National Stakeholders Consultation on the Right to Information Legislation

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BAHAGIAN HAL EHWAL UNDANG-UNDANG
JABATAN PERDANA MENTERI

CENTRE FOR INDEPENDENT JOURNALISM
Advocating Media Freedom and Access to Information

TABLE OF CONTENTS

Executive Summary

The National Stakeholders Consultation on the Right to Information Legislation was jointly organised by the Centre for Independent Journalism (CIJ) and the Coalition of CSOs on Freedom of Expression in collaboration with the Legal Affairs Division of the Prime Minister's Department (BHEUU) from 27-28 November 2019 in Putrajaya.

The Consultation opened with welcome remarks from Wathshlah Naidu, Executive Director of CIJ, and a keynote address by YB Datuk Liew Vui Keong, the Minister in the Prime Minister's Department (Law). Both speakers acknowledged the significance of this collaboration and emphasised the importance of the right to information (RTI) legislation, as well as transparency in governance.

The first session was centered on the challenges and opportunities in upholding the right to information in Malaysia. There were three panelists: Cynthia Gabriel, Executive Director of the Center to Combat Corruption and Cronyism (C4); Shareena Shariff, Programme Manager for Advocacy, Legal Services and Research in Sisters in Islam (SIS); and Aidila Razak, Special Reports Editor from Malaysiakini.

Firstly, Cynthia urged the need to move away from the secrecy framework currently in place towards a friendlier information network. In her view, the law must be actionable as the decentralisation of information could become problematic for the public who wants to seek information. This calls to widen public awareness on the legislation and for the law to be accessible and enforceable. She also raised issues with other laws, like the OSA, and spoke on the need to balance the need for freedom of information (here in after referred to as FOI) with issues of fake news and security.

Next, Shareena spoke on Islamic laws, advocating for the importance in understanding the different sources of Islamic law: Quran, Sharia, Fiqh et cetera. She highlighted thinking in Islam is not immune to change and the view that the religion is sensitive, personal and political creates barriers towards change. She advocated moving away from the monolithic, closed view and for more debates, especially since Islamic law in Malaysia is actionable. She also highlighted the grounds for the SIS lawsuit against the fatwa by the Selangor Islamic Religious Council (MAIS). By declaring SIS deviant, the Council offended the principles of natural justice, challenged their freedom of expression and went beyond its jurisdiction. The consequence of the fatwa was that now corporations, institutions and companies are also subject to Sharia Law, so long as the directing mind is a Muslim.

Aidila then shared the challenges faced by journalists in attaining information in Malaysia. Getting data posed four obstacles: (i) knowing the right person rather than the correct procedures, (ii) confidentiality clauses on seemingly non-controversial data, (iii) the long duration needed to apply for data, and the fact that (iv) the government does not have the necessary data. Her wishes centered on wanting data to be given in accessible formats like PDFs or Excel sheets, for information to be released from paywalls, for all ministries to have information officers, and for the enactment and application of the FOI law. Subsequently,the question-and-answer session raised issues of internal clauses within organisations like the Malaysian Anti-Corruption Commission (MACC), the selective presentation of public data, media sustainability and the need for unbiased data.

The second session examined the fundamental principles and modalities of a Right to Information (here in after referred to as RTI) legislation. Dr. Sonia Randhawa, Director of CIJ, examined a possible framework for an FOI or RTI law in Malaysia while Toby Mendel, Executive Director of the Centre for Law and Democracy, presented on the international standards on the right to information. Their presentations overlapped at times as the proposed framework for Malaysia must be in line with international human rights standards.

Sonia asserted that the RTI law must clearly delineate: Types of information covered and the way the information is held; exemptions for secrecy purposes in relation to matters of national security, ease of access to information and minimal application costs; an independent commission on the right to information; burden of proof on the party withholding information; and a complaints and remedy process.

