

The Role of SUHAKAM in Uncovering the Crime of Enforced Disappearance in Malaysia: An Appraisal of Its Public Inquiry on Enforced Disappearances

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ABSTRACT

Since 2016, three high-profile cases of enforced disappearances have occurred in Malaysia. The enforced disappearance of Amri Che Mat, Pastor Raymond Kho, and Joshua Hilmy-Ruth Sitepu shocked a nation that was not aware of a crime of this nature. Being a crime committed by the agents of the state, its secretive and complex nature makes it extremely difficult for the families to uncover the truth about their disappeared relative's whereabouts or fate. However, in uncovering the crime of enforced disappearance as a reality in Malaysia, the role played by SUHAKAM deserves special mention.

This paper analyses the measures taken by SUHAKAM to find the agents of the state responsible for the enforced disappearances. The analysis revealed that, by adopting a public inquiry, SUHAKAM was able to gather a diverse pool of evidence that ultimately led to the unmasking of enforced disappearances in Malaysia. Finally, it concluded that unless enforced disappearance is recognised as a distinct crime, the struggle endured by the families and SUHAKAM will be in vain.

Keywords: SUHAKAM, Enforced Disappearance, Malaysia, Public Inquiry, Evidence, Human Rights Commission Act 1999, Powers of SUHAKAM

1. Introduction

SUHAKAM, the Human Rights Commission of Malaysia published in 2019 and 2022, its final decision on the fate of four disappeared individuals. On 3rd April 2019, the Commission found the disappearance of both Amri Che Mat and Pastor Raymond Koh to be a case of enforced disappearance. It similarly found Joshua and Ruth Hilmy to be the victims of this crime on 22

April 2022. In the former case, SUHAKAM found the state agents responsible for committing their enforced disappearance. But in the latter case, although the victims were found to have disappeared involuntarily, the Commission was not able to find the state agents to be responsible for this crime. Thus, it was only in the Amri Che Mat and Pastor Raymond Koh cases that SUHAKAM directly implicated state agents as perpetrators. These findings raise a pivotal question about how SUHAKAM reached two separate conclusions in an enforced disappearance case.

Under international law, an enforced disappearance is considered to be the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.⁹⁴ One defining feature of this crime is the difficulty in obtaining any direct evidence, as the victim has vanished without a trace.

The difficulty of proving state complicity in an enforced disappearance has for a long time been a problem faced by the families of the forcibly disappeared and the prosecutors.⁹⁵ But the families have found the international human rights courts and UN treaty bodies to be effective venues for establishing state responsibility with the help of indirect and circumstantial evidence.⁹⁶

In Malaysia, it was SUHAKAM that first ruled the disappearances of these four individuals as enforced disappearances.⁹⁷ The commission positively established this finding by using its power to conduct a public inquiry into the allegations of human rights violations. The Human Rights Commission Act 1999 provides the power to conduct inquiries into any allegations of human rights violations. Being a crime that, in most cases, does not leave any direct evidence,

⁹⁴ International Convention for the Protection of all Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) art 2.

⁹⁵ Emilio Crenzel, 'Inside "State Terrorism": Bureaucracies and Social Attitudes in Response to Enforced Disappearance of Persons in Argentina' (2018) 10(2) J. Hum. Rights Pract. 268 <<https://academic.oup.com/jhrp/article/10/2/268/5050863>> accessed 29 December 2020.

⁹⁶ Thomas Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court' in RB Lillich (ed), *Fact-Finding before International Tribunals* (Ardsley-on-Hudson: Transnational Publishers 1990); Alexander Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 International Human Rights Law Review 57 <https://brill.com/view/journals/hrlr/2/1/article-p57_3.xml> accessed 29 December 2020; Gobind Singh Sethi, 'The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances' (2001) 8 Human Rights Brief 29 <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1507&context=hrbrief>> accessed 29 December 2020.

⁹⁷ Keertan Ayamany, 'Suhakam Inquiry Finds Enforced Disappearance of Pastor, Wife "Involuntary" but No Evidence to Show by "Agents of the State"' *Yahoo News* (Kuala Lumpur, 15 April 2022) <<https://malaysia.news.yahoo.com/suhakam-inquiry-finds-enforced-disappearance-042615961.html>> accessed 17 August 2022; Ida Nadirah Ibrahim, 'Suhakam Concludes Activist, Pastor Victims of Enforced Disappearance' *Malay Mail* (Kuala Lumpur, 3 April 2019) <<https://www.malaymail.com/news/malaysia/2019/04/03/suhakam-concludes-amri-che-mat-victim-of-enforced-disappearance/1739267>> accessed 22 May 2023.

the public inquiry gave SUHAKAM a valuable opportunity to ascertain the fate of the disappeared persons. It also allowed a wide array of evidence to be collected and compiled to find state responsibility for the crime. However, it is to be understood that SUHAKAM's power to conduct an inquiry is limited. Although SUHAKAM can conduct quasi-judicial proceedings, its decisions are not binding. Further, it can only recommend measures to the government. Despite several limitations, SUHAKAM has been successful in uncovering the crime of enforced disappearance in Malaysia.

This article, therefore, explores the efforts of SUHAKAM in clarifying the fate of the disappeared persons in Malaysia. It traces the historical origins of SUHAKAM and examines the motivation behind its establishment. It also describes its powers, especially the power to conduct inquiry and analyse the scope and limitations of the power. It then examines the technique employed in ascertaining the fate of the disappeared individuals and compares the two cases, identifying the similarities and differences. It also examines how SUHAKAM formed different conclusions regarding state responsibility in the Amri Che Mat, Pastor Raymond Koh, and Joshua Hilmy-Ruth Sitepu cases.

