

**AICHR-CACJ HIGH LEVEL ASEAN HUMAN RIGHTS
DIALOGUE: THE RIGHT OF ACCUSED PERSONS IN
CRIMINAL CASES**

KEYNOTE ADDRESS

BY Y.A.A TAN SRI DATUK SERI PANGLIMA RICHARD

MALANJUM

CHIEF JUSTICE OF MALAYSIA

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Salutation

Good Morning.

1. On behalf of the Malaysian Judiciary, I warmly welcome all delegates to Putrajaya. I am honoured to

have been given the privilege to deliver this Keynote Address. This is the inaugural ***AICHR-CACJ High Level ASEAN Human Rights Dialogue: The Rights of Accused Persons in Criminal Cases.***

2. And foremost I wish to congratulate AICHR and CACJ for co-hosting this event. It is a good testament of the cooperation between ASEAN institutions for the cause of human rights.

3. But to digress a little even at the start of this address, may I say this. I think the usage of words 'human rights' has been abused by some quarters for some ulterior motives or being used to the extent that common sense and realities have been made to take the back seat. Peace, racial harmony and national security are made secondary items as well. So perhaps there may be a need to sensitise our society on the true meaning and scope of human rights. After all absolute freedom is a

mirage or elusive to say the least. And the danger arising from such abuse or overuse is probably in near future those words may acquire negative connotations. Their very usage on any given time may bring unrealistic consequences and problems thereby drawing averse reactions from society.

Ladies and gentlemen,

4. I have been informed that today's dialogue is a follow up activity to the successful ***AICHR Judicial Colloquium on the Sharing of Good Practices Regarding International Human Rights Law*** that was held from 13th to 15th March 2017 in Kuala Lumpur.

5. The Colloquium identified many areas of common interest among the ASEAN Member States and the ASEAN Judiciaries even though there are differences in how our judicial systems implement our international

human rights commitments in respect of the rights of women, children and persons with disabilities.

6. But let it be clearly understood that neither the Colloquium nor today's event should be taken as laying down uniformed rules and codes of conduct for each Member State to compulsorily comply with when comes to human rights issues. After all ASEAN operates on consensus. For each Member State has different challenges when come to human rights issues thereby requiring varying approaches suitable to her local conditions and circumstances.

7. Hence, the importance of this gathering is that it provides an avenue for Member States to meet up and exchange ideas and possible solutions for their respective human rights issues confronting them. It may not even be farfetched to say that in dealing with

human rights issues collaboration among Member States could be achieved.

8. There is therefore a need for ASEAN Member States to learn from each other and to discuss strategies to meet the challenges before them. With the great wealth of knowledge and expertise among the human rights experts of the AICHR and the judicial experts of the CACJ, surely there would be sharing of important information, exchange good practices and explore possible ways to strengthen their respective judicial and human rights mechanisms.

9. The Dialogue today focuses on the rights of accused persons in criminal cases. It is a subject that is basic to any ASEAN Member State. In Malaysia for instance, from August to October 2018 alone, there were 503,380 criminal cases registered through our judicial

system where the vast majority of which (96%) recorded in our Magistrates Courts.

10. Having laid down the 'caveats' on human rights vis-à-vis ASEAN Member States may I now make some observations on the rights of accused persons in criminal cases.

Ladies and gentlemen,

11. We cannot discuss the rights of accused persons in criminal cases without linking it to the very basic concept, namely, the "Rule of Law".
12. The Universal Declaration of Human Rights (UDHR) has given the concept of Rule of Law a central place:

"... 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...”

13. Similarly, Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR) provides that in civil and criminal case, the accused has the right not to be compelled to testify against himself or to confess guilt.

14. In many countries, the concept of Rule of Law forms the source of many of the rights of accused persons. These include, among others:
 - a) the right to be presumed innocent until proven guilty;
 - b) the right against self-incrimination;
 - c) the right to a hearing and effective remedy;
 - d) the right to be informed of the grounds of arrest;
 - e) the right to counsel;
 - f) the right to production before a magistrate;

- g) the right to bail; and
 - h) the right to a speedy and fair trial.
15. Equally important is the principle of natural justice, which embodies two essential rights, namely, the right to be heard and the rule against bias. In Malaysia's context, these two principles have formed the basis of our criminal justice system.
16. The concept of Rule of Law, and the many rights accorded to accused persons have now been enshrined in Article 20(1) of the ASEAN Human Rights Declaration (AHRD) in that every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.
17. Article 20(2) of the AHRD further states as follows:

“No person shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed”.

