade forests and pollute water supplies.³²⁴

Suhakam has urged the Malaysian government to address the plight of such groups as the Penan of East Malaysia, who suffer underdevelopment and live under a condition of internal colonialism whereby forest resources are taken from them to serve the development of others.³²⁵ The indigenous peoples of Malaysia have been dispossessed of their ancestral lands, which have undergone environmental degradation to the point of being unable to support their subsistence, violating their right to life and food:³²⁶

Whether it was in Orang Asli areas in the peninsula, in Dayak and Orang Ulu areas in Sarawak or in Anak Negeri areas in Sabah, the consequence was the same: the total disregard for native customary rights to their traditional lands, the plunder and destruction of their resource base, and in at least one case, as reported to SUHAKAM, the rape and killing of Penan people in Ulu Baram, Sarawak.³²⁷

Representatives of indigenous communities have sent reports to Suhakam about how logging companies employed thugs to threaten native peoples to get them to vacate their customary lands, and could do so with impunity because the police did not react to the reports made to them by these communities.³²⁸ This situation precipitated a clash between these thugs and villagers

321. *See id.* (reporting that Suhakam reported a 7.5% reduction in poverty in Malaysia, but that the poverty rate among the Orang Asli has been increasing steadily each year, reaching 81.4%).

322. *See id.*

323. *See id.*

324. *See id.* (discussing logging, appropriation for development projects, and further encroachments by the government onto the native lands).

325. *See id.* (detailing a visit by the Penans in April 2000, an investigation of logging and the misuse of polices, a proposed meeting with the Chief Minister of Sarawak, and a potential fact-finding mission by the Suhakam commissioners).

326. *See id.*

327. *Id.*

328. *See id.* (detailing the complaints made by different groups of indigenous peoples and the subsequent visit of the Penans to Suhakam in April 2000 regarding the injuries caused by the loggers).

resulting in the killing of four thugs.³²⁹ To compound the injustices suffered, nineteen villagers were arrested and charged with murder.³³⁰

In response to these reports, Suhakam sent commissioners on a fact-finding mission to various longhouses in Sarawak to ascertain firsthand the Penans' living conditions, which the commissioners found to be deplorable.³³¹ For example, they found the communities lacked basic necessities like piped water, implicating the right to health and an adequate standard of living.³³² The commissioners found that not only were the Penan unable to protect their lands in the absence of registered title deeds, resettlement schemes had settled them in inferior situations, with poor housing and at too great a distance from their subsistence fields, resulting in food shortages, violating their right to food.³³³ Commissioner Dr. Denison Jayasooria noted that the loss of their forest land—and with that their source of food and employment—was a human-rights violation; he urged the finding of alternative ways to enable the Penan to earn their living.³³⁴ He underscored that the Penan were not against development, but merely wanted their share in it.³³⁵ This is consonant with the right to development and the idea of equitable distribution it embodies. In championing the cause of

329. See *id.* ("Sarawak Oil Palm Berhad, with the tacit backing of state authorities, wanted to occupy the customary land of two Iban communities. It is claimed that the corporation employed armed thugs to instil fear in the native peoples in the hope that they would vacate their customary lands. . . . These thugs . . . became more aggressive until the inevitable clash between them and the villagers resulted in four of the thugs being killed.").

330. See *id.* ("Nineteen of the villagers were, however, charged with murder and were detained for 18 months before their case was first heard in November 2000.").

331. See generally Human Rights Comm'n of Malay. [SUHAKAM], *Reports from Suhakam Offices in Sabah and Sarawak*, in SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 115, 115-36 [hereinafter SUHAKAM, *Reports from Sabah and Sarawak*].

332. See *id.* at 128 ("Access to roads, water and electricity and health care services are still lacking in remote areas of Sarawak. Urgent attention should be given to expanding basic infrastructure and utility supplies.").

333. See *id.* at 115-136 (detailing, analyzing, and making recommendations regarding problems facing residents of Sarawak and Sabah).

334. See Sulok Tawie, *Desperate Penans turn to Suhakam for help*, NEW STRAITS TIMES (Malay.), Oct. 14, 2006, at 27 ("[Suhakam Commissioner] Jayasooria said there should be alternative ways for the Penans to earn their livelihoods or some form of compensation given to them. Concerned for the plight of the Penans, Suhakam met state and federal officials here yesterday.").