Toby followed by outlining seven standards on RTI laws: (i) presumption that information is open; (ii) broad scope of the law; (iii) proactive disclosure of information; (iv) open procedures to request for information with a timeline for response, no requirement to give reasons for requesting data, and no limits on the reuse of information; (v) primacy of RTI law over secrecy laws; (vi) sanctions and protections for information officers; and (vii) the provisional role of the information commission to raise awareness on the RTI law and to implement it. In response to concerns that the government does not have proper record-keeping, Sonia and Toby agreed that the independent oversight body plays a crucial role in maintaining the availability, accessibility and quality of public information.

The third session moved on to discuss different models available at the national, regional and international levels in a forum with five speakers. They were YB Nik Nazmi Nik Ahmad, former state assembly person in Selangor and the current MP for Setiawangsa; Meena Rahman from Sahabat Alam Malaysia; Kishali Pinto-Jayawardena, an RTI Commissioner from Sri Lanka; John Fresly Hutahaen, former commissioner of the National Information Commission of Indonesia; and Matthew Bugher, the Head of the Asian Programme for Article 19. Among the core principles in drafting the RTI law was that no institution or entity is exempted from the law and that the RTI law supersedes laws previously enacted. The law also needs to be drafted bearing the public sector in mind, for example, awarding protection to whistle-blowers. It should not include provisos that can automatically classify information as confidential, rather it should emphasise proactive disclosure. The burden of proof should be shifted from the applicant to the body withholding the information. Definitions must not be too ambiguous or narrow, with the need to look towards other nations and domestic experiences in drafting the law was particularly emphasised. In effecting the legislation, the RTI commission was discussed at length, pointing out issues such as the mandate of the commission, the funding, the powers of the commission and the way the commission handles mahers were discussed, highlighting that powerful corporations and institutions that have a vested interest against the RTI law could pose challenges to commission.

The following sessions shifted the focus from the sharing of expert opinions to the gathering of insights from the participants. It gathered input from participants based on eight key elements of the proposed RTI bill, while the fifth session consisted of reporting and a synthesis of the recommendations. In terms of **challenges and opportunities**, participants highlighted the constraints faced by civil servants under the Official Secrets Act (OSA), which includes the possible conflicts between federal and state laws, the problematic definition of freedom of expression in the Federal Constitution that does not include the right to information, and the quality and accessibility of data. Under **scope and standards,** in general all present agreed to the right to seek, receive and impart information in line with international law. Access to information should include all entities that receive public funding, with the information to be made public, including third party information. The **scope of the RTI** must be specific to the type of information and the procedures to access information, for example, through an online request form as well as through information officers in rural districts. There were suggestions for two weeks as an acceptable time frame for a response, with one to two months given to gather information.

Next, in terms of **restrictions**, any refusal of information on the grounds of national security must be clearly demonstrated. Other exemptions may include trade agreements, personal and private information, information that would harm the institution of royalty, legal professional privileges et cetera, with the overarching rule that all must be narrowly defined and subject to the public interest test. The **information commission** would be quasi-judicial and independent, with fair representation from various segments of society through a transparent selection process carried out by the Parliament., with all to be equipped with security of tenure and of budgeting.

When deliberating on **models and implementation**, the participants suggested a one-stop centre for the application of information, and the gradual roll-out of the law in various levels of government, and the power of the commission to take action against errant information officers. In regards to **complaints and sanctions,** show cause letters can be sent while the appeal process should consider the Personal Data Protection Act (PDPA). There can also be fines (department or individuals), as well as reciprocal sanctions for the abuse of information given. Finally, **on the way forward**, although most participants agree with having the RTI law, they supported to either maintain the OSA or harmonise both laws, to include OSA provisions under the RTI law. This option would be to incorporate both acts together, whilst periodically abolishing the OSA, as when RTI is implemented smoothly, the OSA should, thereby, be repealed. She noted that participants from Sabah and Sarawak insisted that the OSA must be repealed and further suggested the potential to look into the Sri Lanka model for Malaysia based on the similarities in terms of British colonial history and a multi-ethnic society.

