Human Rights In Malaysia: Challenges And Constraints In The Malaysian Context

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Introduction

What are human rights? Human rights may be understood as guarantees to ensure respect for human dignity. Human rights are the entitlement of all individuals, communities and peoples, from the East to the West. No nation or specific culture may claim ownership over human rights, since respect for human dignity is arguably manifested in the beliefs of all cultures and peoples across the world. The Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948, codifies core human rights principles into a document which provides a guideline for understanding human rights. Many commentators regard this document as an expression of international customary law, by virtue of its presumed expression of the collective human rights norms adhered to by all peoples and nations.

Within the Malaysian context, we can point to our own indigenous cultural practices which echo notions of human rights. Concepts such as respect for human life, respect for the elderly, and justice, are all embodied in our age old traditions, and may now also be equated with contemporary human rights

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principles. The Federal Constitution legally enshrines a number of human rights, including the right to life and liberty, freedom of movement, freedom of assembly and freedom of religion. The Federal Constitution also prohibits discrimination against citizens on the ground of religion, race, descent, place of birth or gender.

In addition to human rights obligations stemming from domestic laws, Malaysia has also ratified or acceded to a number of international treaties which either expressly or otherwise, to protect the human rights of various groups within society. Such treaties include the following:

a) Convention on the Elimination of Discrimination Against Women (CEDAW);\(^2\)

b) Convention on the Rights of the Child (CRC);\(^3\)

c) Supplementary Convention on the Abolition of Slavery, the Slavery Trade and Institutions and Practices Similar to Slavery;\(^4\)

d) Convention on the Nationality of Married Women;\(^5\)

e) Convention on the Prevention and Punishment of the Crime of Genocide;\(^6\)

f) Geneva Conventions of 12 August 1949 for the Protection of War Victims;\(^7\)

g) Equality of Treatment for National and Foreign Workers (Accident Compensation) Convention (ILO 19);\(^8\)

h) Forced Labour Convention (ILO 29);\(^9\)

\(^2\) Accession on 5 July 1995.
\(^3\) Accession on 17 February 1995.
\(^4\) Accession on 18 November 1957.
\(^5\) Accession on 24 February 1959.
\(^6\) Accession on 20 December 1994.
\(^7\) Convention (1) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces of the Field; Convention (2) for the Amelioration of the Condition of the Wounded and Sick in the Sea; Convention (3) Relative to the Treatment of Prisoners of War; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Accession on 24 August 1962.
\(^8\) Accession on 11 November 1957.
\(^9\) Accession on 14 January 1960.
i) Recruiting of Indigenous Workers Convention (ILO 50);¹⁰
j) Contracts of Employment (Indigenous Workers) Convention (ILO 64);¹¹
k) Abolition of Penal Sanctions (Indigenous Workers) Convention (ILO 65);¹²
l) Contracts of Employment (Indigenous Workers) Convention II (ILO 86);¹³
m) Abolition of Forced Labour Convention (ILO 105).¹⁴

However, despite the Constitutional protection for human rights, and ratification of various human rights treaties, other impediments still remain to thwart the complement fulfilment of human rights in Malaysia. It is important to recall that the Constitutional rights are not infinite and may be derogated in situations of national emergency and to protect public order and public interest. Derogations to these rights are provided within the very Constitutional provisions which enshrine them in the first place. Exceptions to the application of these Constitutional rights provide Parliament with the discretion to enact various laws, which may result in violations of human rights.

