

Role of NHRIs in facilitating access to remedy for business-related human rights impacts

Malaysian Perspective

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Background

The UN Guiding Principles on the Business and Human Rights (UNGPs) envisage a role for the following three types of mechanisms to provide access to effective remedy in business-related human rights abuses: state-based judicial mechanisms, state-based non-judicial grievance mechanisms (NJMs), and non-state-based grievance mechanisms. While judicial mechanisms are “at the core of ensuring access to remedy”, NJMs such as national human rights institutions (NHRIs) have “an essential role in complementing and supplementing judicial mechanisms”. Like other NJMs, NHRIs should meet the effectiveness criteria set out in Principle 31 of the UNGPs.

Principle 31 of the UNGPs stated that in order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- 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

Operational-level mechanisms should also be based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.

Does your NHRI have a mandate to investigate or conduct inquiry about alleged human rights abuses by businesses?

The Human Rights Commission of Malaysia Act 1999 (Act 597) was enacted by Parliament to provide for the establishment of the Human Rights Commission of Malaysia; to set out the powers and

functions of such commission for the protection and promotion of human rights in Malaysia; and to provide for matters connected therewith or incidental thereto.

Section 4(1) of Act 597 stated that in furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be:

- a. to promote awareness of and provide education in relation 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 with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and
- d. to inquire into complaints regarding infringements of human rights referred to in section 12.

Section 14(1) of Act 579 stated that the Commission shall, for the purposes of an inquiry under this Act, have the power:

- a. to procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as the Commission thinks necessary or desirable to procure or examine;
- b. to require that the evidence, whether written or oral, of any witness be given on oath or affirmation, such oath or affirmation being that which could be required of the witness if he were giving evidence in a court of law, and to administer or cause to be administered by an officer authorised in that behalf by the Commission an oath or affirmation to every such witness;
- c. to summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;
- d. to admit notwithstanding any of the provisions of the Evidence Act 1950 [Act 56], any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings; and
- e. to admit or exclude the public from such inquiry or any part thereof.

Does your NHRI have an explicit mandate to handle complaints concerning alleged business-related human rights abuses?

The Human Rights Commission of Malaysia Act 1999 (Act 597) was enacted by Parliament to provide for the establishment of the Human Rights Commission of Malaysia; to set out the powers and functions of such commission for the protection and promotion of human rights in Malaysia; and to provide for matters connected therewith or incidental thereto. Section 4(1)(d) of Act 597 states that one of the Commission's main functions is to inquire into complaints regarding infringements of human rights referred to in section 12. Pursuant to the mandated function, the Commission has established Complaints and Monitoring Division to carry out activities that are related to that function.

The Commission therefore are open to receive any complaints in relation to human rights infringement. However, section 12 (2) of Act 597 restricts the Commission from inquiring into any complaint relating to any allegation of the infringement of human rights which is the subject matter of any proceedings pending in any court, including any appeals; or has been finally determined by any court. The Commission also has to cease from inquiring into an allegation under section 12(1), as stipulated under section 12(3), should during the pendency of such inquiry the allegation becomes the subject matter of any proceedings in any court.

The Commission did receive the complaints with regards to the business and human rights. However, the Commission did not have specific categorization for the complaints on business and human rights. From 2015 to July 2017, the Commission received a total of 78 complaints related to business and human rights. Among the issues received by the Commission are:

- I. The disputes between the employer and employee. For examples on the issues of wages, termination or alleged constructive dismissals, leaves, sexual harassments etc
- II. On the issues of worker rights for example the rights to a minimum wage, the rights to an identity (holding their own passport) and security, the rights to unionise etc.
- III. Business activity that affected the individual or community such as the construction of highway (land acquisition and compensation), the plantation or logging activity that affected the nearby community (indigenous peoples, villagers or water catchments).
- IV. The complaints about the inefficient of the agencies that supposed to protect worker rights such as labor office and Industrial Relations Department Malaysia.

What types of remedies could your NHRI offer to individuals or communities harmed by businesses?

The Commission have the power to make appropriate recommendations, such as proposing new legislation, revisions of existing legislation or new policy measures or suggested any remedies it deem necessary to the affected party or the complainants. However, the Commission did not have the authority to enforce those recommendations.