The consultation closed with a launch of a Freedom of Information report by C4. The FOI Report is essentially a rights plan for Malaysia that contains information on human rightsand the international standards regarding RTI legislation, comparative analysis between nations with the better laws highlighted, comparisons of model FOI laws, suggestionsfor exemptions, the status quo in other nations, issues related to FOI law like anti-fake news laws, as well as the information landscape in Malaysia. The report recommended the presumptive right of access, a wide scope of application, a non-obstructive requesting procedure, an independent appeals process, appropriate legal sanctions, the superseding of this law against other laws, and the effective promotion of the law.

In her closing speech, Cynthia thanked BHEUU and CIJ for creating this platform and spoke on the need to have larger consultation sessions that would include more stakeholders. For Wathshlah's closing speech, she extended her thanks to everyone and stated that the momentum needed to be maintained, to which she advanced that the comments from this session would be consolidated and that CIJ would be holding online consultation sessions, collaboratives with other ministries, roadshows, town halls, and training to further the process. Dr. Punitha Silvarajoo, Director of Policy and Research in the BHEUU, also extended her appreciation to all, especially to the international panelists, and stated that the information garnered here would be taken into account by the committee in charge. She expressed her hopes to have more consultation sessions in the future.

DAY 1

27 November 2019

Welcome Remarks by Ms.cWathshlah Naidu, Executive Director, Centre for Independent Journalism (CIJ)

Yang Berbahagia Datuk Liew Vui Keong, Minister in the Prime Minister's Department for Legal Affairs; Dato' Rohaizi bin Bahari, Deputy Director General of Policy and Development, Legal Affairs Division in the Prime Minister's Department, esteemed participants, panelists and guests.

Welcome again to the National Stakeholders Consultation on the Right to Information Legislation, jointly organised by the Centre for Independent Journalism (CIJ) and the Coalition of CSOs on Freedom of Expression in collaboration with the Legal Affairs Division of the Prime Minister's Department(BHEUU).

Standing here today is a pivotal moment. First, this collaboration comes after many years and numerous efforts led by committed civil society organisations (CSOs) and actors who had initiated the National Campaign for a Freedom of Information Act in 2005. We now have the Right to Information legislation placed on the agenda of our federal government. Secondly, as new Malaysia, we are also proud that the government and CSOs are able to constructively collaborate in moving this agenda forward.

Why is such concerted effort needed to promote and protect our right to information?

Information is the lifeline of a democratic society!

Freedom of information facilitates the public in forming opinions about issues that affect us, including holding the government and its related body and officials accountable for their that affect the general public. It promotes constructive participation in any debate or discussion related to specific decision-making processes and/or of public interest, thus ensuring transparency and enhancing participatory democracy, good governance and strengthening the rule of law.

We firmly believe that right to information (RTI) or freedom of information (FOI) legislations reflect the fundamental premise that all information held by the State and related governmental institutions is in principle, public, and may only be withheld if there are legitimate reasons, typically for purposes of state security or privacy, for not disclosing it.

It is #MYRightToKnow, as noted in the hashtag, to have timely access to information on public expenditure, national resources, public health, safety and the environment!

This right to seek and impart information is recognised by international and regional human rights bodies.

- "Freedom of information is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated." (UN General Assembly Resolution 59, 1946)
- Right to freedom of expression includes the freedom to "seek, receive and impart information and ideas through any media and regardless of frontiers" (Universal Declaration of Human Rights (UDHR) ArHcle 19, 1948)
- Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart informaHon, whether orally, in wriHng or through any other medium of that person's choice." (ASEAN Human Rights Declaration)

In the context of Malaysia, despite Article 10 of the Federal Constitution providing a constitutional guarantee of freedom of expression, it does not explicitly include freedom of information as a fundamental human right.

