



# **Role of Human Rights Commission in relation to Access to Remedies**

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# Introduction

- ▶ International human rights system - victims must have access to an effective remedy when their rights have been violated.
- ▶ The United Nation Guiding Principles(UNGPs) on Business and Human rights - the State duty to protect - if companies abuse human rights, States will provide a robust and appropriate remedy to those affected, through judicial, administrative, legislative or other appropriate means
- ▶ Effective judicial mechanisms are at the core of ensuring access to remedy

## Pillar 3 UNGP :Access to Remedies

- ▶ State-Based Judicial Mechanisms
- ▶ State-Based Non-Judicial Grievance Mechanisms ( **Example Human Rights Commission/NHRIs**)
- ▶ Non-State Based Grievance Mechanisms

# Principle 31 of the UNGPs

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- **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
- A source of **continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms

# National Human Rights Institution and business and human rights

- ▶ NHRIs are **independent bodies** tasked with promoting and protecting international human rights law standards at country level.
- ▶ Their involvement in issues concerning human rights abuses by corporate entities predates the **UN Guiding Principles on Business and Human Rights** (UNGPs).
- ▶ **NHRIs** have subsequently played a role in the **implementation of the UNGPs**, including access to remedy, known as the third pillar.
- ▶ NHRIs and their varying mandates may allow for more **flexible implementation** of the UNGPs tailored to local needs.
- ▶ NHRIs are often the only **state-based non-judicial mechanisms (NJMs)** with **mandates** expressed in explicitly **human rights terms** that are capable of responding to systemic issues.
- ▶ In complex and systemic human rights cases, NHRIs are able to address **root causes**.

# Role of NHRIs in relation to access to remedy

- ▶ **Complaint handling mandates.**
- ▶ Mandate to receive complaints is not an express requirement under the Principles relating to the Status of National Institutions (Paris Principles), this mandate may help NHRIs in addressing access to remedy.
- ▶ **The Paris Principles, adopted by UN General Assembly resolution 48/134 of 20 December 1993, are a set of non-binding principles that set out a framework for the work of NHRIs.**
- ▶ NHRIs may sometimes be the only venue that is available to the victims or affected parties seeking remedy.
- ▶ **Wider investigations and public inquiries** by NHRIs
- ▶ NHRIs can ensure that victims are aware of their rights and fully involved in the process.
- ▶ NHRIs can also support access to remedy through **advocacy and education/training**. For example, certain NHRIs have conducted training for the business community or transnational corporations on how to set up project-level grievance mechanisms.

# Role of NHRIs in relation to access to remedy

- ▶ Complaint handling mechanism ( including cross border transnational issue issue)
- ▶ SOP on complaints and inquiry
- ▶ Training and education of NHRIs officers – enforcement agencies , OHCHR etc
- ▶ Support access to remedy by advocacy roles – education and training mandates
- ▶ Promotion and protection of the HR mandate
- ▶ Power to issue recommendations and remedial actions
- ▶ Conduct watching briefs

# Role of NHRIs in relation to access to remedy

- ▶ Role of NHRI to **conduct mediation**
- ▶ NHRIs with a mandate to monitor judgments of the national courts and receive referrals by such courts to undertake mediation on human rights cases, including on business-related abuses.
- ▶ As some judicial bodies do not have the expertise and capacity to deal with particular human rights cases, it is important for NHRIs to offer their human rights expertise, including through building the capacity of judicial institutions.
- ▶ Mediation in business and human rights is also available from other NJMs, including the National Contact Points (NCPs) of the Organisation for Economic Co-operation and Development (OECD). However, there have been cases where NCPs' decisions are not implemented and followed up.



