

**CONFERENCE ADDRESS BY SUHAKAM
CHAIRMAN TAN SRI RAZALI ISMAIL AT
INTERNATIONAL MALAYSIA LAW CONFERENCE
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**“EXPLORING THE RULE OF LAW:
THE MALAYSIAN EXPERIENCE IN AN ASEAN
CONTEXT”**

1. I confess that the theme of this International Malaysian Law Conference 2016 - “Challenges of an ASEAN Community: Rule of Law, Business and Being People-Oriented” is a daunting topic. Where do I begin? And out of the many themes relevant to ASEAN, it is interesting that the Malaysian Bar chose to focus on Rule of Law, Business and Being People Oriented. The organisers have taken on a worthy task and I for one, as chair of Suhakam will look forward to the fruits of their deliberations.
2. The political structures of the 10 ASEAN member states range from an absolute monarchy, being military-ruled system or authoritarian regimes and democracies in varying degrees. Within ASEAN, we have nations where the majority religions are Islam, Christianity, and Buddhism and all of us are proud of the fabric of our diversity and heterogeneity.

3. Despite differences, there are commonalities. All leaders seek to make the lives of their citizenry better and richer. All leaders want their societies and economies to soar, and their nations to surge and all of us want to see a people oriented ASEAN realised, whatever it takes.
4. How can these be achieved?
5. For a start, there is an inescapable need for key institutions such as a robust law-making assembly, an independent Judiciary, a fearless Bar, and an independent National Human Rights Institution which can rise to the occasion to cajoule governments to protect and fulfil the civil, political, social, economic and cultural rights of its peoples, and the Rule of Law is the cornerstone on which these institutions are built.
6. So, what is the Rule of Law? Lord Bingham, once the Lord Chief Justice of England and Wales, in his book, *The Rule of Law* pointed out eight key characteristics of which conformity to the listed characteristics would in his view enhance the foundation of a fair and just society, a government responsible for its acts, the nourishment important to economic growth and offers the best means for securing peace and co-operation. As I am not a lawyer myself and still apprehensive over the learned audience which includes the Lord Chief Justice himself, I will not venture into all the characteristics outlined by Lord Bingham. Instead, I will delve on several key aspects of the listed characteristics and its relevance to human rights.

7. Firstly, according to Lord Bingham, laws must be accessible. As much as possible, it must be intelligible, clear and predictable.
8. One of the legacies of our colonial past is that our laws continue to be drafted in English. Of course, there are also the Bahasa Malaysia version, and it is the Bahasa Malaysia text that is authoritative in the event of a discrepancy between the Bahasa Malaysia and the English versions.
9. On accessibility, Malaysia has a proud tradition of providing legal aid to those in the low income bracket. The government has Legal Aid Bureaux in each state and the Federal Territories. The Malaysian Bar's Legal Centres are much admired worldwide. Very few Bar associations take up this mammoth task of providing free legal service to the poor. I applaud this initiative and it reflects greatly on the stand and conscience of the initiators and the current office bearers.
10. Since you must know your rights, before you access the law, one of SUHAKAM's key roles is in the area of education. We go to the schools to talk about Human Rights Best Practices, and conduct training for enforcement agencies. In 2009, SUHAKAM in collaboration with the Ministry of Education introduced a programme called "Human Rights Best Practices in Schools" where 5 schools were initially selected by the Ministry of Education to participate in this programme.

Today, this number has increased from five to 220 schools all across Malaysia, though we are still a long way compared to the number of schools in the country. Without proper research and systematic evaluation we are not sure how and to what extent has the programme affected the children, teachers, and staff in applying and practising human rights in their life.