We face numerous other legislative challenges that further create barriers, limiting our right to information, which will be talked about below.

Current laws that prevent citizens from having the right to access public information:

Official Secrets Act (OSA) 1972- allows for any document to be classified as secret, with no requirement for harm and without requiring any relation to national security, international relations or defence. There is no time limit imposed for the classified documents and the Act ousts the court's jurisdiction to review the classification of the document.

Section 203A, Penal Code - it is an offence to disclose any unauthorised dissemination of information obtained in the performance of any duties or functions to the general public, where it may lead to a fine of up to RM1 million and imprisonment for up to one year.

Section 114A, Evidence Act - an internet user is deemed the publisher of any online content unless proven otherwise. This makes individuals and those who administer, operate or provide spaces for online community forums, blogging and hosHng services, liable for content published through their services.

Nonetheless, we have seen significant development in relation to RTI in recent years, as the Selangor and Penang FOI Enactments are seen as the benchmarks which respectively seek to recognise and uphold the fundamental right to information, even if it is within the limited boundaries of each state. However, these state-level enactments are hindered by the hierarchical power of the federal-level OSA, which cannot be overridden as states do not possess the requisite power to do so.

This is a timely moment for Malaysia. Pakatan Harapan (PH), in its 14th General Elections (GE14) manifesto, pledged to enact a federal Freedom of Information (FOI) Act with the option to review the OSA 1972. In July 2019, the Prime Minister reiterated that an FOI Act will be drawn up to replace the OSA in 2020. A commitment was made to ensure that "the drafting process must focus on public engagement and sufficient outreach programmes must be held with the people".

We have been informed by BHEUU that it has set up a Steering Committee and a Technical Committee to review current laws related to FOI and is committed to conducting stakeholder consultations which will inform the drafting process of a federal FOI law.

In taking this forward, this National Stakeholder Consultation is jointly convened by the State and CSOs to provide a space to deliberate and discuss the overarching principles and content of a RTI legislation, in the context of the current legislative and political framework.

As a democratic country, there is no excuse for Malaysia to delay its commitment in expanding the human rights of its people to include the right to access information. We do not want to fall behind the 127 countries (out of 193 UN Member States) that have RTI laws, including Thailand, Indonesia, Vietnam, Philippines and Timor Leste in Southeast Asia.

Great things happen when there is a gathering of great minds. On that note, it is with great anticipation that we welcome all of you to this Consultation.

Thank you.

Keynote Address by YB Datuk Liew Vui Keong, Minister in the Prime Minister's Department (Law)

Yang Berbahagia Dato Rohaizi bin Bahari, Deputy Director General of Policy and Development, BHEUU; Ms. Watshlah Naidu, Executive Director of CIJ; and Mr. Matthew Bugher, Head of Asia Programme, Article 19; Ms. Kishali Pinto Jayawardana, Commissioner from Right to Information (RTI) Commission from Sri Lanka; panelists, moderators and facilitators from Malaysia and abroad; distinguished participants from the government, Parliament, SUHAKAM; CSOs and media entities; ladies and gentlemen, ***salam sejahtera*** and ***salam sayangi Malaysiaku.***

Firstly, I'd like to take this opportunity to convey my sincere appreciation to the Centre for Independent Journalism (CIJ) and the CSO Coalition on Freedom of Expression for organising this event in collaboration with the Legal Affairs Division of the Prime Minister's Department under me, for organising this National Stakeholders Consultation on the Right to Information Legislation.

This programme is meant to review and consolidate the experiences, current initiatives and lessons learnt from the state and CSOs, nationally and regionally, in the draeing and implementation of an RTI legislation for our beloved country.

We are honoured by the presence of everyone here today. The initiative to drae a FOI Act is part of the government's commitment in promoting good governance in public administration. Before we proceed, I'd like to stress the importance of the right to freedom of information for this new Malaysia as kindly highlighted by Ms. Naidu in her speech earlier. Of course there is no other reason than to promote transparency and accountability, as well as to strengthen the public right to be informed.