It concludes that even though it had limited power and a dearth of direct evidence, SUHAKAM used its authority to initiate a public inquiry as a powerful tool to collect several crucial pieces of indirect evidence to ascertain the fate of the disappeared persons and finally hold the state responsible for this crime in the Amri Che Mat and Pastor Raymond Koh cases. However, in the Joshua and Ruth Hilmy case, despite using the same technique, SUHAKAM did not find state responsibility for their enforced disappearance due to insufficient evidence. This demonstrates that in an enforced disappearance case, proving state responsibility depends on a case-by-case basis. It also proves that no hard and fast rule can be employed, and only an independent, thorough, and impartial investigation can reveal the true nature of a serious violation of human rights like an enforced disappearance.

This study will be divided into five parts. Part One will explore the origins of SUHAKAM and the motivation behind establishing this body. In Part Two, the power of SUHAKAM to conduct an inquiry, its scope, and its limitations will be examined. This examination is important because SUHAKAM used the inquiry as a tool to ascertain the fate of the disappeared and hold the state responsible in two cases. Part Three analyses the techniques employed by SUHAKAM for clarifying the fate of the disappeared and holding the state responsible. This analysis will help identify the investigative techniques employed by SUHAKAM and demonstrate how these techniques can be used as a general fact-finding mechanism in future enforced disappearance cases in Malaysia. In Part Four, the similarity and dissimilarity between the Amri Che Mat and Pastor Raymond Koh cases and the Joshua Ruth Hilmy case will be analysed. This is done to identify the reasons for absolving state agents' responsibility in the Joshua and Ruth Hilmy case. Conclusions will be discussed in Part Five.

2. The Birth of SUHAKAM: Origin and Motivations

SUHAKAM (Suruhanjaya Hak Asasi Manusia Malaysia) is the acronym for the Human Rights Commission of Malaysia. It was established in 1999 by the Human Rights Commission of Malaysia Act 1999. There is no one fixed reason behind establishing a human rights

commission, and a combination of socio-political factors can be seen as a major driving force behind its creation.⁹⁸ Primary among these factors is the Mahathir administration's abuse of state power and the civil society backlash against it, which was a major reason for the creation of SUHAKAM.⁹⁹

During the Mahathir years, the government employed stringent laws like the Internal Security Act (ISA) to jail political opponents and curb the *reformasi* movement.¹⁰⁰ The detention of persons without trial, the indefinite application of emergency provisions, the rise in custodial deaths, and police shootings were some of the major excesses of power perpetrated by the administration.¹⁰¹ Apart from the civil society backlash, a United Nations Special Rapporteur report also criticised the administration for violating the human rights of political opponents and recommended the establishment of a human rights commission.¹⁰²

Thus, it is contended that Prime Minister Mahathir's decision to establish SUHAKAM can be impliedly based on the following reasons: (1) to appease the civil society groups; (2) to improve Malaysia's international image, which was destroyed by the government repression of Anwar Ibrahim (The then Deputy Prime Minister) and his *reformasi* movement; and (3) to catch up with the human rights commitments made by the ASEAN neighbours.¹⁰³ The following reasons can therefore be ascertained as the catalysts for the establishment of SUHAKAM. However, the process preceding its enactment was criticised by civil society as flawed because of the absence of public consultation.¹⁰⁴ Despite the concerns of civil society, the Parliament swiftly passed the Act, and thus, SUHAKAM was born.

Since its inception, it has been argued that SUHAKAM was placed at the centre of the government versus civil society debate. Being a creation of the state, its control was in the hands of the state. However, being a human rights body, it was also mandated to inquire into allegations of human rights abuses by the state. Human rights organisations like the Abolish ISA Movement (AIM) had urged the government to empower SUHAKAM with more power.¹⁰⁵ On the other hand, the government representative made it well known that they had no

⁹⁸ Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia' (2011) 1(1) *Asian Journal of International Law* 165 <http://www.journals.cambridge.org/abstract_S204425131000038X> accessed 18 April 2023.

⁹⁹ Greg Felker, 'Malaysia in 1998: A Cornered Tiger Bares Its Claws' (1999) 39(1) *Asian Survey* 43 <<https://www.jstor.org/stable/2645593>> accessed 23 April 2023; Meredith L Weiss and Bridget Welsh (eds), *Routledge Handbook of Contemporary Malaysia* (1st edn, Routledge 2018) 293.

¹⁰⁰ Ramdas Tikamdas, 'Human Rights in Malaysia: The Last 10 Years' (*Malaysian Bar*, 9 September 2009) <https://www.malaysianbar.org.my/cms/upload_files/document/ramdas%20tikamdas.pdf> accessed 23 April 2023, para 4.1.

¹⁰¹ Ramdas Tikamdas, 'Evaluation of SUHAKAM's Reports for Three Years and the Government's Response' in S. Nagarajan (ed), *SUHAKAM After 3 years: Recommendations for Promotion and Protection of Human Rights and the Government's Response* (Era Consumer Malaysia, 2003).

¹⁰² Commission on Human Rights, 'Report on the Mission to Malaysia' (1998) E/CN.4/1999/64/Add.1 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/052/96/PDF/G9805296.pdf?OpenElement>> accessed 23 April 2023.

¹⁰³ Renshaw, Byrnes and Durbach (n 98) 172.

¹⁰⁴ Thio Li-ann, 'Panacea, Placebo, or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (SUHAKAM)' (2009) 40 *George Washington International Law Review* 1271, 1274.