Furthermore, while Malaysia has acceded or ratified the previously mentioned international human rights treaties, concerns still remain concerning the implementation of obligations within these treaties. Malaysia has also yet to ratify other core human rights treaties, including the Convention Against Torture, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

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¹⁰ Accession on 11 November 1957.
¹¹ Ibid.
¹² Ibid.
¹³ Accession on 19 May 1958.
¹⁴ Accession on 13 October 1958.
SUHAKAM, as an institution established by Parliament to promote and protect human rights, regularly monitors the human rights situation in Malaysia, to identify trends and patterns relating to human rights issues of concern. The remainder of this paper will discuss some of the main human rights areas of concern within Malaysia, as identified by SUHAKAM during the course of its work over the years.15

**Detention without trial**

The Universal Declaration of Human Rights 1948 contains a number of provisions which affirm the right of liberty of the individual from arbitrary arrest and detention. Article 3 categorically affirms the “right to life, liberty and security of the person,” Article 9 stipulates that “no one shall be subjected to arbitrary arrest, detention or exile,” while Article 10 guarantees the right to “a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations, and of any criminal charge against him.” These are just some of the provisions within the UDHR which attest to the overall incongruity between human rights and detention without trial.

Freedom of the individual is also guaranteed by the Federal Constitution. Article 5 of the Constitution guarantees the right to life and personal liberty, save in accordance with requirements of the law. Article 5 is also equipped with additional guarantees, including the right to be informed of the grounds of arrest, the right to be defended by a legal practitioner of his choice, and the right to appear before a Magistrate within 24 hours. However, the Federal Constitution also contains other provisions which dilute the protection

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15 Please refer to SUHAKAM’s Annual Reports, particularly the 2004 Annual Report, for further pertaining to many of the issues highlighted within this paper.
conferred by Article 5. These provisions allow for the enactment of emergency and public laws, which allow for detention without trial or preventive detention. Preventive laws include the Internal Security Act 1960, the Emergency (Prevention of Crime) Ordinance 1950, and the Dangerous Drugs (Special Preventive Measures) Act 1999.

According to statistics available to SUHAKAM, the use of the Internal Security Act (ISA) increased after the beginning of the “war on terror,” following the terrorist attacks in America on September 11, 2001. Arrests and detentions were made in Malaysia, particularly in respect of persons accused of being affiliated to Jemaah Islamiah and Kumpulan Mujahideen Malaysia, during 2002 and 2003. However, the number of arrests decreased in 2004, compared to previous years following the 9/11 attacks. As of the beginning of July 2004, 101 persons were confirmed to be detained under section 8(1) of the ISA, out of which, only 18 were detained in 2004.

Some ISA detainees have alleged to have been victims of different forms of human rights violations during the two main phases of detention under the ISA. During the first phase of detention under section 73 of the ISA, detainees are held in police lock-ups and police remand centres for up to 60 days. SUHAKAM’s two main reports on the ISA, mainly the Report of the Public Inquiry on Conditions of Detention under the ISA, and the Review of the ISA, have found that the majority of systematic human rights violations are alleged to have taken place during detention under section 73, including allegations of cruel, inhuman and degrading treatment, denial of the Constitutional right to legal counsel, access to a magistrate within 24 hours etc.16

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SUHAKAM has also received complaints concerning the conditions of detention under section 8(1) the ISA, which allows detentions for up to two year periods, renewable indefinitely. During this phase of detention, ISA detainees are detained at the KEMPTA detention facility in Kamunting, Perak. Violations during this period routinely relate to limitations on access to family visits, and poor living conditions. Additionally, towards the end of 2004, SUHAKAM investigated violent scuffles at Kamunting, involving the prison guards and several detainees allegedly affiliated to Jemaah Islamiah. A number of detainees were injured during the course of these scuffles.

However, the ISA is not the only preventive detention law which raises concerns for human rights in Malaysia. SUHAKAM has also received complaints from detainees detained pursuant to the Emergency (Prevention of Crime) Ordinance. Many of the detainees under the Emergency Ordinance are held at the Simpang Renggam detention center in Johor. Detainees at the Simpang Renggam detention facility organized a hunger strike to protest their detention following the Deepavali and Hari Raya festivities in November 2004. SUHAKAM carried out investigations at Simpang Renggam, and was instrumental in persuading the last remaining hunger striker to end his protest fast.

Law Enforcement Issues

SUHAKAM has received many complaints concerning the conduct of law enforcement officials, particularly the police. Such complaints include allegations of abuse of power, excessive use of force, inaction or slow
response rate to complaints from the public, lack of notification to
apprehended individuals and relevant family of grounds of arrest, death in
custody and consecutive remand orders.