18. Any violation of the rights of an accused person should be remedied by the courts. Article 5 of the AHRD guarantees that every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.

19. Articles 5 and 20 therefore seek to protect the rights of accused persons and to ensure fair trials. What then are the substantive contents and meanings of these Articles? Hopefully in this Dialogue the answers will be forthcoming.

Ladies and gentlemen,

20. Fair trial and effective remedy are essential elements to the principle of universal access to justice. For that, I must say that to achieve universal access to justice, access must be provided for all, and in equal extent. But that is in Utopia.

21. In reality, today as we gather here there are some people who are denied access to justice for varied reasons such as poverty, lack of information and resources, status of nationality and the absence of legal aid.

22. Given the multi-dimensional nature of the root causes that hinder equal access to justice, the United Nations General Assembly in June 2017 had decided to integrate “access to justice” into the global development framework namely the Sustainable Development Goals (SDGs). The global framework SDGs under Target 16.3 (“Peace, Justice and Strong Institutions”) specifically strives to promote the Rule of Law and ensure equal access to justice for all. So destination has been given. It is the journey that matters today.

Ladies and gentlemen,

23. May I now focus on the rights of accused persons in criminal cases in Malaysia.

24. I begin by quoting Wan Sulaiman FCJ in the case of **Krishnan v Public Prosecutor (1987) 1 MLJ 292** at page 295:

'It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law.... But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.'

25. The quote is indeed a synopsis of our criminal justice system. It is based on the Rule of Law which is one of three basic concepts embodied in our Federal

Constitution. The other two concepts are Federalism and Separation of Powers.

26. In our system of government, the Judiciary plays a critical role in upholding and enforcing the Rule of Law. It provides the necessary check and balance to the Legislature and the Executive in a functioning democracy.

27. For the Rule of Law to be effectively manifested in criminal justice system, the principle of equality before the law must be the bedrock.

28. Articles 5(1) and 8(1) of our Federal Constitution state that-

*“... no person shall be deprived of his life or personal liberty save in accordance with law”,
and*

“... all persons are equal before the law and entitled to the equal protection of the law' respectively”.

(May the day never come to pass when it is added to this Article the phrase: 'but some are more equal than others' as happened in the fictitious work, 'Animal Farm' by George Orwell.)

29. There are other rights stipulated in our Federal Constitution and other written laws which accused persons are, as of right, entitled to relied upon. For instance, Part II of our Federal Constitution sets out most of these fundamental rights and liberties.

30. Article 5(1) of our Federal Constitution guarantees the right of a person not to be deprived of his life or liberty

save in accordance with the law. This encompasses the right to be presumed innocent until proven guilty. Indeed this Article is aligned with Article 11 of the UDHR that states:

“... everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence”.

31. As regards the right against self-incrimination, the proviso to section 112 (2) of our **Criminal Procedure Code** is clear. It provides:

‘(2) Such person shall be bound to answer all questions relating to the case put to him by that officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.'

32. And as an affirmation to that right our Federal Court in the case of **Goi Ching Ang v Public Prosecutor [1999] 1 MLJ 507** (approved by the Federal Court in later case of **Francis Antonysamy v PP [2005] 2 CLJ 481**) said this at page 257:

'Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of

extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission’.

33. The keywords are ‘fair trial’ and ‘fair trial procedure’ in upholding the right against self-incrimination.

34. Another right is the right to be informed of the grounds of arrest. In Malaysia, Article 5(3) of our Federal Constitution gives an arrested person the right to be informed the reasons of his arrest. This is particularly important to ensure that the accused person knows why he is arrested, and have adequate information to enable him to defend himself.