335. See *Suhakam wants Govt to address Penans' Plight Quickly*, MALAYSIAN NAT'L NEWS AGENCY, Oct. 27, 2006, <http://www.bernama.com.my/bernama/v3/news.php?id=226566> [hereinafter *Address Penans' Plight Quickly*].

indigenous peoples, Suhakam has shown a willingness to go against the project of modernity and development.³³⁶

During their fact-finding missions, Suhakam commissioners met legal officers and state-government officials from departments dealing with the environment and natural resources and members of the Sarawak Forestry Corporation and Time Association, from whom they elicited promises to look into the Penan issues and revert within a set time period.³³⁷ Suhakam was expected to publish its findings sometime in late 2006 or 2007, though this has not yet taken place.³³⁸ There are sensitivities in this field, as government officials may have vested interests if they profit from the grant of timber licenses. Nevertheless, in July 2007, after a fact-finding mission, Suhakam issued a press statement identifying seven key areas requiring “drastic improvement” to put the nomadic Penan on par with other communities in the country.³³⁹

By gaining firsthand knowledge of the needs of indigenous peoples, Suhakam can urge government policy toward allocating resources to meet needs such as education, piped water, human-rights training for abusive police officers, the policing of logging companies who encroach into native land, and the lack of official personal-identification documents, which hinders access to health services and registration of children for school. In particular, groups like the Penan, who live in remote areas, are unduly penalized by a late registration fee when applying for documents which they can ill-afford.³⁴⁰ To address these problems, Suhakam has suggested “greater co-operation between the government and

336. See generally SUHAKAM, *Reports from Sabah and Sarawak*, *supra* note 331.

337. See Tawie, *supra* note 334, at 27.

338. See *id.* (“[The Suhakam Commissioner] said the various bodies had promised to look into the Penan issue and get back to Suhakam in two weeks. Suhakam was expected to publish its findings on the Penan complaints either late [2006] or early [2007].”).

339. See *Suhakam Finds Seven Areas To Improve Life Of Penans*, MALAYSIAN NAT’L NEWS AGENCY, July 27, 2008, <http://www.bernama.com/bernama/v3/news.php?id=275670> (concluding that key areas are: land rights, Environmental Impact Assessment (EIA) reports, poverty, personal identification documents, education, health, and the duty of the Sarawak state government in protecting the rights of the Penans).

340. See SUHAKAM, *Reports from Sabah and Sarawak*, *supra* note 331, at 115-16 (discussing burden of late registration fees for documents). Although Suhakam has urged the waiver of these fees, citing the special difficulties the indigenous peoples face living in remote areas without easy access to NRD offices, the blanket exemption of the Penans was rejected. The NRD chose to retain the case-by-case examination procedure, in which the aggrieved party must produce supporting documents from the Welfare Department. See Linda Khoo, *Penans Still Find It Difficult To Own MyKad*, MALAYSIAN NAT’L NEWS AGENCY, Jan. 6, 2007, <http://www.bernama.com.my/bernama/v3/printable.php?id=239671>. [DEAD LINK]

Penan community,"³⁴¹ urging the National Registration Department to conduct the registration of Orang Asli in their settlement.³⁴²

Suhakam can complement the activism of indigenous peoples by providing a venue where attention can be drawn to their plight and pressing for political will to uplift these economically disadvantaged communities while preserving their culture and way of life. Although Suhakam has improved its accessibility to indigenous peoples by the establishment of offices in Sabah and Sarawak, the delay of a Suhakam report concerning indigenous peoples suggests that economic interests may stymie its active championing of indigenous peoples' rights.³⁴³

Increasingly, indigenous peoples are turning to Suhakam for help.³⁴⁴ In 2005, Suhakam received 396 complaints relating to Orang Asli reserve lands, 381 of which were from Sabah and Sarawak.³⁴⁵ The Complaints and Inquiries Working Group conducted various visits to Orang Asli villages and held a dialogue with the Sarawak Penan Association to address grievances relating to natural resources usage, access to education, and health services.³⁴⁶

341. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 127.

342. Regarding registration of the Orang Asli, "[a]ccording to Shabat Alam Malaysia, about 50 per cent of the 12,000 Penans in Sarawak did not have proper documents such as birth certificates and [identity cards]." Lathefa Koya, *Statelessness in Malaysia*, in FIFTH CONSULTATION, *supra* note 162, at 57, 61. For an analysis of the situation of the Orang Asli peoples in Malaysia, see generally *id.* at 61-62. See also SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 127 ("A sizeable number of Malaysians in Sarawak remain without official personal identification documents. The situation is extremely serious for the Penan community, which lives in remote areas and therefore has difficulty obtaining medical treatment at hospitals/clinics and in sending children to school.").

343. However, even helping to promote the resolution of indigenous issues in this way is not free of controversy and opposition from interested parties. Opposition politician Lim Kit Siang has queried whether the delay in the completion of the Native Customary Rights report in relation to Sarawak written by Salleh Mohd Nor (a Commissioner whose term was not renewed) was due to the Sarawak state government's objection to the Suhakam inquiry. See Media Statement, Lim Kit Siang, Has Suhakam violated human rights in suppressing the Salleh Sarawak NCR land inquiry report? (Apr. 4, 2003), <http://www.limkitsiang.com/archive/2003/apr03/lks2258.htm>.

344. See Tawie, *supra* note 334, at 27 ("[T]he 200 Penans from 11 settlements in Belaga district now have absolutely no means to earn a livelihood or even find food. . . . Desperate, they sent an SOS to the [Suhakam] pleading for help.").