11. In an ideal situation, a subject on human rights should be taught in all schools. We can draw from the experience of India where principles of human rights have been infused into their current education curriculum since the year 2000. Under the Indian 'Curriculum Framework of 2000', children are taught at the very young age to appreciate and practise the concept of human rights. This is a first step in creating a culture of respect for human rights and parents, teachers and the society as a whole must play its part to enable this culture to take root and thrive.
12. SUHAKAM also works closely with the indigenous community, in our effort to improve the access to education for their children. There are other bodies who are also helping. Yet, I am told the progress is patchy. Looking at the broad picture, the solutions to the overall issues relating to the grievances of the indigenous groups remains a long and winding road. SUHAKAM recently was approached by an indigenous people group expressing their total disenchantment towards the relevant government agency that is supposed to deal and assist them. SUHAKAM hopes and is willing to act as a bridge to close the gaps that has widened

over the years between the Indigenous People and the Government. We (Suhakam) wonder and would be very interested to know how the indigenous people in ASEAN are treated by their governments!

13. Suhakam's training programme for law enforcement agencies continue to expand. Currently our programme involve the Royal Malaysian Police, Prison Department, Immigration Department, Agency for Volunteer Forces (RELA), Malaysian Anti-Corruption Commission and the local authorities. I must confess here, this is a mammoth task and SUHAKAM really has to dig deeper into its "raison d'être" and its resources to ensure that all the training and teaching given will have a positive impact on them. These programmes and trainings do not cover all personnel and intermittent in nature. We appreciate the space allocated to us by the respective authorities but in all honesty, SUHAKAM's effort is just a scratch on the surface and without continuous and consistent learning and further reminder, all would be forgotten.

14. It is vital that the police and other uniformed bodies from the lowest to the highest personnel should imbibe and understand the value of human rights because of the country's needs in enhancing security and dealing with terrorism. Regulations are being promulgated in a sweeping fashion that will have the effect of threatening democratic practice and undermine the fundamental liberties enshrined in the Federal Constitution. In essence, the police should be the face of human rights,

and not a face to intimidate, even as the police needs to be the bulwark of the country's security.

15. Lord Bingham's fourth characteristic of the Rule of Law is salutary. Ministers and public officers at all levels must exercise powers conferred on them in good faith, fairly, and for the purpose for which the powers were conferred. Such powers should not be exercised unreasonably or in excess of their limits. How is this rule of law observed and applied in ASEAN? This rule has huge implications - the limits of power, the legitimacy of power and the abuse of power that would eventually open the door to monetary or power corruption, and all agencies and authorities have to ensure that actions taken should be in line with the simple principle of proportionality. We have to ensure that actions taken would protect the public without undermining the institutions they rely on. This is especially relevant in efforts to deal with terrorism and security. Those entrusted to address the matter must bear in mind that any actions taken must be proportional to the situation and that any extended powers are not used beyond their stated purposes.

16. Despite every member state of ASEAN ratifying the UN Convention Against Corruption (**CAC**), issues of corruption continue to plague virtually all ASEAN countries. The preamble to the CAC makes it clear that the problems and threats posed by corruption threaten the stability and security of societies. Corruption jeopardises sustainable development and the Rule of Law, and transmits the wrong message to the younger

generation that corruption can be rationalised in the pursuit of power and in the name of security.

17. SUHAKAM would like at this point to focus on the devastating effects of powers not exercised in accordance with its purpose in the context of the number of deaths in police custody. SUHAKAM has conducted a thematic study in 2015 on death in police custody and a total of 242 deaths in custody had occurred from 2000 until February 2014. In most cases, the cause of death was attributed to “natural causes” or diseases. As per Rule 10 of the Lock-up Rules 1953, a detainee should be examined by a medical doctor as soon as possible upon his detention. Such examination is to determine the suitability of the detainees to be held either in a lock-up or elsewhere for further medical treatment. However, based on SUHAKAM record and observation, the Rule was not observed by the authorities responsible. Hence, it is not surprising that the number of death in police custody is high. Deaths caused by the medical conditions of detainees would probably be avoided if the Lock-up Rules 1953 were to be enforced stringently and the condition and environment of lock-up are improved.

It is interesting to note that the obligations imposed on the authorities in the Lock-up Rules 1953 are also contained in international documents such as European Prison Rules (EPR) and United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR). Comparable bodies like Suhakam in other ASEAN countries need to be in solidarity to insist

that the authorities ensure that Standard Operating Procedures are strictly enforced.