¹⁰⁵ Yusof Ghani, 'Show Your Teeth, AIM Tells Suhakam' *Malaysiakini* (Petaling Jaya, 10 April 2003) <<https://www.malaysiakini.com/news/15129>> accessed 7 May 2023.

intention to give teeth to SUHAKAM.¹⁰⁶ Despite being projected as a paper tiger, it is argued that SUHAKAM managed to bring human rights to the forefront in its first ten years of functioning.¹⁰⁷ The commission intervened in well-known human rights violations like the KESEAS highway incident, and the crackdown on *reformasi* leaders, thereby ensuring its relevance by holding the government accountable for its excesses.¹⁰⁸ Thus, despite being considered a creature of the state, SUHAKAM is said to have played a key role in bringing human rights issues to the public forum by holding the state accountable for such human rights violations.

In summary, it can be implied that the reason for creating SUHAKAM is more of a political play than a humanitarian concern. The backlash received by the Mahathir administration for excessive crackdowns on political opponents is one instance of arguing that political considerations were at the forefront of the government rather than a genuine concern for upholding human rights. However, notwithstanding the presence of clean motivation, the long-standing demand of NGOs was fulfilled with the creation of SUHAKAM. Regardless of the political motives, it can be contended that the birth of SUHAKAM has ignited open debates on human rights matters in Malaysia.

3. Powers of SUHAKAM

The Human Rights Commission of Malaysia Act 1999 is the statute that established SUHAKAM and guarantees it certain powers. The Act consists of 23 sections and is divided into 5 parts. The latest amendment to this Act was made in 2009.¹⁰⁹ In the following subsections, the powers of SUHAKAM will be examined. After the examination of its powers, the scope and ambit of its powers will be discussed. The nature of the scope and ambit of its powers will also be analysed to demonstrate its utility in investigating human rights violations.

3.1 Powers and Functions of SUHAKAM under the Human Rights Commission of Malaysia Act 1999

The preamble of SUHAKAM provides an overall idea of its fundamental purpose. This Act was enacted to provide for the establishment of the Human Rights Commission of Malaysia, to set out the powers and functions of such a commission for the protection and promotion of human rights in Malaysia, and to provide for matters connected therewith or incidental thereto.¹¹⁰ Therefore, the protection and promotion of human rights in Malaysia are expressed as the core objectives of the human rights commission. Thus, by examining the preamble, the intention of the legislature is properly understood. That is, they have laid down

¹⁰⁶ Beh Lih Yi, 'Govt: We Don't Intend to Give Suhakam Teeth' *Malaysiakini* (Petaling Jaya, 27 March 2006) <<https://www.malaysiakini.com/news/48965>> accessed 7 May 2023.

¹⁰⁷ Ken Setiawan, 'The Politics of Avoidance: The Malaysian Human Rights Commission and the Right to Freedom of Religion' (2013) 25(2) *Global Change, Peace & Security* 213 <<https://doi.org/10.1080/14781158.2013.787059>> accessed 7 May 2023.

¹⁰⁸ *ibid* 218–19.

¹⁰⁹ Francis John Ak Adam, 'The Human Rights Commission of Malaysia (SUHAKAM)' (*Majlis Perbandaran Sibul*) <<https://smc.gov.my/web/attachment/show/?docid=R0RtZ3FZRDBSd3BJQlVzY1lhZGRmdz09OjpdluHJnvakRA9HPUyOP0rC>> accessed 22 May 2023.

¹¹⁰ Human Rights Commission of Malaysia Act 1999.

in clear and precise words the powers and functions of SUHAKAM to further the protection and promotion of human rights in Malaysia.

3.1.1 Functions of SUHAKAM

Section 4(1) of the Human Rights Commission Act 1999 lays down the functions of SUHAKAM. Section 4(1) also provides that the functions of the commission shall be in furtherance of the promotion and protection of human rights in Malaysia.¹¹¹ So, it can be implied that all the powers of the commission are directed to ensure the protection and promotion of human rights in Malaysia. As per Section 4(1)(a), the function of the commission is to promote awareness and provide education in relation to human rights.¹¹² The second function is to provide guidance and support to the government in developing laws and administrative policies and suggesting appropriate actions that need to be implemented.¹¹³ Thirdly, the commission's function is also to provide suggestions to the government concerning the endorsement or joining of human rights-related treaties and other international agreements.¹¹⁴ The last function of the commission is to inquire into allegations of human rights, as mentioned in Section 12.¹¹⁵

In conclusion, it is evident from Section 4(1) of the Human Rights Commission Act 1999 that the primary objective of SUHAKAM is to promote and safeguard human rights in Malaysia. All the functions of the commission are aimed at achieving this goal, which includes providing guidance to the government in developing policies and legislation related to human rights, making recommendations on international human rights agreements, and investigating alleged human rights violations. Thus, the commission has a critical role to play in ensuring that human rights are protected and upheld in Malaysia.

3.1.2 General Powers of SUHAKAM

Section 4(1) laid down, in a specific manner, the various functions of SUHAKAM. Meanwhile, Section 4(2) of the Act provides that the commission may discharge its functions by exercising certain powers. The powers are expressly mentioned in the Act. Firstly, the commission's power is to raise awareness about human rights, conduct research through various activities such as programmes, workshops, and seminars, and then share and circulate the outcomes of such research.¹¹⁶ Secondly, the commission has the power to inform the government or relevant authorities about complaints made against them and suggest appropriate actions to be taken by the government or relevant authorities.¹¹⁷ Thirdly, the commission is empowered to analyse and check any human rights violations as per the rules in this Act.¹¹⁸ Fourthly, the commission has the power to visit detention centres as per the procedure laid down by the

¹¹¹ *ibid* s 4(1).

¹¹² *ibid* s 4(1)(a).

¹¹³ *ibid* s 4(1)(b).

¹¹⁴ *ibid* s 4(1)(c).

¹¹⁵ *ibid* s 4(1)(c).

¹¹⁶ *ibid* s 4(2)(a).

¹¹⁷ *ibid* s 4(2)(b).