345. See SUHAKAM ANNUAL REPORT 2005, *supra* note 87, at 69-70.

346. See *id.*

2. Migrant Workers and Conformity to Economic Imperatives of the State

Suhakam has displayed sensitivity to government concerns with respect to immigration problems, noting the differentiation between legitimate refugees and economic migrants.³⁴⁷ The Malaysian government has detained some belonging to the latter category, despite temporary protection orders by the UNHCR.³⁴⁸

Suhakam has called for clearer policy guidelines and procedures in relation to immigrants to curb potential human-rights violations.³⁴⁹ It has also urged cessation of the practice of whipping illegal immigrants, as this did not deter them in the long run.³⁵⁰ Chairman of the Complaint and Inquiries Working Group, Hamdan Adnan, noted, “[w]hipping, to me, simply does not solve the problem because people who are hungry and starving would not care about the pain from caning as they are survivors.”³⁵¹ Some argue that attention should be directed toward employers who willingly employed illegal immigrants, instead.³⁵² The instrumental nature of the approach toward migrants, as opposed to citizens, is apparent in that the issue of whether to make social services available to undocumented migrants is a subject for further policy debate. Suhakam’s 2005 Annual Report notes that migrants without proper documentation often have limited health-care-service access which “could result in undesirable outcomes.”³⁵³

Amanda Whiting notes that the politics of a developmental state and the “nationalist aspects of the development paradigm” have prevented Suhakam from taking up the concerns of migrant workers.³⁵⁴ For example, when Human Rights Watch authored a critical report on the situation of female foreign domestic workers in Malaysia,³⁵⁵ a Suhakam commissioner dismissed this as an attempt to portray Malaysian employers poorly, and “exhibited his own kind treatment of his servant as proof that the nation had been misrepresented.”³⁵⁶ The issue is sensitive because cheap migrant

347. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 13.

348. See *id.*

349. *Id.*

350. See *id.*; see also *Suhakam unhappy illegals being whipped*, DAILY EXPRESS (Malay.), Dec. 10, 2004, <http://www.dailyexpress.com.my/news.cfm?NewsID=31270>.

351. *Id.*

352. See *id.*

353. SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 13.

354. Whiting, *supra* note 226, at 395.

355. See Human Rights Watch, *Malaysia: Migrant Workers Fall Prey to Abuse*, May 17, 2005, <http://hrw.org/english/docs/2005/05/17/malays10959.htm>.

356. Whiting, *supra* note 226, at 395

workers help support the Malaysian consumerist middle class, which drives economic growth.³⁵⁷

3. Women, Religion, and Law

Suhakam has been supportive of the concerns of women and has voiced support for the stance of Muslim women groups calling for a uniform syariah law, as opposed to a diffuse set of state laws, and the adoption of “the overarching principle of equality for all,” while ensuring a balanced distribution of rights and responsibility between men and women.³⁵⁸ Zainah Anwar, who founded the influential NGO Sisters in Islam, was a Suhakam commissioner.³⁵⁹ Suhakam also lends support to NGO lobbying to reform Islamic family law to comport with CEDAW standards.³⁶⁰ Both Suhakam and Sisters of Islam, however, were disappointed when the government adopted the Islamic Family Law (Federal Territories) Act, which was supposed to provide greater protection for Muslim women but ended up facilitating polygamous unions, despite the government’s promise to the CEDAW committee to make them more difficult.

4. Conclusion

Ultimately, the ability of Suhakam to advance the human-rights cause turns on its sociopolitical environment. In Malaysia, the sociopolitical environment is contoured by the economic imperatives of a developing state, considerations of ethnic-religious harmony in the context of the increasing politicization of Islam, and a semiauthoritarian political system. A contextual approach reveals that the particular political sensitivities of a country shape the degree to which an NHRI can robustly champion a cause or investigate alleged violations. The efficacy of an NHRI thus may turn on the type of right at stake.

In general, Suhakam has adopted a nonconfrontational approach in its dealings. The topics it chooses to champion and the methods it adopts reflect this approach. With respect to the latter, Suhakam has preferred to focus on educational measures,

357. *See id.*

358. *See* HUMAN RIGHTS COMM’N OF MALAY. [SUHAKAM], REPORT ON THE ROUNDTABLE DISCUSSION: RIGHTS AND OBLIGATIONS UNDER CEDAW 146 (2004), *available at* http://www.digitalibrary.my/dmdocuments/malaysiakini/537_rights%20&%20obligations%20under%20cedaw.pdf.

359. *See Sister in Islam*, TUFTS E-NEWS, Dec. 10, 2002, <http://enews.tufts.edu/stories/983/2002/12/10/SisterInIslam> (profiling Zainah Anwar, a Tufts graduate).