SUHAKAM reacts to these complaints in different ways, in accordance with
the nature of the abuses involved. In situations where such abuses imply the
existence of a systemic pattern of violations, SUHAKAM avails itself to its
powers to conduct Public Inquiries, as provided for under section 12(1) of the
Human Rights Commission of Malaysia Act 1999. In February and March
2004, SUHAKAM held a Public Inquiry in relation to police actions at Desa
Monteki, in Kundasang, Sabah. The Inquiry Panel investigated allegations of
improper use of force when evicting villagers from land, inhumane treatment
of detainees in the police lock-up, and improper use of remand orders under
section 117 of the Criminal Procedure Code.

Although the Inquiry Panel did not find evidence to substantiate all
allegations made against the police, some of the allegations were proven. For
instance, the Inquiry Panel found evidence to suggest that the police had
subjected the detainees to inhumane treatment, including excessive
overcrowding and unhygienic conditions in the lock-up, denial of medical
assistance and insufficient food and drinking water. The Inquiry Panel also
found that the police had misused remand orders under section 117 of the
Criminal Procedure Code, to delay the release of detainees on bail.

It is hoped that the government’s decision to establish a Special Commission
to Enhance Management of the Police Force, will herald a reduction in
complaints of human rights violations by the police. The recently released
report of the Special Commission verified instances of excessive use of force
by police, particularly against suspects in custody - allegations which SUHAKAM has already highlighted in its reports and statements.

The establishment of a Special Taskforce to implement the Police Commission recommendations should lead to a reduction of human rights violations by the police, when established. It is hoped that the Task Force will be established as soon as possible. Even as recently as May 2005, SUHAKAM received 3 separate complaints against the police, relating to abuse of power, excessive use of force, and also inaction in the investigation of cases.

The Courts

The notion of justice is inextricably interrelated to the effective enjoyment of human rights. The UDHR has devoted a number of rights relating to justice. Article 8 guarantees the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted by the Constitution, or by operation of the law. Article 10 enshrines the right in full equality to a fair and public hearing, by an independent and impartial tribunal. Additionally, Article 11 contains a number of safeguards including the basic presumption of innocence until proven guilty before a public trial, the right to a defence, protection against convictions resulting from acts or omissions which did not constitute offences at the time of commission, and also protection from the imposition of heavier penalties than what was applicable at the time of the commission of the offence.

Domestic laws also include provisions to ensure that justice is met. For example, Article 5 of the Federal Constitution provides for the right to appear before a magistrate within 24 hours of arrest. This Article also provides the High Court with the jurisdiction to inquire into complaints concerning
unlawful detentions and to release those who have been unlawfully detained. Article 7 provides protection against retrospective criminal laws and repeated trials. Furthermore, Article 8 guarantees equality before the law, and equal protection before the law.

Notwithstanding the existence of such Constitutional guarantees, and other applicable laws, concerns still remain which thwart access to justice before the Courts. SUHAKAM has received many complaints concerning delays in the disposal of cases, which inevitably leads to various other grievances, including increase in litigation costs, prolonged anxiety and extended deprivation of the right to liberty of persons held in custody without bail. There is also room for concern regarding the lack of familiarity and receptivity of the judiciary to applying international human rights principles to their judicial deliberations and determinations.

It is positive to note that the Judiciary has embarked on internal initiatives to redress some of these problems. At the end of 2004, the Chief Justice embarked on a self-evaluative reporting mechanism to increase public confidence in the judiciary’s capability. The findings of this new initiative were released the Judiciary’s “Inaugural Report on the Superior and Subordinate Courts in Malaysia.” This report acknowledges the existence of many deficiencies of the court system. This acknowledgement is clearly an important step forward to ensuring swift and effective justice before the Courts.

However, the existence of internal self-evaluation mechanisms should not negate the right of external parties to monitor and issue constructive comments to improve the performance of the Courts. In general, SUHAKAM
has been monitoring the performance of the Courts, and acting upon complaints received in relation matters within SUHAKAM’s legal jurisdiction.