# NHRI- Power to investigate , mediate, mandate to receive complaints (labour issues)

- **Sexual harassment in the workplace**
- **Rights of domestic workers**
- **Discrimination against pregnant employees**
- Access to healthcare for migrant workers
- Right to Unionize- union busting
- Minimum wage
- Withholding of migrant workers' passports
- Living conditions of migrant workers ( safety at workplace)
- Trafficking issues –Discovery of death camp- Wan Kelian issues
- Responsibility of GLC /SOE- Pillar 1 - GP 4 UNGP
- Small and Medium Enterprise ( 90 % registered with SSM)

# Mandate of Human Rights Commission of Malaysia by Law

- Section 4(1) of Human Rights Commission of Malaysia Act 1999(Act 597):

To promote awareness of and provide education in relation to human rights

To advise and assist the Government in formulating legislation and procedures and recommend the necessary measures to be taken

To recommend to the Government regarding accession to international human rights instruments

To inquire into complaints regarding infringements of human rights

# Mandate under the National Human Rights Commission Act

- ▶ Mandate under the National Human Rights Commission Act
- ▶ **Receiving complaints**
- ▶ **Conducting Public and National Inquiries**
- ▶ **Investigation powers**
- ▶ 114 on B & HR complaints – 2011- 2014, 26 complaints in 2015 (out of 676) and 16 complaints in 2016 (698)
- ▶ 2000- 2017- 13,440 HR complaints
- ▶ Trespass and damage to native customary land as a result of logging activities, land development and land communities, denial of rest days for employees, late payment of salary, unfair dismissal, discrimination of marginalized groups, administrative issues , land titles, trafficking of person , disappearance of persons, freedom of speech and expression

## Section 12 of Act 1999

- A national inquiry is a mechanism that can be used to achieve SUHAKAM's mandate to investigate systemic human rights issues with a view to solving them through systematic means.
- By adopting a broad-based human rights approach, it can examine a large situation as opposed to an individual complaint, and
- Dual focus, fulfilling both fact finding and educational roles (capable of educating the public and all parties concerned and
- Regarded to be better at investigating systemic causes of human rights violations.

# National Inquiry on into the Land Rights of Indigenous Peoples

- ▶ SUHAKAM's authority to conduct a National Inquiry lies in **section 12(1) of the SUHAKAM Act (Act 597)**.
- ▶ Section 12(1) of the Act stated that the Commission may, **on its own motion or on a complaint made by an aggrieved person or group of persons** or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons
- ▶ Issues -administrative, plantation, logging and forest reserves, inclusion of land into protected areas, indigenous land development schemes and commercial development projects.

# Scope and framework of National Inquiry

- ▶ Legislative Basis
- ▶ Terms of reference
- ▶ Panel of inquiry
- ▶ Procedure of national inquiry
- ▶ Introductory session
- ▶ Research
- ▶ Public submission
- ▶ Public consultations – 23 districts , 34 days, 6,500 IP, 892 statements
- ▶ Public hearings – April – June 2012- 132 cases (National Inquiry)
- ▶ Report of inquiry
- ▶ Follow up recommendations with state and federal government

# Terms of reference

- ▶ To determine the constitutional , legal and administrative and political recognition of the indigenous people's rights to land and their effectiveness in protecting and promoting the IP rights to land
- ▶ To inquire into the land rights situation of the IP and the impact of the recognition and non recognition of their rights to land to their social , economic , cultural and political rights taking into consideration relevant international and domestic laws
- ▶ To identify constraints which impede full enjoyment of IP rights to land in accordance with their needs and requirements
- ▶ To create and promote awareness , knowledge and understanding of the IP rights to land and their way of life

# Process

- ▶ The Inquiry started with **introductory sessions** followed by **public consultations** with stakeholders.
- ▶ the Inquiry also called for **written public submissions**.
- ▶ Subsequently **public hearings** were conducted to hear selected cases from the consultations and submissions.
- ▶ The Inquiry also **commissioned studies into the land rights of the indigenous peoples** to be conducted in Peninsular Malaysia, Sabah and Sarawak.
- ▶ Ensure that all **stakeholders understand the true intention of SUHAKAM**, appreciate the Terms of Reference, and **participate actively in the process of the Inquiry**,
- ▶ SUHAKAM held a series of introductory sessions in the Peninsula, Sabah and Sarawak.