18. SUHAKAM would also like to highlight the issue of the repeal of the Internal Security Act 1960 (ISA), Restricted Residence Act 1933 and Banishment Act 1959. These repealed Acts are commonly cited as laws which infringed on the fundamental liberties and true to our mandate, SUHAKAM since 2002 has consistently called and advocated for the repeal of such Acts. While SUHAKAM appreciates the intention of the Government to protect the sovereignty of the country and its people, the subsequent introduction of the Security Offences (Special Measures) Act 2012, Prevention of Terrorism Act 2015 and National Security Council Act 2016 have in a way resurrected the concerns attached to the repealed laws. The broader power as enshrined in those new Acts have opened up the possibility of misuse and abuse of power. The characteristics of such laws should be reviewed as laws enacted are supposed to protect and guarantee the fundamental rights of the people and not stifle the rights of the people. ASEAN countries cannot allow for a drift towards authoritarianism in the name of enhancing security.

19. This brings us to the fifth characteristic of the Rule of Law: the law must afford adequate protection of fundamental human rights. The term 'human rights' may not be welcomed by all and not applied equally, even the Federal Constitution of Malaysia differentiates the fundamental rights of a citizen and non-citizen. I

would like to note that our Federal Constitution does not have the phrase “human rights” but instead uses “fundamental liberties”.The stand taken by the Government in interpreting who is entitled to what rights has alienated a significant number of Stateless children from receiving proper and free education. The barring of someone from exercising their fundamental rights could also be seen in laws such as the Peaceful Assembly Act 2012 and Section 28A subsection 8 of the Criminal Procedure Code.

20. At the regional level, ASEAN’s commitment to the promotion, protection and fulfilment of human rights is clear with the establishment of two human rights commissions at the regional level. In 2009, the ASEAN Inter-Governmental Commission on Human Rights (**AICHR**) was set up, followed by the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (**ACWC**) in 2010.
21. Among the biggest challenges for the peoples of ASEAN looking to AICHR and ACWC to protect their rights lie in the terms of reference and recourse for both AICHR and ACWC. The principles of non-interference and sovereignty coupled with the consensus style of decision-making make dealing with perennial issues such as trafficking of persons, corruption and transboundary haze such Sisyphean tasks.
22. On the bright side, the terms of reference for both AICHR and ACWC are due for review. This is the time for civil society organisations to lobby the respective

ASEAN governments for an improvement in the terms of reference for those two regional bodies.

23. SUHAKAM attempts to be an independent National Human Rights institution (NHRI). We work with other NHRIs through a range of NHRI networks. At the international level, SUHAKAM is member of the Global Alliance of NHRIs (GANHRI) and the Commonwealth Forum of NHRIs (CFNHRI). SUHAKAM is also an active member of the Asia Pacific Forum on NHRIs.
24. SUHAKAM also has a strong working relationship with its counterparts in South East Asia. SUHAKAM is one of the founding members of a sub-regional grouping of NHRIs called the South East Asia NHRIs Forum (SEANF), which comprise the NHRIs of Indonesia, Malaysia, Myanmar, the Philippines, Thailand and Timor Leste. SEANF's overarching objective is to promote greater respect for, and enjoyment of human rights in Southeast Asia by jointly working on human rights issues of common concern, with a view to offering recommendations to better uphold human rights in the region.
25. Unfortunately, ASEAN and its subsidiary bodies such as AICHR and ACWC do not formally recognise SEANF, owing to the fact that not all ASEAN countries have established an NHRI – an argument which I find counterproductive to the realisation of ASEAN's aspiration to become a People-Oriented and People-Centred ASEAN Community.

26. ASEAN, and its bodies, should instead be open to formal consultation and dialogue with SEANF to find ways to address the various human rights issues. NHRIs, which are normally created either by the constitution or by an act of parliament and are independent bodies, with a broad mandate to promote and protect human rights, are uniquely-placed and well-positioned to offer evidence-based recommendations to Governments on matters pertaining to human rights. In this light, I hope that with the increasing number of NHRIs being established throughout the world, ASEAN countries that do not have an NHRI will see the value and importance of NHRIs and muster the political will to establish one gradually.