In April this year, SUHAKAM organize a public forum to discuss and address the issue of delays in the disposal of cases by the Courts. SUHAKAM recently released the first part of the report of this forum, which focuses on Civil and Criminal Court cases. A number of recommendations are made within this report to expedite the disposal of cases by the Courts. Recommendations relating to the Criminal Courts include separation of the functions of the Judicial and Legal Services, review of current practices for the examination of witnesses, prioritisation of cases involving children, persons with disabilities and the aged, increasing the number of foreign language interpreters, and conducting case management through pre-trial reviews. In relation to Civil Court cases, SUHAKAM makes several recommendations, including that judges disallow adjournment of trial dates once dates are fixed, and that judges increase their specialisation in different areas of law including human rights law.

**Freedom of the Media**

Article 19 of the UDHR declares that everyone has the right to freedom of opinion and expression; which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Under Malaysian law, freedom of information is guaranteed to some extent through Article 10 of the Federal Constitution, which affords every citizen with the right to freedom of speech

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and expression. However, the Constitution also allows the enactment of laws which effectively derogate the full exercise of freedom of expression in certain situations. Laws which minimize the enjoyment of this right include the Printing Presses and Publications Act, as well as the Official Secrets Act.

SUHAKAM has received many complaints from the media, alleging violations to their rights. Such complaints usually revolve around the restrictive effect of laws regulating the media profession. SUHAKAM organised a workshop on freedom of the media in 2002, and published its recommendations in a report on this issue. Recommendations include for the government to review and amend restrictive legislation, and to support the establishment of a Media Council to facilitate internal self-regulation of the journalistic profession.

However, concerns have been raised to SUHAKAM on the allegedly unethical manner of reporting of some reporters and journalists, which excessively encroached into the arena of individual privacy. The right to privacy is enshrined in Article 12 of the UDHR, which confirms that “No one shall be subjected to any arbitrary interference with his privacy, family, home, correspondence, nor to attacks upon his honour and reputation.” Article 12 also clarifies that “Everyone has the right to equal protection of the law against such interference or attacks.”

In 2004, SUHAKAM decided to establish a Media Complaints Committee, to act as a catalyst for the eventual formation of a Media Council to improve the standards of the journalistic profession. The primary purpose of the

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Committee is to investigate and act upon complaints of unethical reporting, leading to violations of the right to privacy, and any other human rights, by journalist. SUHAKAM will only act as a mediator for the aggrieved party and the party complained of. Better standards of journalism should lead to the propagation of an equitable balance between the equally important, but often conflicting demands of privacy, with freedom of expression and information.

**Indigenous Peoples**

As previously noted within this paper, SUHAKAM is a party to a number of ILO Conventions which protect the rights of indigenous peoples. Despite this, indigenous peoples continue to be subjected to various violations of human rights, including deprivation of their native customary land rights following acquisition of their lands by the government for development projects. Indigenous peoples in rural areas are also often deprived of access to basic living amenities, including healthcare and clean drinking water. Ultimately, many rural indigenous communities are unable to exercise their right to self-determination, which is recognised within the international human rights framework as the core right to enable realisation of all other rights.

In 2004, SUHAKAM released a report on the plight of the indigenous communities in Sarawak.[^19] This report was the result of detailed onsite investigations in rural areas including Sungai Asap in Belaga, and Hulu Sungai Balui. In this report, SUHAKAM called upon the government to adopt a number of measures, including recognition of native customary land rights, provision of adequate compensation for land accrued by the government; recognition of the right of indigenous communities to self-determination;

ensuring accessibility to basic needs; providing opportunities to make a living through gainful employment; and guaranteeing indigenous communities their citizenship rights.

SUHAKAM relied on international standards, including those within the UDHR, ILO Convention Concerning Indigenous and Tribal People in Independent Countries (ILO 169), and the draft UN Declaration on the Rights of Indigenous People, when formulating its recommendations for the report. Subsequent to the release of this report, SUHAKAM has since embarked on further research into the situation of other marginalised indigenous communities in Malaysia, beginning with the Orang Asli communities of East Malaysia. This research is still ongoing.