¹¹⁸ *ibid* s 4(2)(c).

detention centre regarding such visits and make necessary recommendations.¹¹⁹ Fifthly, SUHAKAM can issue public declarations and give statements on human rights issues when it is necessary to do so.¹²⁰ Lastly, the commission can perform any other activities that are appropriate and in line with the express laws in force.¹²¹

In conclusion, Section 4 of the Human Rights Commission Act of 1999 outlines the functions and powers of SUHAKAM (The Human Rights Commission of Malaysia) in promoting and protecting human rights in Malaysia. The Act's preamble establishes the core objective of SUHAKAM as the protection and promotion of human rights in the country. Section 4(1) further emphasises this objective by stating that the functions of the commission are directed towards the advancement of human rights.

The functions enumerated in Section 4(1) demonstrate SUHAKAM's multifaceted role in the human rights landscape. The commission is tasked with promoting and protecting human rights, providing guidance and support to the government in developing laws and policies, suggesting appropriate actions, and offering recommendations on endorsing or joining human rights-related treaties and international agreements. Additionally, SUHAKAM is empowered to inquire into allegations of human rights violations, as stipulated in Section 12.

Furthermore, Section 4(2) grants SUHAKAM specific powers to discharge its functions effectively. These powers include raising awareness about human rights, conducting research, sharing research outcomes, notifying the government or relevant authorities of complaints, suggesting appropriate actions, analysing and monitoring human rights violations, visiting detention centres, making recommendations, issuing public declarations and statements on human rights issues, and engaging in other activities per the applicable laws.

The comprehensive functions and powers outlined in the Act highlight the instrumental role of SUHAKAM in safeguarding human rights in Malaysia. The commission acts as an advocate, advisor, monitor, and investigator, working towards the protection, promotion, and awareness of human rights across various sectors of society. Through its activities, SUHAKAM contributes to the development of a human rights-oriented culture and facilitates the implementation of necessary measures to ensure the well-being and dignity of all individuals in Malaysia.

3.1.3 Powers of 'Public Inquiry' of SUHAKAM

The disappearances of Amri Che Mat, Pastor Raymond Koh, and Joshua-Ruth Hilmy were proved to be cases of enforced disappearance after SUHAKAM conducted a 'public inquiry'. However, if one examines the Human Rights Commission Act of 1999, it can be identified that the word 'public inquiry' is not used in the statute anywhere. However, Part Three of the Human Rights Commissions Act 1999 provides the various powers available to SUHAKAM in conducting an inquiry. In the following subsections, the inquiry powers and the procedures relating to these powers will be examined and discussed. This will be described and examined to analyse whether 'public inquiry' can be derived from Part Three of the Act.

¹¹⁹ *ibid* s 4(2)(d).

¹²⁰ *ibid* s 4(2)(e).

¹²¹ *ibid* s 4(2)(f).

3.1.3.1 The Commission may inquire on its own motion or complaint

Part Three of the Human Rights Commission Act 1999 lays down the inquiry powers of SUHAKAM. Section 12(1) of the Act provides that the Commission may, *suo moto* or after receiving any complaint from any other person or group of persons, or any person acting on behalf of a person or group of persons may conduct an inquiry into an allegation of human rights violation.¹²² Thus, from a literal reading of Section 12(1), it can be understood that the inquiry power of SUHAKAM confers them a discretionary power to choose whether to inquire on an allegation of human rights violation. Section 12(1) uses the word “may” and not “shall”. It is because the word “may” imposes discretion on the authority of the legislature and is not a mandatory requirement.¹²³ However, the commission's power to conduct inquiries is limited in two circumstances. Section 12(2) provides that the commission shall not conduct inquiries into any complaints of alleged human rights in two circumstances.¹²⁴ One, mentioned in Section 12(2)(a), where any human rights matter is the subject of any court proceedings and is *sub judice*.¹²⁵ Two, as per Section 12(2)(b), where the matter has been ultimately decided by the Court.¹²⁶ Thus, the usage of the word “shall” here implies a compulsory obligation to bar SUHAKAM from conducting inquiries.

3.1.3.2 Disclosure and non-disclosure of human rights violation

Section 13 of the 1999 Act is a provision that lays down the procedure to be followed after the disclosure or non-disclosure of a human rights violation by SUHAKAM. Section 13(1) lays down that during the non-disclosure of a human rights violation by the commission, it shall readily record the findings and inform the person who made the complaint.¹²⁷ However, as per Section 13(2), if there is a disclosure of an infringement of human rights, then the commission shall refer the matter to the necessary authorities or person, where appropriate, together with the required recommendations.¹²⁸ Thus, Section 13 imposes a mandatory duty upon the commission to recommend the measures to be taken after disclosing or not disclosing a human rights violation.

3.1.3.3 Power relating to inquiries

Section 14 of the Act lays down the various powers that are available to SUHAKAM in the course of conducting an inquiry. Firstly, according to Section 14(1)(a), the commission has the authority to obtain and collect any evidence, whether written or oral, and to interview any individuals as witnesses, as they deem necessary or desirable for investigation.¹²⁹ Secondly, as per Section 14(1)(b), the commission can demand that any witness give their evidence, whether spoken or written, under oath or affirmation, which should be the same as the one

¹²² *ibid* s 12(1).

¹²³ *Vidarbha Industries Power v Axis Bank Limited* (Supreme Court of India) [64].

¹²⁴ (n 110) s 12(2).

¹²⁵ (n 110) s 12(2)(a).

¹²⁶ (n 110) s 12(2)(b).

¹²⁷ (n 110) s 13(1).

¹²⁸ (n 110) s 13(2).