Section 14 of the Act 597 allows 2 types of inquiries (investigation). One is the investigative inquiry without a public hearing (closed investigation). A closed investigation is conducted mainly through correspondence, meeting, interview, site-visit, mediation and recording of authenticated statements of witnesses and receipt of documentary and other exhibits. A closed investigation may also include a 'private/closed inquiry'. A private/closed inquiry is where the Commissioner in-charge may subpoena respondent to attend a meeting and provide response to complaint lodged with the Commission.

The second type of inquiry is the open or public/national inquiry. Public Inquiry is an inquiry into specific incident which has a public interest where the Commission will appoint a panel of inquiry comprising of Commissioners to conduct a public hearing of testimonies from witnesses, whereby witnesses will be subpoenaed. National inquiry is an inquiry into a systemic human rights issue with a view to solving them through systemic means.

What are the three most critical challenges that your NHRI has experienced in providing access to effective remedies in business-related human rights abuses?

The Commission did not have any enforcement power and thus have to rely on other agencies feedback. When a complaint does not fall within the Commission's jurisdiction or could be more effectively or expeditiously dealt with by another appropriate body, the Commission may refer the complaint to/or advise the complainant to contact the said relevant body.

Section 12(1) provides that Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of human rights of such person or group of persons.

The Commission did not have any enforcement power nor the power to visit government or private business premises without prior notice. However, in some cases, the Commission seek assistance from other enforcement agencies to enter private business premises. For example, when the Commission received a complaint about the private drug Rehabilitation Centre, the Commission managed to enter the said premises with an assistance from the National Anti-drugs Agency (AADK). The Commission also have visited the factories, plantations and few others business premises during it inquiry works.

How does your NHRI deal with complaints which have a transnational dimension (extraterritorial)?

On 20 October 2014, the Commission received a Memorandum from Earth Rights International and representatives from Mekong River Communities from Cambodia pertaining to the development of the Don Sahong Hydropower project. The Memorandum alleged that a Malaysian company Mega First Corporation Berhad (MFCB) which had been appointed to build a dam along Mekong River in southern Laos had violated the human rights of the communities living along Mekong River in Vietnam, Cambodia and Thailand. It was alleged that damming the Don Sahong endangers the Mekong's migratory fish and impose negative impacts to the communities that rely upon them.

During the initial thought, this complaint was not within the Commission's jurisdiction because it involves a project at Cambodia and Laos. However, the Commission decided to act on this case since the company that involved in this case was a Malaysian company and it is within the Commission's reach.

The Commission met with Mega First Corporation Berhad (MFCB) to discuss the allegations and obtain further information regarding the Don Sahong Hydropower Dam Project. It was highlighted that MFCB was appointed as the owner and the project manager of the concession for 25 years. Upon expiry of the term, MFCB will hand over the dam to the Government of Laos at no cost. As part of the package in the agreement, MFCB will build access road, bridge to the mainland, school, supermarket and other facilities for the communities to improve their living conditions. In addition, MFCB had also made a pledge to contribute USD 1 million annually (throughout the period of the concession) in form of a trust fund as part of their CSR initiative to enhance the livelihood (for education, economic development and welfare) of the affected communities. Before the project started, MFCB had conducted briefing and consultation sessions at the district and provisional level involving heads of villages and communities. It was highlighted that most villagers were in favour of the project, which is expected to improve their livelihood and increase their income. MFCB informed that thus far, they have invested USD 15million for a nine-year research to study the environmental and ecological impacts of the project.

Can you share any good practice examples in which your NHRI was able to facilitate, directly or indirectly, effective remedies for business-related human rights abuses?

Since its establishment, the Commission has received various complaints and memorandums from indigenous communities alleging various forms of human rights violations. In response to these, SUHAKAM conducted investigations into specific cases, carried out field studies, held dialogues with the relevant communities, roundtable discussions with the State Government and other relevant agencies as well as private enterprises indicated in these complaints. Among the complaint received

by the Commission was regarding the encroachment of the indigenous people's land by the private companies. The Commission is of the view that a problem of this magnitude could not be overcome by using piecemeal approaches or addressed on a case by case basis and thus decided to conduct a National Inquiry into the Land Rights of indigenous peoples in Malaysia. It was also the aim of the Inquiry to create and promote more public awareness on the indigenous peoples' rights to land and their way of life. In addition to creating public awareness, the Inquiry is seen as a major empowering platform for the indigenous communities, thereby mobilizing themselves towards protecting their customary land. The National Inquiry Report contains a number of recommendations for the consideration and follow-up actions of the Government, both by the Executive and Legislative, where appropriate.