This is in line with the National Anti-Corruption Plan (NACP) 2019-2023 which aims to fully address governance, integrity and anti-corruption issues, with the vision of creating a corruption-free nation by improving government efficiency, transparency and accountability based on good governance.

As rightly pointed out in the speech by Ms. Naidu, accountability and transparency are important elements of good governance in Malaysia Baru to ensure our country is put on the right path again. It is a collective responsibility that involves both public and private sectors.

The principle of transparency in government can be traced back to the 18thcentury, to enlightenment philosophers such as Emmanuel Kant and Jean-Jacques Rousseau. Certainly, this is not new to Malaysia where the corrupted and kleptocrats hide behind the wheels of the Official Secrets Act (OSA) to extend their personal wealth and political power at the expense of the people.

The recent trials involving certain personalities from the previous administration have made some of our jaws drop when we heard the evidence given by certain witnesses. Regardless, legal structures should never be used to hide stolen assets and building blocks of hidden money.

As you are all aware, the public has the right to know about the assets owned by members of the administration such as myself, the Members of Parliament (MP), and members of the cabinet; last July, we managed to convince the House to approve a motion to compel every single Member of Parliament to declare their assets. This serves as a useful tool to combat corruption, abuse of power and to potentially detect conflicts of interest.

The whole idea of the declaration of assets is to compel the MPs to declare their assets when the MPs have been made members of the administration. Should any MP acquire wealth that is unexplainable during his tenure as Minister or Deputy Minister, he shall establish that the acquisition of assets are free from any influence or persuasion. Failure to do so, shall be made liable under the Malaysian Anti-Corruption Commission Act 2009 (MACC).

This is what we have been actively promoting, to ensure that the public has the right to know, and one of the initiatives is through the MACC portal, where the income, revenue and assets of all the MPs or members of the administration are made accessible to the public. I urge all MPs to make their asset declarations! The House has put down a deadline to 31 October 2019, but some MPs, especially the opposition, have not filed their declarations. The Speaker has agreed to extend the deadline until 5 December 2019.

This is not a new mechanism: in France, I was told that the official agency called the High Authority for Transparency in Public Life was created in 2013 to check tax returns, personal assets, and absence of conflicts of interest for elected representatives. In England, a rule is in place where they require all the members of the administration to declare their assets.

One of the many reasons why some MPs in our country are reluctant to make their declarations or have reservations in declaring their asset, was because of fear, for safety and security reasons, where they claim that if they declare their assets, this will affect the members of their families and may even lead to extortion or kidnapping.

Ever since last October when many have made their declarations- that are displayed in the portal as of today- there has not been a single case of extortion or kidnapping involving any one of us or our family members. The fear portrayed by some MPs to avoid giving this important information to the public is, rather, unfounded. I sincerely hope all the MPs in the August house will declare their assets for all to see.

This is paramount for the government to create an enabling environment that upholds and promotes the right to information of every individual. This will also enable constructive participation through the discussions that will benefit the decision-making process of specific issues pertaining to public interest and ultimately, this will enhance participatory democracy, good governance and strengthen the rule of law.

Having said that, I must bring forward to you the pledge made in the GE14 manifesto under PH, to develop a federal Freedom of Information (FOI) law with the option to repeal the OSA 1972. In this context, the cabinet mandated me to work with my colleague, the honourable Minister of Multimedia and Communications, to construct and develop this Act.

The Prime Minister announced in July this year to have the FOI replace the OSA by next year. This requires a number of engagements with all relevant stakeholders and civil society. For Malaysians, the FOI Act requires an in-depth and holistic study to ensure that it does not contravene existing laws.