¹²⁹ (n 110) s 14(1)(a).

required in a court of law, and the commission may also have an authorised officer administer the oath or affirmation to each witness.¹³⁰ Thirdly, Section 14(1)(c) provides that the commission has the power to call upon any individual who is residing in Malaysia to appear before them in a meeting, to provide evidence or present any document or item that they possess, and also has the authority to question them as a witness or request that they produce any document or item that is in their possession.¹³¹ Fourthly, Section 14(1)(d) provides that the commission has the power to accept any evidence, regardless of whether it would typically be considered inadmissible in civil or criminal proceedings under the Evidence Act 1950 [Act 56].¹³² Lastly, under Section 14(1)(e), the commission has the power to grant or deny admission to the public of an inquiry or any part of an inquiry.¹³³

In summary, Section 14 of the Human Rights Commission of Malaysia Act 1999 outlines the powers available to SUHAKAM during an inquiry. These include the ability to collect evidence, interview witnesses, administer oaths, summon individuals to provide evidence or documents, accept evidence that would typically be inadmissible, and control the admission of the public to an inquiry or part of an inquiry. These powers provide the commission with the tools necessary to conduct thorough investigations into potential human rights violations.

3.1.4 Public Inquiry as a specialised inquiry procedure or a general power of inquiry of the Commission?

A public inquiry is a process that is generally considered important in fact-finding situations.¹³⁴ What separates a public inquiry from a normal inquiry is that its purpose is well established and its functions are laid out in precise order.¹³⁵ Public inquiries are also said to be mechanisms of accountability and a vital component of the state machinery.¹³⁶

It must be understood that the Human Rights Commission Act 1999 has not defined what a public inquiry is or what are the procedures to be conducted during a public inquiry. However, in the inquiry reports, SUHAKAM provided the meaning of “public inquiry”. According to SUHAKAM, a public inquiry is defined in the Amri Che Mat report as-

*“An official review of events or actions ordered by a government body, that accepts evidence and conducts its open hearings in a more public forum and focuses on a more specific occurrence”.*¹³⁷

¹³⁰ (n 110) s 14(1)(b).

¹³¹ (n 110) s 14(1)(c).

¹³² (n 110) s 14(1)(d).

¹³³ (n 110) s 14(1)(e).

¹³⁴ Stephen Sedley, ‘Public Inquiries: A Cure or a Disease?’ (1989) 52(4) MLR 469, 469
<<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.1989.tb02609.x>> accessed 17 May 2023.

¹³⁵ New Zealand Law Commission, *The Role of Public Inquiries* (NZLC IP1, 2007) para 22
<<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP1.pdf>> accessed 17 May 2023.

¹³⁶ Emma Ireton, ‘How Public Is a Public Inquiry?’ [2018] PL 277, 277
<https://www.researchgate.net/publication/324123679_How_Public_is_a_Public_Inquiry> accessed 17 May 2023.

¹³⁷ SUHAKAM, ‘Public Inquiry into the Disappearance of Amri Che Mat (Final Decision)’ (SUHAKAM, 3 April 2019)
<https://drive.google.com/file/d/1VB__ZJyop1ZaAYeDQ3KZOR-aqr2lUndg/view> accessed 17 May 2023, para 44.

However, in the Pastor Raymond Koh report, SUHAKAM defined public inquiry less transparently by changing 'Open' hearings to hearings only.¹³⁸ This implies a decline in transparency regarding the hearing process, as the commission can also conduct closed hearings in certain cases. From the examination of the definition, a few essential ingredients of a public inquiry can be identified, and they are: -

- (a) It is an official investigation of any event or action.
- (b) It is mandated by a government authority.
- (c) Evidence is accepted during the inquiry.
- (d) Hearings are conducted in an open or closed setting.
- (e) The Involvement of the Public is essential.
- (f) Focusing on specific cases or issues.

Thus, these six elements can be said to be the core ingredients of a public inquiry procedure. In the three reports on enforced disappearance, SUHAKAM considered the difference between a public inquiry and an ordinary inquiry. It held that, unlike other inquiries, the witnesses can submit statements and also listen to oral evidence submitted by other witnesses.¹³⁹

SUHAKAM also considers public inquiry as a comprehensive human rights-based approach that can be used to investigate serious human rights violations with a much wider scope than receiving complaints from a single individual.¹⁴⁰ SUHAKAM considers a public inquiry to have two major objectives, one is to find the facts, and the second is to educate the government on the specific human rights issue.

Thus, according to SUHAKAM, the power to conduct a public inquiry has been laid down in Section 14 of the Human Rights Commission Act 1999. All three public inquiry reports on enforced disappearances made it expressly clear that Section 14 lays down the powers relating to the conduct of a public inquiry.¹⁴¹ Even before the commencement of the public inquiry,

¹³⁸ SUHAKAM, 'Public Inquiry into the Disappearance of Pastor Raymond Koh (Final Decision)' (SUHAKAM, 3 April 2019) <<https://drive.google.com/file/d/1qQ9WAQzizsZDGwHsiYM-mFWnlkg2XJPU/view>> accessed 17 May 2023, para 48.

¹³⁹ SUHAKAM, 'Public Inquiry into the Disappearance of Joshua Hilmy and Ruth Sitepu (Final Decision)' (SUHAKAM, 15 April 2022) <https://suhakam.org.my/wp-content/uploads/simple-file-list/Final-Report-Public-Inquiry-into-the-Disappearances-of-Joshua-Hilmy-and-Ruth-Sitepu_compressed.pdf> accessed 17 May 2023, para 17; *Amri Che Mat* (n 137) para 45; *Pastor Raymond Koh* (n 138) para 49.

¹⁴⁰ *Amri Che Mat* (n 137) para 46; *Joshua Hilmy and Ruth Sitepu* (n 138) para 18; *Pastor Raymond Koh* (n 139) para 50.