35. The right to counsel is yet another right available to an accused person. Every accused person must be allowed access to a lawyer of his choosing at every stage of a criminal proceeding.
36. Article 5(3) of our Federal Constitution provides that an arrested person has the right to consult and be defended by a legal practitioner of his choice. This right may be practiced in two separate scenarios, namely, consultation at the police station immediately upon arrested, and representation in court. However, while this right has been fully recognised by our courts, its exercise may be postponed *‘if it impedes police investigation or the administration of justice’* per Abu Samah Nordin FCJ at para. 44 in **Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor [2017] MLJU 1184.**

37. And if an accused person cannot afford a lawyer, legal aid must be granted to guarantee a fair representation of his case. In Malaysia, our hybrid legal aid system permits options for the accused to access legal aid through government or private-led legal aid schemes – with minimal cost, or free of charge, depending on various criteria set by each of the legal aid providers.
38. In addition, the Chief of Registrar's Office of the Federal Court has been providing free legal aid service for the accused in any death penalty offence. The scheme that is offered without the need for a means test is our strong manifestation to ensure the right to justice for all, regardless of their status or nationality.
39. It is also the basic jurisprudence of Malaysia Justice system that an accused person has the right to speedy trial. The Malaysian Judiciary is very sensitive to the maxim: 'justice delayed is justice denied'. As such

there are timelines mandated to first instance courts in Malaysia to dispose of their trials. For the Magistrate's court the timeline for criminal cases is 3-6 months from the dates of registration while in the Sessions Courts and High Courts it is 12 months.

40. Unfortunately, while the courts are very keen to keep within the timelines there have been instances when it is just not possible. And the blame does not fall squarely on the courts. Some of the reasons are the calendars of defence counsel who are not many in number, limited prosecutors, delays in securing experts reports, forced adjournments, interlocutory applications and so forth.

41. The right to disclosure of document available to an accused person was made possible in Malaysia with the inclusion of section 51A in our revised Criminal

Procedure Code as of 4th April 1999. It is part and parcel of a fair trial process.

42. Those rights to accused persons mentioned are the basic rights. There are other rights as well. Surely through this Dialogue today we would hear more on how the courts in other ASEAN Member States protect many other rights of the accused persons in their respective local jurisdiction.

Ladies and gentlemen,

43. In the ASEAN context on the rights of accused persons in criminal cases the ASEAN Charter should be the guiding light. It is clear in the Charter that the ASEAN Member States shall act in adherence to the Rule of Law, good governance and the principles of democracy and constitutional government, and with respect for

fundamental freedom, the promotion and protection of human rights, and the promotion of social justice.

44. And it should be noted that the ASEAN Political-Security Community Blueprint 2025 mandates regional programmes for mutual support and assistance among ASEAN Member States ('AMS') to develop strategies for strengthening the Rule of Law, judicial systems and legal infrastructure.

45. So ASEAN Member States are expected to work in harmony to attain the expectations enshrined in the ASEAN Charter. Perhaps one approach is to identify commonalities among Member States in their respective justice systems and to build thereon common best practices in protecting the rights of accused persons in criminal cases.

46. As said earlier this Dialogue is definitely a step in the right direction. It gives us the opportunity to engage and interact with each other and explore ways to strengthen cooperation to advance the realisation of human rights for the peoples of ASEAN thus advancing the spirit of the ASEAN Charter and the ASEAN Human Rights Declaration in particular on Articles 5 and 20.

47. Given that the AHRD is the foundational human rights document for ASEAN, hopefully this Dialogue could be institutionalised and build a regional common understanding on the rights of accused persons in criminal cases. It would be a good start if AICHR and CACJ could share and elaborate on the proper and mutually acceptable interpretation of Articles 5 and 20 of AHRD to guide ASEAN Member States in their pursuit to interpret their domestic laws pertaining to the rights of accused persons in criminal cases when there

is any ambiguity. And thereafter to work in the near future on the other provisions of AHRD so that all Member States, without any compulsion, adhere to a common standard in the protection of human rights.

48. On that note I look forward with keen interest to the outcome of this Dialogue. I thank you for listening and wish you all an enjoyable and fruitful dialogue.

Thank you.