People who questioned approached me asking: “why does it take so long to repeal and reform the law?” For some context, the ISA was enacted before independence, and it took almost 60 years for the country to repeal it; the Sedition Act 1948 required tremendous effort,consultation and work progress with all the relevant Ministries before it can be passed to the cabinet for approval.

I can assure you that work is in progress for most of the laws promised under the PH manifesto to be repealed such as SOSMA, which is under the purview of the Home Ministry. The Ministry has come up with the bill that I am hopeful of, will be tabled soon. It requires tremendous effort not only from the executive but also from the public to have this engagement with relevant stakeholders.

The IPCMC, while being tabled in the Parliament, I decided aeer the first reading, at the second reading, to refer the bill to the Parliamentary Select Committee (PSC) because of the tremendous requests by the House to refer it to the PSC. This is a progress that the PH government has made, and the fact that the referring of the IPCMC Bill to the PSC is a first and historical move for the government. This has never happened before during any of the previous administrations.

We need continuous feedback and support from everyone, members of the public, to progress more actively for FOI. We have only been in Government since May last year, one and a half years. In this year and a half, we have done a lot. We repealed the anti-fake news law, which we did not see as relevant to be used against social media users, and considering that we have sufficient multimedia laws to deal with that. There are only four Parliament sessions in a year; lastyear when we came into power, it was in May, the first sitting was in July, and we were in a hurry as I only took over as Minister in the Prime Minister's Department in charge of Law and Parliament Affairs on 2 July. The Parliament convened on 16 July. I had about two weeks to deal with so many matters.

The budget was out in October, and there were many issues. It was the first budget for PH, tabled in October last year, despite only coming into power in May. There were only four months to prepare for this year's budget. This year, our second budget was prepared for next year.

We abolished GST, we tabled a constitutional amendment for Sabah and Sarawak to have the same status as Semenanjung, we lowered the voting age to 18 years old so they are now eligible to vote and also eligible to become candidates in the coming GE. We also allowed additional 13 seats for Sabah's State Legislative Assembly.

All these took place in a year and a half. This is major! When we talk about allowing 18 year olds to vote in the coming GE, this is the single most important political reform as it changes the political landscape forever with the addition of 7.2 million voters if we have the election in 2023.

We have also dealt with the issue of the death penalty, and many other laws that had been promised by PH. In these five years, under my purview, I hope I will be able to carry out all the reforms as promised in the manifesto, including this FOI Act.

With that, I would like to thank the CIJ and BHEUU, and all of you who have come to this meeting today and I hope you will come up with fruitful discussions. Rest assured, I will take note of all the contributions and recommendations from you. I hope the consultation will pave the way and continue with further consultations with different stakeholders to achieve the government's reform agenda.

Thank you and welcome, and I hope you all will have a fruitful discussion ahead.

Session 1: Charting the Opportunities and Potential Barriers/ Challenges in Upholding the Right to Information in Malaysia

The first session involved three speakers: Cynthia Gabriel, Executive Director of the Center to Combat Corruption and Cronyism (C4); Shareena Shariff, Programme Manager for Advocacy, Legal Services and Research in Sisters in Islam (SIS); and Aidila Razak, Special Reports Editor from Malaysiakini. The forum was moderated by Dr. Cheah Swee Neo, Secretary of the Human Rights Commission of Malaysia (SUHAKAM).

This panel session was aimed at having the panelists share the experiences and challenges they have faced when obtaining information and have them tease out the gaps in the current structure, which once identified, could be pushed to cover in the drae of the upcoming Right to Information (RTI) legislation.

Cynthia Gabriel, Executive Director, Center to Combat Corruption and Cronyism (C4)

Cynthia is a key human rights advocate in Malaysia. She spent most of her professional life in the field of advancing and promoting human rights, good governance and democratic freedoms. Cynthia has also worked on UN contractual research work in the area of migrant and refugee research and their vulnerabilities towards HIV/AIDS. Much of her time has been devoted to building and shaping the work of leading human rights advancements in Malaysia and across the globe. In recognition of this, she was elected Vice President of the Global Advocacy Group, the Paris-based International Federation for Human Rights (2004-2009) and has recently set up a policy centre called the Center to Combat Corruption and Cronyism (C4).