**Women and Child victims of trafficking**

During the course of routine investigations in Kajang Prison in 2003, SUHAKAM discovered the presence of young women from various countries, who had been trafficked to Malaysia under false pretences, and inevitably lured and trapped into the flesh trade. These women come from different countries, particularly from China, Indonesia, Thailand, Cambodia, Vietnam, Philippines, and even former Russian Republics such as Uzbekistan. Many of these women revealed that they had entered into vice under duress from persons they had most trusted. Most of these women were detained by the police for violation of immigration offences.

SUHAKAM organised dialogues and a seminar specifically aimed at conceptualising coordinated response amongst neighbouring countries in Asia to combat human trafficking. A number of recommendations were made
to solve this problem. SUHAKAM’s recommendations include the establishment of a regional human trafficking Information Centre, signing of a Memorandum of Understanding between the Malaysian government and neighbouring countries, establishment of a national trafficking taskforce, and ratification of the UN Protocol to Trafficking in Women and Children (Palermo Protocol).

**Rights of asylum seekers and migrant workers**

On various occasions, SUHAKAM has been confronted with situations of human rights violations involving non-Malaysian nationals. While conducting investigations at the Menggatal immigration detention facility in Sabah, on 15 September 2004, SUHAKAM discovered 43 foreign children of uncertain status and national origin, who were detained together with adult detainees, none of whom were their relatives or guardians. The children had been arrested straight from the streets. These children ranged from the ages of 4 to 15 years.

This detention arguably violated Malaysia’s obligations under the Convention on the Rights of the Child (CRC). Article 2(1) of the CRC requires State Parties to ensure the rights of all children within their jurisdiction, without discrimination of any kind, including discrimination in relation to nationality and racial origin. Furthermore, under Article 22, State Parties are required to provide child asylum seekers with all the additional protection guaranteed to them under international refugee law, at least until proper procedures have been instituted to properly verify and determine their status. The children

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20 *Trafficking in Women and Children* is available from the following URL: www.suhakam.org.my/docs/document_resource/trafficking/Trafficking_Chip7.pdf
were eventually separated from the adult detainees upon the actions of Chief
Minister of Sabah, Dato Seri Musa Aman, in response to SUHAKAM’s
recommendations for action to be taken.

The situation is even more complicated with adult asylum seekers. Malaysian
law makes no distinction between genuine refugees and undocumented
migrant workers, who are all considered as illegal immigrants if found
without proper documentation. All illegal immigrants are equally subject to
various punitive measures including deportation and caning.

However, in practice, there is indication that the government may be making
certain policy exceptions to this general rule. For instance, at the end of 2004,
Minister in the Prime Minister’s Department, Mohd. Nazri Abdul Aziz,
announced that the government would recognise the status of the existing
Rohingya Community in Malaysia, some of whom have been living in
Malaysia without any documentation or status for over 20 years. Rohingyas
are generally recognized by the international community to be stateless
persons. More recently, the government reportedly announced that refugees
would be allowed to work in certain sectors, to overcome current labour
shortages in Malaysia following the mass deportation of undocumented
migrant workers early in 2005.21

If implemented, these policy decisions may eventually pave the way for
systematic governmental recognition of the rights of refugees and stateless
persons, and ultimately even accession to applicable international human
rights instruments, including the 1951 Convention on the Status of Refugees

21 The Star: UNHCR refugees to be allowed to work here, 6 July 2005.
SUHAKAM organized a roundtable dialogue with government officials, NGOs and the UNHCR, with a view towards discussing the problem faced by bona fide refugees in Malaysia.

Conclusion

While certain positive headways have been noted, it is clear that certain areas of human rights concern still remain. For its part, SUHAKAM will continue its work in these and other areas of human rights concern, with the aim of fulfilling its mandate to promote and protect human rights in Malaysia.