¹⁴¹ *Amri Che Mat* (n 137) para 48; *Joshua Hilmy and Ruth Sitepu* (n 138) para 20; *Pastor Raymond Koh* (n 139) para 52.

SUHAKAM collected statements from persons who gave information on the disappearances, and possible witnesses were actively investigated by the commission.¹⁴²

In conclusion, the paragraphs highlight the significance of public inquiry as elucidated by SUHAKAM (The Human Rights Commission of Malaysia). While the Human Rights Commission Act of 1999 lacks a specific definition or fails to highlight procedural guidelines for public inquiries, SUHAKAM's inquiry reports provide clarity on the meaning and essential elements of a public inquiry. According to SUHAKAM, a public inquiry is an official review of events or actions mandated by a government body that accepts evidence and conducts hearings in either an open or closed setting. These six core ingredients of a public inquiry—official investigation, government authority mandate, evidence acceptance, open or closed hearings, public involvement, and a focus on specific cases or issues—form the basis of the procedure.

SUHAKAM emphasizes the distinction between public inquiries and ordinary inquiries. Unlike other types of inquiries, public inquiries allow witnesses to submit statements and listen to oral evidence from other witnesses. This distinction enhances transparency and inclusivity in the process. Furthermore, SUHAKAM views public inquiries as a comprehensive human rights-based approach, capable of investigating serious human rights violations from a broader perspective, rather than solely relying on individual complaints. The dual objectives of public inquiries, as stated by SUHAKAM, are to establish the facts and educate the government on specific human rights issues.

Section 14 of the Human Rights Commission Act 1999 grants SUHAKAM the power to conduct public inquiries, as explicitly highlighted in the three public inquiry reports on enforced disappearances. Additionally, before commencing a public inquiry, SUHAKAM actively collects statements from individuals with information on the disappearances and investigates potential witnesses. This proactive approach demonstrates the commitment of SUHAKAM to uncover the truth and address human rights violations effectively.

In essence, public inquiries play a vital role in ensuring transparency, accountability, and the protection of human rights. They serve as a platform for a thorough investigation, evidence collection, public participation, and government enlightenment. The insights provided by SUHAKAM and their diligent application of public inquiries to investigate enforced disappearances highlight the significance of this mechanism in upholding justice and safeguarding human rights.

4. Proving an Enforced Disappearance through a Public Inquiry – Analysing the SUHAKAM reports on Enforced Disappearance

This part examines the methods adopted by SUHAKAM in proving enforced disappearance by state agents in Malaysia. As enforced disappearance is a unique, complex, and secretive act, it is extremely difficult to obtain any direct evidence to prove state responsibility. However, it is argued that SUHAKAM employed public inquiry as a fact-finding investigation tool in finding

¹⁴² *Amri Che Mat* (n 137) para 50; *Joshua Hilmy and Ruth Sitepu* (n 138) para 22; *Pastor Raymond Koh* (n 139) para 53.

the disappearances of Amri Che Mat, Pastor Raymond Koh, Joshua Hilmy and Ruth Sitepu as enforced disappearance cases. The following subsections will examine the methods used by SUHAKAM in establishing an enforced disappearance case in Malaysia. Further, the similarities in the reports will be analysed. The variances in the three reports will also be discussed to find out the reasons for not finding the agents of the state responsible for the enforced disappearance of Joshua Hilmy and Ruth Sitepu.

4.1 Elements to be proven at the Public Inquiry

In the three reports, the commission was tasked with proving whether the victims were abducted by the agents of the state or whether they were abducted by non-state agents with the authorisation, support, and/or acquiescence of the state.¹⁴³ SUKHAM also had to determine whether the state had actively refused to share any information about the abduction with the families of the forcibly disappeared.¹⁴⁴ Thus, the commission's mandate was to find out whether these disappearances were perpetrated by state agents or non-state agents and whether the state denied the abduction of these persons and hid the whereabouts or fate of the disappeared persons.

4.2 Religious Issues as the reason for perpetrating enforced disappearance in Malaysia: SUHAKAM's findings

Religion and race are said to be the hallmarks of Malaysian society.¹⁴⁵ Although the country is not a deeply conservative theocratic state, the Malaysian Constitution expressly grants Islam the status of the country's dominant religion.¹⁴⁶ It is said that Islam's status as the religion of the state will not hinder the right of non-Muslims to practise their religious beliefs, as the Constitution expressly guarantees freedom of religion for all religious groups.¹⁴⁷ However, despite the constitutional guarantees, it is found that non-Muslims and sects like Shi'ism and Ahmaddiyas are subject to various types of discrimination.¹⁴⁸ The United States Commission on International Religious Freedom expressed its concern in its 2019 report by stating that

¹⁴³ *Amri Che Mat* (n 137) para 52; *Joshua Hilmy and Ruth Sitepu* (n 138) para 191; *Pastor Raymond Koh* (n 139) para 56.

¹⁴⁴ *Amri Che Mat* (n 137) para 56; *Joshua Hilmy and Ruth Sitepu* (n 138) para 194; *Pastor Raymond Koh* (n 139) para 59.

¹⁴⁵ Nur Amali Aminnuddin, 'Ethnic Differences and Predictors of Racial and Religious Discriminations among Malaysian Malays and Chinese' (2020) 7(1) *Cogent Psychology* 1766737 <<https://www.tandfonline.com/doi/full/10.1080/23311908.2020.1766737>> accessed 20 May 2023.

¹⁴⁶ Dian Abdul Hamed Shah and Mohd Azizuddin Sani Mohd, 'Freedom of Religion in Malaysia: A Tangled Web of Legal, Political, and Social Issues' (2010) 36 *North Carolina Journal of International Law* 647, 659 <<http://scholarship.law.unc.edu/ncilj/vol36/iss3/5>> accessed 20 May 2023.