Cynthia opened her speech by noting that the country has come very far in the push for the FOI legislation, something that was previously difficult. Previous work related to the FOI legislation included consultation sessions co-organised with SUHAKAM to look into the challenges against the FOI legislation, such as the Sedition Act and the OSA. She added her appreciation for the presence of international experts such as those from Sri Lanka and Indonesia as they would be valuable in providing advice in the action to gain RTI legislation.

Cynthia opined that we need to move away from the secrecy framework that has been in place for over 60 years and instead adopt a friendlier information framework. Tax payers must not only feel that it is their right to know, but to have a place to go to and obtain information, thereby granting them the privilege to access public information. This would then allow them to scrutinise government policy and call for better accountability, and in turn offer better protection of rights.

She also lauded some of the advancements in RTI in Malaysia, namely the enactment of FOI legislation in Selangor and shortly aeer, in Penang as well. She further commended the quality of the Selangor enactment, stating that they had had a good team to drae the legislation.

Challenges

Among the challenges brought to light was that **the law was not actionable, but the law needs to work and implementation is very important**. As an example, Cynthia brought up a case where she and her team had gone to the Selangor State Secretariat in hopes of getting information on water quality in Selangor and were immediately sent to the Water Department, where the officer in charge could not find the necessary forms. This shows that even though the law is in place, the current infrastructure does not allow for the ease of access to information.

In accordance to it, she argued that **the decentralisation of information** is problematic as the public would not know which department to go to in the event that information is needed, such in her anecdote, where they had to be directed to the Water Department.

The next challenge posed is the lack of **awareness on the enactment of the legislation.** Cynthia observed that in both Selangor and Penang, the officers in charge of implementing the law did not publicise any progress of the FOI enactment, which could have allowed for more empowerment. She quoted Minister Liew Vui Keong in his keynote address that knowledge is empowerment; with knowledge comes the ability to make better-informed decisions. Lessons must be drawn from the FOI enactment in the two states.

Cynthia further advanced that one of the biggest hurdles was **the OSA**. She made two examples: the first of which was the confidentiality of local government meeting minutes, including those of municipal councils. She argued for those who pay assessments and certain services, such as the maintenance of drains, streetlights or fogging to combat Aedes Mosquitoes as those who made such payments expect and deserve to know how the actions will be carried out.

Not only the maintenance of drain should be made known to the taxpayers, but also all upcoming projects and those responsible for them, which were conventionally kept in the dark from the public's eyes. Here, the Kinrara-Damansara (KIDEX) Highway Project (now cancelled) was cited as a prime example. Information on the project, ranging from the name of the contractor hired, down to its cost of RM 14 billion (which would have made record to be the most expensive highway ever built in Malaysia) were classified as confidential under the OSA, owing to the fact that it was a Federal government project, stirring much controversy as the acquisition of land would have displaced many people who has been living there for, in some cases, up to 70 years.

She later went on to state that while some countries such as India, managed to enforce both an OSA and a FOI act, it is still a challenge to drae the exceptions here. She again referenced the Minister's keynote address, in which he advanced that the OSA would be replaced with the FOI legislation. She stated that it was now their responsibility she felt, to continue to reaffirm what has been said on outlets such as social media.

Cynthia added that **the law needs to be accessible, affordable and enforceable**. Earlier this year, a Selangor state assemblyman had requested to view the salaries of several Directors of Government-Linked Companies (GLCs). The filing of his application alarmed a worrying clause in the Selangor FOI enactment to surface, as the clause stated that, for the release of information concerning third parties, the consent of the third party in question needed to be obtained first. This was a problem, as most would not award their consent therefore allowing them to escape the enforcement of the act. Cynthia reiterated that it is insufficient to call for an FOI law; the content of the FOI law is pertinent.