360. *See* Thas, Fifth Consultation, *supra* note 277, at 71-75.

like workshops and consultations, rather than active intervention in human-rights abuses. The reluctance of commissioners to respond quickly to controversial issues manifests this perceived preference of keeping a low profile. The preference seems to stem from the belief that “undue attention can hamper [Suhakam’s] work in progress.”³⁶¹

In terms of topics championed, some observers believe Suhakam tends to eschew more controversial matters relating to political freedom, favoring less controversial issues like native customary rights, the rights of the disabled, human-rights education and training, and prison conditions.³⁶² Perhaps Suhakam adopts this approach for the pragmatic reason that it is able to make more headway in these fields. It appears the more politically controversial a matter is, the less effective Suhakam becomes. The concerns of indigenous people and women, for example, do not pose a threat to the political status quo, so lobbying for reform in these areas meets less government resistance, though this does not always translate into positive gains. It is not surprising that in relation to controversial issues like apostasy, Suhakam does not venture where the government and judges fear to tread.

V. ASSESSING SUHAKAM

The moment a new body is established there is this great expectation that miracles will happen overnight.³⁶³

—Tan Sri Harun Hashim

One must assess Suhakam’s efficacy with an appreciation of its institutional role, which is advisory rather than quasi-judicial in nature; the political environment within which it operates; and ultimately, its willingness to engage in politically sensitive issues and the nature and extent of this engagement.

The attitude of government and civil society toward Suhakam is decidedly mixed. Suhakam is aware of the negative perceptions it has garnered with some in the government, who perceive it with hostility and accuse it of being “anti-government” and of “acting like an NGO.”³⁶⁴ Conversely, it noted in its 2003 Annual Report³⁶⁵

361. See SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 206.

362. See SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 206 (detailing Suhakam’s limited focus with respect to matters of political freedom).

363. Hashim, FIRST CONSULTATION, *supra* note 21, at 6.

364. See Chiam Heng Keng, *Overview of Suhakam’s Annual Report 2003*, in FOURTH CONSULTATION, *supra* note 231, at 9, 9.

365. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169.

that many civil-society activists “still regard Suhakam as ineffective and nothing more than a public relations exercise of the Government.”³⁶⁶ The report laments that both sides need a “more balanced and realistic expectation of Suhakam’s role and ability to deliver.”³⁶⁷ A Suhakam staffer has noted despairingly that people unrealistically expect Suhakam “to provide the sky and moon [because] they want heaven on earth.”³⁶⁸ However, Suhakam’s critical stance does not exceed expressions of “hope[] that Government agencies will become more sensitive to human rights issues.”³⁶⁹

A. *Government Attitudes*

Bureaucratic resistance has stymied Suhakam’s work. For example, after receiving complaints from university students demanding freer and fairer campus elections, Suhakam’s request to monitor these polls was shot down.³⁷⁰ In some instances, Suhakam has acted independently enough to earn government ire, for instance when it proposed the repeal of the ISA or issued its opinion that the police ban on public rallies unduly restricted free speech and asked the government to prove their claim that the rallies threatened national security.³⁷¹ In response to Suhakam’s recommendations for the enlargement of the freedom of expression and right to assembly, Prime Minister Mahatir reportedly stated that “Suhakam seems to be setting up standards of their own. They are not interested in national security. . . . Suhakam is just a group of people, but the majority of the people, their interests have to be taken into consideration. They are free to give suggestions but it doesn’t mean we have to follow them.”³⁷² Mahatir summarily dismissed the Kesas Highway Report on free assembly as a product of “western bias.”³⁷³

366. *Id.* at 12.

367. *Id.*

368. Interview with Suhakam Secretariat, in Kuala Lumpur, Malay. (Nov. 31, 2006).

369. SUHAKAM ANNUAL REPORT 2003, *supra* note 69, at 22.

370. See Abdul Razak Ahmad, *It’s no easy run for campus candidates*, NEW STRAITS TIMES (Malay.), Sept. 23, 2006, at 22.

371. The Int’l Free Anwar Campaign, *Mahatir slams Suhakam*, FAC NEWS, Aug. 7, 2001, <http://www.freeanwar.net/>.

372. *Id.*

373. See *No Engagement with Suhakam for 100 days*, *supra* note 123.

1. Tardy or Ineffectual Responses to Reports

An indicator that a government is not taking an NHRI seriously is tardiness in responding to key reports. Suhakam has expressed concern about “the lack of adequate positive response” to its law-and-policy-reform recommendations, including its call for the ratification of various human-rights treaties and some of its key reports of public interest, such as its Freedom of Assembly Report.³⁷⁴ Suhakam highlighted this problem in its 2002 Annual Report, and in 2003 stated that the government had given “two substantial responses from the Government in relation to Suhakam’s 2000–2002 Annual Reports and specific reports released as of the end of 2003.”³⁷⁵ The responses, however, tend to merely list the relevant laws, which is hardly effectual.³⁷⁶