¹⁴⁷ Mohd Azizuddin Mohd Sani and Dian Diana Abdul Hamed Shah, 'Freedom of Religious Expression in Malaysia' (2011) 7 *Journal of International Studies* 33, 34 <<https://e-journal.uum.edu.my/index.php/jis/article/view/7916>> accessed 20 May 2023.

¹⁴⁸ Mohd Faizal Musa, *Freedom of Religion in Malaysia: The Situation and Attitudes of "Deviant" Muslim Groups* (ISEAS Publishing 2022) 4-5 <https://www.iseas.edu.sg/wp-content/uploads/2022/09/TRS16_22.pdf> accessed 20 May 2023.

religious discrimination against non-Muslims and non-Sunni sects is legitimised at various levels in Malaysia.¹⁴⁹

It is interesting to note that all three forcibly disappeared persons belonged to these religious minorities. During the investigations, SUHAKAM found that a religious undertone was visible in the enforced disappearances of Pastor Raymond Koh, Amri Che Mat, Joshua Hilmy, and Ruth Sitepu. In Amri Che Mat's case, the commission had convincing evidence to find that the Shia background of Amri Che Mat was the reason for the Special Branch to conduct surveillance against him.¹⁵⁰ In the Pastor Raymond Koh report, SUHAKAM identified the religious works undertaken by Koh, including alleged proselytization, as a reason for his enforced disappearance.¹⁵¹ In the Joshua Hilmy and Ruth Sitepu report, SUHAKAM found their religious activities and provocative comments against the Holy Prophet to have led to their enforced disappearance.¹⁵²

4.3 The Interplay Between Direct and Circumstantial Evidence in the Amri Che Mat, Pastor Raymond Koh, and Joshua Hilmy-Ruth Sitepu Cases

Proving an enforced disappearance is considered an extremely difficult process.¹⁵³ It is deliberately made difficult by fabricating or eliminating all evidence related to the crime, thereby making obtaining evidence a challenging task.¹⁵⁴ Thus, the prosecution will be placed under an extreme burden to prove the guilt of a person accused of committing an enforced disappearance.¹⁵⁵ However, the mandate of SUHAKAM was not to find individual responsibility but to answer the question of whether these disappearances were 'enforced disappearances' and, if so, whether the state agents were responsible.

In finding answers to these questions, the commission admitted both direct and circumstantial evidence as effective evidential tools. The significance of adopting circumstantial evidence as a reliable source of evidence was laid out by the Inter-American Court of Human Rights (IACtHR) in the case of *Bámaca-Velásquez v Guatemala* (2000).¹⁵⁶ The Court ruled that the

¹⁴⁹ United States Commission on International Religious Freedom, 'Factsheet: Enforced Disappearances in Malaysia' (*uscirf.gov*, October 2019)

<<https://www.uscirf.gov/sites/default/files/2019%20Malaysia%20Factsheet.pdf>> accessed 20 May 2023, 1–2.

¹⁵⁰ *Amri Che Mat* (n 137) para 136.

¹⁵¹ *Pastor Raymond Koh* (n 138) para 37.

¹⁵² *Joshua Hilmy and Ruth Sitepu* (n 139) para 55, 56.

¹⁵³ Committee on Legal Affairs and Human Rights, 'Enforced Disappearances' (*Parliamentary Assembly of the Council of Europe*, 19 September 2005) Doc. 10679 para 10.1.2 <<https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11021>> accessed 22 June 2022.

¹⁵⁴ Ophelia Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudences' (2010) 5 *Intercultural Human Rights Law Review* 407, 415 <<https://www.stu.edu/portals/law/docs/human-rights/ihr/r/volumes/5/407-462-opheliaclaude-acomparativeapproachtoenforceddisappearancesintheinter-americancourtofhumanrightsandtheuropeancourtofhumanrightsjurisprudence.pdf>> accessed 22 June 2022.

¹⁵⁵ UN Commission on Human Rights, 'Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Commission Resolution 2001/46' (8 January 2002) UN Doc E/CN.4/2002/71 para 69 <<https://www.refworld.org/docid/3d6ce3c50.html>> accessed 23 August 2022.

¹⁵⁶ *Bámaca-Velásquez v Guatemala* [2000] IACHR 7.

difficulties faced in obtaining any direct evidence necessitate the use of circumstantial and indirect evidence in an enforced disappearance.¹⁵⁷ In the Amri Che Mat report, SUHAKAM received direct evidence wherein witnesses claimed to have seen three cars boxing another car on the highway.¹⁵⁸ Apart from the direct evidence, the commission also found the circumstantial evidence of two people to be credible, as they testified to seeing the three same vehicles parked outside Amri Che Mat's house.¹⁵⁹ In the Pastor Raymond Koh case, the evidence of a police officer was critical in holding the agents of the state responsible for Koh's enforced disappearance. The officer's testimony to the wife of Amri Che Mat that Pastor Raymond Koh was also forcibly disappeared by the Special Branch, Bukit Aman due to his proselytization activities was found to be credible by SUHAKAM.¹⁶⁰

However, in the Joshua Hilmy-Ruth Sitepu case, SUHAKAM failed to find any direct or circumstantial evidence regarding their enforced disappearance. The fact that state agents were responsible for perpetrating their enforced disappearance was not established in the Joshua Hilmy-Ruth Sitepu case.¹⁶¹