# Recommendations of National Inquiry

## 1. Recognise Indigenous Customary Rights to Land

- **Recommendation 1:** Address Security of Tenure
- **Recommendation 2:** Clarity of Concepts on Customary Tenure
- **Recommendation 3:** Restitution for Non-Recognition of Customary Lands

## 2. Remedy Land Loss

- **Recommendation 4:** Redress Mechanisms
- **Recommendation 5:** Address Past Policies & Programmes
- **Recommendation 6:** Review Compensation

## 3. Address Land Development Issues/Imbalances

- **Recommendation 7:** Adopt HRBA to Development and FPIC Law
- **Recommendation 8:** Ensure Land Development Does Not Adversely Impact
- **Recommendation 9:** Promote Successful Development Models
- **Recommendation 10:** Policy Towards People-Centred Inclusive-Sustainable Development

#### 4. Prevent Future Loss of NCR Land

- **Recommendation 11:** Settlement Exercise on Indigenous Customary Land
- **Recommendation 12:** Recognition of Indigenous Lands in Protected Areas
- **Recommendation 13:** Encourage Active Involvement of Indigenous Peoples in Forest Management

#### 5. Address Land Administration Issues

- **Recommendation 14:** Conduct Comprehensive review of JAKOA
- **Recommendation 15:** Capacity Enhancement of Land Departments
- **Recommendation 16:** Review Responses to Land Issues
- **Recommendation 17:** Immediate Implementation of Corrective Measures

#### 6. Recognise Land as Central to Indigenous Peoples' Identity

- **Recommendation 18:** Establish an Independent National Commission on Indigenous Peoples

# Legal Issues and Challenges



## Access to Environmental Justice

- i. A **growing call for greater public participation in environmental issues** particularly in the enforcement process of environmental laws.
- ii. Public participation crucial in the enforcement of environmental matters through ensuring right to access to information, right to participate and right to access to effective justice.
- iii. Many **environmental statutes in the developed world provide people with certain specific rights** to participate in permitting procedures, public petitions for agency action and citizen enforcement of a state law.

# ACCESS TO JUSTICE IN ENVIRONMENTAL GOVERNANCE



## Procedural Issues on Environmental Cases

- i. **Absence of provision to allow the victim of environmental harm to bring a case directly to court** for the purpose of claiming compensation for any damage suffered. Under the EQA 1974, and any other environmental legislation, prosecution remains exclusively with the respective Director Generals.
- ii. **Access to civil litigation in environmental cases is very tight such as *Locus standi* requirement** in which only persons who can demonstrate sufficient connection with or interest in the subject matter in dispute can seek a judicial remedy.



## Lack of Resources

- i. **Shortage of skilled and experienced professionals for effective enforcement of environmental law** is a common phenomenon in Malaysia as in most other developing countries.
- ii. The planning and environmental department officials trained in the physical, biological and social sciences, needed to implement interdisciplinary environmental protection techniques, are not available.
- iii. States often not capable to effectively deal with environmental problems due to the **limitation of their resources for adequate manpower, finance, monitoring equipment and technical expertise.**

# Challenges faced by NHRI

- ▶ While NHRI mandates may provide **flexibility in implementing the Paris Principles**, they can also **limit** an NHRI's room for manoeuvre.
- ▶ Even if NHRIs have the power to issue recommendations on remedial actions they **may lack enforcement powers**.
- ▶ NHRIs are part of state-based NJMs with the ability to **complement and supplement both judicial mechanisms as well as other NJMs**, including those operating at the international level.
- ▶ The roles of these mechanisms overlap and a key issue is how to **enhance their cooperation** with one another to deliver accountability and effective remedy, and to **prevent duplication**.
- ▶ NHRIs should **not operate in isolation**, as they are part of a broader system.
- ▶ **Independence**
- ▶ **Restricted mandate**
- ▶ **Limited resources**
- ▶ **Lack of political will** to reform mandates or relevant legislation, to allow NHRIs space to operate without interference, and to provide them with sufficient and reliable funding.

# Going Forward

- ▶ Strategic and systematic approaches to ensure accountability and remedy for business related rights abuses
- ▶ Integration of mandate- -judiciary – conducting human rights training for judiciary – contribute to greater access to remedy
- ▶ NHRIs relation with other actors (business enterprises) mentioned in UNGP and broader human rights system
- ▶ Communicating and sharing information with other mechanism, enforcement bodies and regulatory agencies
- ▶ Strategize and potential platforms in resolving cross border /extraterritorial issues in the region(AICHR)



**THANK YOU**

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