In its 2005 Annual Report, Suhakam published its comments on the government’s response to its 2003 Annual Report. In its 2002 Annual Report, Suhakam expressed concern over the lack of positive response to its calls for treaty accession.³⁷⁷ Suhakam printed the response of the Ministry of Foreign Affairs (MFA) in its 2005 Annual Report.³⁷⁸ The response stated that the government was in the process of considering the ratification of human-rights instruments proposed by Suhakam, and rebuked Suhakam for not duly acknowledging their meeting on July 19, 2004, to discuss these human-rights instruments, which indicated “the Government’s commitment in this matter.”³⁷⁹ This was duly acknowledged in the 2005 Annual Report, where Suhakam also offered its assistance to the MFA.³⁸⁰

2. Ignoring Recommendations

Minister Nazri, when asked in Parliament why the government had not taken up Suhakam’s suggestion to repeal the ISA and replace it with clearer legislation, was content to state that it was merely a recommendation the government was not bound to

374. See SUHAKAM ANNUAL REPORT 2003, *supra* note 169, at 12 (“SUHAKAM remains concerned about the lack of adequate positive response to its calls for law and policy reform contained in some key reports of public interest, including the Freedom of Assembly.”).

375. SUHAKAM ANNUAL REPORT 2003, *supra* note 69, at 22.

376. See *id.*

377. See SUHAKAM ANNUAL REPORT 2002, *supra* note 248, at 22.

378. See SUHAKAM’s *Comments on the Government’s Response to SUHAKAM’s Annual Report 2003*, in SUHAKAM ANNUAL REPORT 2005, *supra* note 87, annex VII, at 189, 190.

379. *Id.* at 190-91.

380. See *id.* at 189.

accept.³⁸¹ Suhakam has reiterated its call to repeal the ISA, noting that the law has been used “in an unrestrained manner, contrary to principles of proportionality and necessity.”³⁸²

3. Ignoring Proposals and Requests for a Larger Role

The government also rejected Suhakam’s proposal for a national human-rights plan of action,³⁸³ submitted for consideration on February 25, 2002. The plan purposed to mainstream human rights by “placing human rights improvements in the context of public policy, so that governments and communities can endorse human rights improvements as practical goals, devise programmes to ensure the achievement of those goals, engage all relevant sectors of government and society and allocate sufficient resources for the programmes.”³⁸⁴ The plan emphasized the role of human rights in national development and the need to develop specific programs to alleviate “the human rights situation of vulnerable groups in society.”³⁸⁵ The terse government response to the plan stated that “Malaysia does not need the National Human Rights Plan of Action since human rights are guaranteed under the Federal Constitution and existing laws in Malaysia.”³⁸⁶

Suhakam has also urged the government to confer upon it a larger role in legislative review by referring draft legislation to Suhakam for advice.³⁸⁷ The government has ignored this request as well.³⁸⁸

4. Not Debating Annual Reports in Parliament: Giving Teeth to the “Toothless Tiger”

Section 21(1) of the Suhakam Act ensures some accountability in the workings of Suhakam, and requires an annual report be sent to Parliament containing a list of all matters referred to Suhakam along with its recommendations.³⁸⁹ Parliament has yet to consider these annual reports, however, despite attempts by opposition Parliamentarians to have them debated. Dato Michael Yeoh has stated

381. *See* Li, *supra* note 2.

382. *Id.*

383. *See* Human Rights Comm’n of Malay., Proposed National Human Rights Plan of Action (Feb. 25, 2002) (on file with author).

384. *See id.*

385. *See id.*

386. Tikamdas, *supra* note 245, at 23.

387. *See* SUHAKAM ANNUAL REPORT 2003, *supra* note 168, at 13.

388. *See id.*

389. *See* SUHAKAM Act, *supra* note 94, § 21(1).

that Suhakam needs “more bite,”³⁹⁰ which could be effectuated were its annual reports debated. The 2002 Annual Report stated:

Advocacy on human rights for Parliamentarians and policy makers is an area which requires attention by the Commission as it is only when government authorities and Parliamentarians have a better realisation of human rights can they be more willing to accept and implement the Commission’s recommendation and can we expect the Commission’s reports to be debated in Parliament.³⁹¹

NGO activists have argued that civil society has a “legitimate expectation” that Suhakam reports should receive the “due respect and consideration they deserve,” to avoid Suhakam becoming a mere public-relations exercise which thwarts the purpose of the Act.³⁹² When questioned why Suhakam reports had not been debated in Parliament since its formation, however Minister Nazri replied that Parliamentarians were free to debate them on various occasions and there was no need to allocate a specific time for the debate.³⁹³

As Linda Reif notes, the positive response of the government is crucial to whether an NHRI is effective because if the NHRI’s work and recommendations “are ignored or unreasonably criticized by government, the effectiveness of the institution will suffer.”³⁹⁴

B. *Civil Society*

Civil society’s reaction to Suhakam in its role as protector of human rights is mixed. On the negative side, the fact that the government ignores Suhakam has prompted the criticism that it is “a warehouse for storing reports and memorandums,” which the government will systematically ignore.³⁹⁵ In addition, Suhakam has been sued unsuccessfully for apparent breach of statutory duty, on the basis that it had not investigated an incident of violence sufficiently.³⁹⁶

Suhakam upset civil-society groups when it invited former prime minister Mahatir to address its Human Rights Day conference in 2005, ignoring reminders from civil-society groups of the human-rights violations the Mahatir administration had committed over 22

390. See Interview with Dato Michael Yeoh, *supra* note 236.

391. See SUHAKAM ANNUAL REPORT 2002, *supra* note 248, at 110.

392. Ramdas Tikamdas, *Evaluation of Suhakam’s Reports and the Government’s Response*, in THIRD CONSULTATION, *supra* note 17, at 22, 27.