4.4 Findings and Recommendations of SUHAKAM: A Roadmap for the Future?

SUHAKAM found that it was the Special Branch, Bukit Aman, and Kuala Lumpur that perpetrated the forced disappearance of both Amri Che Mat and Pastor Raymond Koh.¹⁶² However, in the Joshua Hilmy-Ruth Sitepu case, the commission could not convincingly hold the state agents responsible for participating in their enforced disappearance.¹⁶³ But despite finding the absence of direct state participation, their enforced disappearance was indirectly supported by the state as evidenced by its refusal to acknowledge the arrest of the two persons.¹⁶⁴ In the Amri, Koh, and Joshua Hilmy-Ruth Sitepu cases, the state was held responsible by SUHAKAM for refusing to acknowledge the arrest or detention and concealing the nature of the disappeared person's status.¹⁶⁵

The similarities between Amri Che Mat, and Pastor Raymond Koh's enforced disappearances convinced SUHAKAM to mark these two as enforced disappearances committed by a common religious motive.¹⁶⁶ Though the religious element was also present in the Joshua Hilmy-Ruth Sitepu case, SUHAKAM could not find a specific religious motivation for committing the enforced disappearance like in the Amri Che Mat and Pastor Raymond Koh cases. In the Amri Che and Raymond Koh cases, SUHAKAM had convincing evidence to establish that both were

¹⁵⁷ *ibid* 131.

¹⁵⁸ *Amri Che Mat* (n 137) para 53.

¹⁵⁹ *Amri Che Mat* (n 137) para 150.

¹⁶⁰ *Pastor Raymond Koh* (n 138) para 137.

¹⁶¹ *Joshua Hilmy and Ruth Sitepu* (n 139) para 239.

¹⁶² *Amri Che Mat* (n 44) para 171; *Pastor Raymond Koh* (n 138) para 153.

¹⁶³ *Joshua Hilmy and Ruth Sitepu* (n 139) para 239.

¹⁶⁴ *Joshua Hilmy and Ruth Sitepu* (n 139) para 73.

¹⁶⁵ *Amri Che Mat* (n 137) para 177; *Joshua Hilmy and Ruth Sitepu* (n 139) para 279; *Pastor Raymond Koh* (n 138) para 157.

¹⁶⁶ *Pastor Raymond Koh* (n 138) para 158.

targeted by religious authorities,¹⁶⁷ while the targeting by religious authorities was not convincingly established in the Joshua Hilmy-Ruth Sitepu case.

In its recommendations, SUHAKAM urged the Malaysian government to ratify the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED) and codify enforced disappearance as an offence in the Malaysian criminal code.¹⁶⁸ Secondly, the commission also reminded the police and religious authorities to understand their respective powers and advised them not to exceed their limits, especially on sensitive issues such as proselytization.¹⁶⁹ Thirdly, police reforms were suggested by SUHAKAM, wherein the commission called for the creation of an accountability mechanism for the Special Branch. Fourthly, in all three reports, SUHAKAM emphasised the obligation of state authorities to respect the freedom of religion as a fundamental right.¹⁷⁰

5. CONCLUSION

Enforced disappearance is a crime that causes immense psychological anguish to the families of the forcibly disappeared. The families are left in a state of permanent uncertainty regarding their loved one's fate. The right to know the truth about the fate or whereabouts of their disappeared loved one is a fundamental right that they possess. Denying this basic right is equivalent to condemning them to severe psychological torture. While the state had failed to appreciate the seriousness of enforced disappearance, SUHAKAM played a key role in unearthing this crime in Malaysia. Even though SUHAKAM was partly created by political motivations, its public inquiry into uncovering enforced disappearances turned out to be a clear indictment of the state's responsibility in perpetrating this crime.

Even though the Act didn't mention anything about public inquiry, SUHAKAM relied on its powers under Sections 12 and 14 to develop a systematic human rights-based approach to investigating a serious crime like enforced disappearance. In the cases of Amri Che Mat, Pastor Raymond Koh, and Joshua Hilmy-Ruth Sitepu, SUHAKAM made effective use of its broad public inquiry powers by accepting a wide variety of indirect evidence like witness testimonials to solve the disappearance. A public inquiry was particularly successful in investigating an enforced disappearance because of the large number of witnesses who came forward to testify. Thus, it can be said that public inquiry is a perfect method used by SUHAKAM in proving state responsibility for this crime. It is also found that religious reasons are apparent in the enforced disappearance of all the persons. However, unlike the Amri Che and Pastor Raymond Koh cases, the absence of clear and convincing circumstantial evidence of state agents' involvement prompted SUHAKAM to exonerate the agents of any culpability in the Joshua Hilmy-Ruth Sitepu case. But it is to be noted that these three public inquiry reports established these disappearances as "enforced disappearances" as defined under Article 2 of the ICPPED. The recommendations of SUHAKAM can be termed a well-founded and legally sound response

¹⁶⁷ *Amri Che Mat* (n 137) para 183.

¹⁶⁸ *Amri Che Mat* (n 137) para 215; *Joshua Hilmy and Ruth Sitepu* (n 139) para 287 read together with Chapter 7 Recommendations, paras 7 and 9; *Pastor Raymond Koh* (n 138) para 193.

¹⁶⁹ *Amri Che Mat* (n 137) para 195; *Pastor Raymond Koh* (n 138) para 175.

¹⁷⁰ *Amri Che Mat* (n 137) para 195; *Joshua Hilmy and Ruth Sitepu* (n 139) para 76; *Pastor Raymond Koh* (n 138) para 173;

to the Malaysian government. The need to accede to the ICPPED, to ensure accountability for special branch actions, and to respect freedom of religion is indeed the most effective mechanism to prevent enforced disappearances in the future.

This study provides the backbone for future research on strengthening the powers of SUHAKAM in its investigation of gross human rights violations like enforced disappearance. Future studies on enforced disappearance in Malaysia are recommended to understand the role of human rights institutions, NGOs and family members in preventing the crime of enforced disappearance.

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