27. The sixth characteristic of the Rule of Law as set out by Lord Bingham is that in the process of accessing justice through the law, there should not be inordinate delay nor prohibitive costs.

28. We are fortunate in Malaysia that our cases are now mediated, arbitrated or litigated in a relatively short period of time. I believe 9 months is the KPI set by the courts for the completion of cases from the date of filing in court to disposal at the first instance. Of course, in ASEAN, nobody can beat the ever efficient Singaporeans! Yes – I know there are quite a few Singaporeans here today, and they are smiling! SUHAKAM will be falling in its duty if it does not point out here that it is not happy in the delay in the pardon's board process in relation to appeals by prisoners facing the death penalty.

29. And finally, the Rule of Law requires governments to comply with its obligations in international law as in national law.
30. There are some who hold the view that it is only through legislation we may transform conventions that Malaysia has ratified internationally into enforceable laws in Malaysia. There are yet others who say that while that may be ideal, it is not wholly necessary. Article 26 of the Vienna Convention on the Law of Treaties provides that, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”
31. Malaysia has only acceded to three out of the nine core human rights treaties. Malaysia’s engagement with the treaty bodies continues to be patchy. In August 2016, Malaysia submitted its combined third to fifth report to the CEDAW Committee. It has only ever submitted one report to the CRC Committee, and none to the CRPD Committee.
32. The Rule of Law needs an independent judiciary. The Judiciary are in the best position to provide proper checks and balances on the effectiveness of the Government in protecting human rights and fundamental freedoms. Prior to 1988, the Malaysian judiciary was considered as one of the most independent internationally. The Malaysian judiciary went through a turbulent time during the 1988 crisis which resulted in the sacking of the then Lord President

of the Supreme Court, and five other judges met the same fate. This is a black mark on the history of our judiciary and no attempt should ever be made again to emasculate the independent power base of the judiciary. It is crucial that the Government ensure the independence of the judiciary by implementing adequate strategies and measures in order to maintain the independence and impartiality of the judiciary, and to ensure the moral integrity and accountability of the members of the judiciary, legislative and executive powers.¹

33. In recent years, the Malaysian courts have been progressive in their judgements. For example, in *Lee Kwan Who v Public Prosecutor* [2009] 5 MLJ 301, the Federal Court held that we should view human rights “prismatically”. This means that within a right provided for in the Federal Constitution, there are other rights that may be derived from it. For instance, the right to life under the Federal Constitution also encompasses the right to live with dignity.

34. On the issue of unilateral conversion that has been increasingly polarising Malaysians, the Federal Court in *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585 held that civil courts will have precedence in mediating divorce and child custody cases involving spouses who convert to Islam after marriage if that marriage was contracted in civil law under the Law Reform (Marriage and Divorce) Act

¹ Resolution 19/36, Human rights, democracy and the rule of law, A/HRC/RES/19/36, paragraph 16(v)

1976. I, as the chairman of Suhakam, sincerely hope that the proposed amendment to the Law Reform (Marriage and Divorce) Act 1976 would finally put this matter to rest.

35. Every ASEAN country needs an independent Bar. SUHAKAM has been approached by legal practitioners expressing their grave concern that if the proposed amendments to the Legal Profession Act 1976 is passed in October's Parliamentary session, it will mark the beginning of the end of such independence. The amendments will affect the composition of the Bar Council and office bearers. No deliberations of the Bar Council will be private and confidential as there will be 2 government appointees to the Bar Council, and they will report back to the government. SUHAKAM supports this concern and appeal to the Government to ensure that any amendments would not curtail the independence of the Bar.

36. The Rule of Law and proper administration of justice of which an independent judiciary and legal profession are a prerequisite, play a crucial role in the promotion and protection of human rights. This resonates with the preamble of the UDHR - "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. In its basic form, the Rule of Law is meant to prevent dictatorship and to protect the rights of the people.

37. When the echoes of your discussions from this conference have somehow faded and seems in the distance, remember the real value and contributions which you could make in ensuring that the Rule of Law is upheld. You must never lose sight of that truth, that is the challenge which you must uphold to the end as democratisation, the rule of law, respect for human rights and good governance are intertwined.

38. Thank you.