393. See Li, *supra* note 2.

394. Reif, *supra* note 26, at 27.

395. Ramakrishnan, THIRD CONSULTATION, *supra* note 17, at 35.

396. See Subramanian Vythilingam v Human Rights Comm’n of Malay. [2003] MLJU 94 (Malay.).

years.³⁹⁷ Thirty civil groups addressed an open letter to Suhakam urging the withdrawal of this invitation, but to no avail.³⁹⁸ Major NGOs such as Suaram, Aliran, and HAKAM boycotted the event.³⁹⁹ Mahatir was unapologetic for his use of the ISA against political dissidents and for implementing national development projects such as the Bakun Dam project, which displaced 10,000 indigenous people, reportedly stating “at least we did not leave them to drown, like others have.”⁴⁰⁰

Civil society has expressed disquiet where they perceive Suhakam’s failure to act. For example, Suhakam has not addressed the discriminatory terms of employment relating to the retirement of Malaysian airlines system cabin crew, which required women to retire between 40 and 45 while males could continue working until 55. It would be well within Suhakam’s ambit to address this matter, as it implicates issues of equality and Malaysia’s obligations under CEDAW.⁴⁰¹

More charitable assessments are forthcoming from Ramdas Tikandas, former president of the NGO HAKAM, who views Suhakam “as a bridge between us and the establishment,” such that NGOs now have new opportunities “to meet directly and engage with police and prison authorities, which did not happen before.”⁴⁰² He states further that Suhakam has contributed toward the legitimacy of human-rights discourse, noting that in the past, “human rights was a subversive term, spoken in select circles and sometimes in whispers!”

Certain commissioners have made it a point to consult with NGOs on their views. Commissioner Hamdan consulted with NGOs after Suhakam received a January 13, 2006, memorandum signed by fifty-four NGOs, expressing their concern over government interference with the press after the government sent a show cause letter to China Press for reports of the nude squat incident and the subsequent resignation of two top editors.⁴⁰³ NGO consultation shows a willingness to cooperate with civil society. Suhakam appreciates that it needs to engage NGOs and the press in order to

397. See SUARAM Human Rights Report 2005, *supra* note 181, at 129.

398. See *id.*

399. See *id.*

400. See *id.* at 130.

401. See Maria Chin Abdullah, *Rights of Women and Children*, in FOURTH CONSULTATION, *supra* note 231, at 28, 30.

402. Abdul Razak Ahmad, *Keeping on track the civil liberties debate*, NEW STRAITS TIMES (Malay.), Feb. 21, 2006, at 18.

403. See Hamdan: *Act vital to protect freedom of information*, *supra* note 249, at 11.

advance human rights. It has urged the media to play its part in promoting human-rights awareness by having specialized reporting or a special desk to cover human rights continuously rather than on an ad hoc basis.⁴⁰⁴

Suhakam does not always take the lead in human-rights issues, but will lend its support to private initiatives even if it goes against government policies. The clearest example relates to concerns over plans to privatize water management in Malaysia, which sparked fears of the “commodification” of water, increased prices, and jeopardy to the poor’s access to a basic resource. In response, twenty-six NGO groups united to form the Coalition Against Water Privatisation. The Coalition presented protest memoranda to Parliament and Suhakam which argued that the right to water was a fundamental human right and water itself was a common good which should not be subject to profit motive.⁴⁰⁵ Suhakam has agreed with this conceptualization of water as a human right, which reflects international practice⁴⁰⁶ and affirmed that this is part of the human right to adequate housing, that is, a human right to access to safe drinking water and sanitation.⁴⁰⁷

By raising sensitivity about human-rights issues, mobilizing civil society, and fostering activism, Suhakam can help nurture a human-rights culture.

VI. CONCLUSION: SUHAKAM’S TEETHING PROBLEMS

Today, human rights is being spoken of everywhere, among the people, the authorities. This is a good sign. To this extent, I

404. See SUHAKAM, A CASE FOR MEDIA FREEDOM, *supra* note 247, at 22.

405. See Memorandum from Coalition Against Water Privatization [CAWP] to the Human Rights Comm’n of Malay. [SUHAKAM] (Feb. 25, 2005), available at <http://www.mtuc.org.my/memosuhakam24feb05.htm> (“Finally, we believe that water is a commons, the essence of life, and therefore should not be owned as private property and sold as a commodity Water rights are natural rights, water can be used by all but not owned. .”); see also *World Water Day, Malaysia – Penang Declaration*, ALIRAN MONTHLY (Malay.), Mar. 2005, <http://www.aliran.com/oldsite/monthly/2005a/2e.html> (“Water is a common good – the trust of humanity. It belongs to all – to everyone, everywhere.”); Anil Netto, *Why privatise water*, ALIRAN MONTHLY (Malay.), Feb. 2005, <http://aliran.com/oldsite/monthly/2005a/2c.html>.

406. See Int’l Covenant on Econ. Social & Cultural Rights (ICESCR) Comm., *General Comment No. 15: the right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 1, U.N. Doc. E/C.12/2002/11 (July 20, 2003).

407. See Suhakam Adequate Housing Statement, *supra* note 196.

would say Suhakam has been very successful in creating awareness and protection of human rights.⁴⁰⁸

—Tan Sri Abu Talib Othman

While we appreciate Suhakam's willingness to listen to our complaints and accept our reports, we also want some kind of action.⁴⁰⁹

—Maria Chin Abdullah

An institution is a product of the sociopolitical environment in which it operates; but it also constitutes and shapes this environment. As a focal point and venue for human-rights concerns, the existence and operation of Suhakam has affirmed the legitimacy of human-rights concerns as an integral aspect of political discourse. The importance of this cannot be discounted in states where the idea of human rights has been delegitimized by projecting it as an alien, imperialistic discourse. An NHRI allows a state to progress to the next stage of acquiring fluency in this new language and to integrate its priorities and perspectives into the formulation of law and public policy. NHRIs also serve as a social-justice mechanism because they speak to the need of victims of human-rights violations and let them know they do not have to suffer in silence. NHRIs do this first by characterizing a human-rights violation as a wrong or grievance and second by providing a channel through which violations may be articulated.

The workings of Suhakam are to a large extent driven by the priorities and particularities of Malaysian society. In particular, Suhakam is influenced by Malaysia's emphasis on meeting basic needs, poverty reduction strategy, and its economic goal to be a fully developed nation by 2020, encapsulated in Vision 2020.⁴¹⁰ Suhakam's focus on socioeconomic rights poses less of a threat to the political status quo and does not exacerbate social fragility in terms of race-religion relations. The government considers this to be constructive engagement. Emphasis on socioeconomic rights is consonant with the economic imperatives of a developing state⁴¹¹ and in line with the Malaysian stance, as reflected in the 1993

408. Nuraina Samad, *The Sunday Interview: Allow the wronged justice*, NEW SUNDAY TIMES (Malay.), Feb. 6, 2006, at 7 (profiling and interviewing Tan Sri Abu Talib Othman, Chair of Suhakam).

409. Abdullah, *supra* note 401, at 31.

410. Mahathir Bin Mohamad, *The Way Forward – Vision 2020*, <http://www.wawasan2020.com/vision/> (last visited Nov. 30, 2009) (first presented by former Prime Minister Mohamad at the tabling of the Sixth Malaysia plan in 1991).

411. See Whiting, *supra* note 226, at 387-97.

Bangkok Declaration, that the right to development is a central, fundamental, inalienable right.

Malaysia stresses the importance of meeting basic needs and has declared this a priority before international forums, so a central criterion in monitoring progress must be the extent to which this goal has been realized. In considering this, one should give special consideration to whether the right to development is a right enjoyed by all sectors of society, or whether marginalized communities exist. This is particularly important because Prime Minister Badawi noted in 2004 that distributive justice was a defining feature of Malaysian development strategy.⁴¹² The prime minister stated that it was integral to the social contract which sought to address income disparity and prioritized eradicating poverty as a method of reducing tensions between the poorer Malay majority and the wealthier immigrant communities, mainly the Chinese and Indians.⁴¹³ As part of the social compact, he said, immigrant Chinese and Indian communities would be granted political rights and citizenship in return for agreeing to special economic privileges for *bumiputera* or indigenous peoples, given their economically disadvantaged position.⁴¹⁴ Development policies are to take place “within the context of an expanding economic cake, so that assistance for the weaker community would not be at the expense of the communities that were better off.”⁴¹⁵ The prime minister further noted “that economic growth, and more importantly the equitable sharing of the fruits of such growth, has a positive impact on the stability of multicultural societies [and] provides an environment conducive to social harmony.”⁴¹⁶

Despite the prime minister’s statements, indigenous communities and their champions have pointed out their exclusion from the fruits of development, and the fact that such vulnerable communities disproportionately suffer from poverty and low living standards. The work of Suhakam is helpful in underscoring that the right to development cannot be assessed in purely quantitative terms, as a human-rights, “economics plus” approach to development implicates issues of distributive justice, local empowerment, and participation in the decision-making process. Suhakam can

412. Prime Minister Abdullah Badawi, Asia Media Summit, Keynote Address: The Challenges of Multireligious, Multiethnic and Multicultural Societies (Apr. 14, 2004), available at <http://www.un.int/malaysia/PM%20Statement/PM041904.htm>.

413. See *id.*

414. See *id.*

415. *Id.*

416. *Id.*

contribute to the concretization of the otherwise vague content of the right to development.

In its seven years of existence as a statutory body, Suhakam has managed to irritate the government and disappoint sectors of civil society.⁴¹⁷ It finds itself in the odd, “schizophrenic” position of being considered a body which is both antigovernment and an instrument of government, both a creature of the state and its watchdog. As an observer commented, “[i]t is probably the fate of Suhakam to be bashed by both sides.”⁴¹⁸

The U.S. Department of State noted in its 2005 report on Malaysia that many analysts had come to see Suhakam as a “credible monitor” of human-rights situations and a check on police activities that previously lacked oversight.⁴¹⁹ The report described Suhakam as “one of the few institutions in society with any ability, to challenge, however tentatively, executive control.”⁴²⁰

In March 2006, however, the *de facto* law minister Nazri reportedly stated that “Suhakam was never meant to have any teeth.”⁴²¹ His statement was in response to an opposition politician’s lament in Parliament that Suhakam was a toothless tiger and lacked enforcement powers to act against government agencies which committed human-rights abuses.⁴²² Suhakam has not been likened to an enforcement agency like the police, immigration, or customs department; rather some have said “it is very much like a Royal Commission”⁴²³ whose function is to hold inquiries and make recommendations.

Minister Nazri stated, “I think you are dreaming, we have never planned to give any teeth to Suhakam. It does not have prosecuting powers because this can be done by other enforcement agencies.” Another minister, however, Rais Yatim, was more receptive toward the role of Suhakam in September 2006, even when it raised difficult issues like the lack of review of ministerial decisions. Yatim stated that Suhakam, as the “highest body” on human-rights issues in Malaysia, was entitled to raise such issues, and the government should take its opinion into consideration “since Suhakam

417. For a thorough analysis, see generally Whiting, *supra* note 24.

418. Rainer Heufers, *Realisation of Freedom and Human Dignity*, in THIRD CONSULTATION, *supra* note 17, at 5, 7.

419. U.S. DEP’T OF STATE, *supra* note 77, at 17.

420. *Id.*

421. See Li, *supra* note 2 (quoting Mohd Nazri Abdul Aziz).

422. See *id.*

423. Hashim, THIRD CONSULTATION, *supra* note 114, at 17.

was created by the government and no one should say that Suhakam cannot bring this up.”⁴²⁴

Suhakam’s adoption as a facet of national capacity building is crucial to the cultivation of a human-rights culture, as well to the practical enjoyment of rights. Suhakam is eager to institutionalize human rights in daily practice in the name of good governance, which

involves all sectors of society in making and implementing decisions, through a participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive approach which respects the rule of law. It ensures that all avenues for corruption are minimized if not eradicated; minority views have to be fully considered; the voice of minorities are taken more seriously; and that the voices of the most vulnerable and marginalized groups are heard.⁴²⁵

Suhakam appreciates that it cannot function alone. For human rights to be effectively promoted, Suhakam must work in tandem with the Malaysian media and NGOs, as well as both the supporting faction and opposition factions in Parliament, to influence reform, educate the public, and create “a stronger culture of respect for human rights in Malaysia.”⁴²⁶ In formulating its action plan, Suhakam conceived of it as both “an outcome and a process,” observing that if all sectors of society were engaged in developing it, and it was well managed, it could yield positive results by strengthening civil society, and promote a better functioning electoral system, a stronger legal system, the rule of law, and an independent judiciary. As noted by Angela Thas, “[t]he only way Suhakam is going to grow some baby teeth, is for others to effectively complement its role and use the commission’s reports for lobbying and advocacy work.”⁴²⁷

In the final analysis, aside from questions of institutional capacity and competence, the sociopolitical environment, and even the stage of economic development, one final factor cannot be discounted in analyzing the efficacy of NHRIs in promoting a human-rights culture and affording some redress to human-rights violations—the human element and the need for moral courage. As Linda Reif notes “[t]he strength of character and, occasionally, the courage needed to operate an effective national human rights insti-

424. See Call for Freer Judiciary, *supra* note 66.

425. See SUARAM HUMAN RIGHTS REPORT 2003, *supra* note 11, at 12-13.

426. *Id.* at 12.

427. See Thas, FIFTH CONSULTATION, *supra* note 277, at 76.

tution should not be underestimated.”⁴²⁸ There must not only be good institutions; they need to be staffed by good men and women with proven track records and an authentic and principled commitment to promoting human rights as a facet of the common good.

In an interview former Suhakam Commissioner Zainah Anwar noted that Suhakam did not need to have any further powers; it was simply a question of “using what you have.”⁴²⁹

428. Reif, *supra* note 26, at 27.

429. Interview with Zainah Anwar, Former Suhakam Commissioner, in Petaling Jaya, Malay. (Nov. 31, 2006).