Additionally, she stated that there are new challenges to the imposition of the FOI legislation such as **fake news and security issues.** She noted the need to learn from neighbouring countries on how and why we need to place law on access and right to information the primary drivers of where Malaysia should be headed, in spite of these challenges.

Comment on the PH Government

Cynthia continued by noting that the transparency promises should have been the pillar of the PH government during the governmental transitional period. She said that while there have been advancements, the enforcement of such advancements were severely wanting, where she stated three examples to illustrate her point.

The first was the requirement for Members of Parliament (MPs) to make declarations of their assets, something that would have been impossible before. However, instead of providing a breakdown of each MP's assets, only their salaries were stated- information that was already known to the public. Information like the number of cars and properties they owned were not made to be public knowledge yet.

The second example was the recent scandal regarding procurement processes. The PH government has currently banned the use of support letters, therefore, for example, the actions of an Agricultural minister in writing support letters to the Prime Minister to help a company garner support and secure a contract for paddy farming should not have happened, yet it did. This only further propounded the importance of the FOI legislation as people would be able to know the criteria for bidding and how contracts are awarded.

The last example was the infamous Council of Eminent Persons Report, which until today is still classified as an Official Secret. She commented that a report like this is not a matter of national security, hence should not be withheld from the public, as reforms had been put together and the issues that were deemed as priorities to the government.

Conclusion

Cynthia closed her speech by advancing that it was important to figure out the elements of a good law and to find out better ways to advocate for a friendlier information framework. She stated that we must move towards an environment where people are willing to share information of more than just trivial matters and that we should look to nations like Sri Lanka and Indonesia who have successfully implemented this law.

She also stated the need to continuously pressure the government of the matters brought forward above. Despite the challenges, she believes that FOI must be recognised as a human right alongside the freedom of expression; without information, people do not and would not know or be able to express themselves nor ask questions. The fundamental issue of the right to know should be the key "take-home" message of this consultation.

Shareena Shariff, Programme Manager for Advocacy, Legal Services and Research, Sisters in Islam (SIS)

SIS is an NGO advancing the rights of Muslim women within the framework of Islam, human rights, constitutional guarantees and grounded by lived realities. Shareena is involved in work relating to injustices experienced by women as a result of biased laws, policies and institutional structures. Areas include critical analysis of Islamic laws, political Islam, women's rights in the family and in the public sphere and gender equality for women. Her team operates Telenisa, a helpline provided free of charge for Muslims requiring legal advice under Islamic Family Laws. Shareena is a lawyer by training with over 20 years of experience, with her career focused on policy and law reform as well as strategic planning. Her previous position was with a statutory body – Securities Commission, a regulatory authority for the capital markets.

Shareena's speech was centered around the fatwa against SIS that was issued by the Selangor Islamic Religious Council (Majlis Agama Islam of Selangor, MAIS) and in relation to that, the challenges to FOI and towards non-governmental organisations (NGO) and CSOs in their work.

Background of Sisters in Islam (SIS) and Introduction into Islamic Law

Shareena stated that SIS works with Islamic laws, policies and thinking in conjunction with their core objective of wanting to open up the avenues for debate on those a for ementioned topics. She stated, as a matter of fact, that here in Malaysia, Islam was not just a personal matter of faith, rather an issue of both law and policy that affects the lives of Muslims and non-Muslims alike.

She also stated that at SIS, they believe that it is their right as citizens to comment on and criticise any law that is being imposed upon the public, adding upon that they also work toward opening up the knowledge on the breadth of fiqh (Islamic jurisprudence).

She explained that in Islam, they have the sharia, the fiqh and the law, each deriving from different sources, thereby, at times, causing a disjunction/confusion between the derivatives, furthering the fact that there is the matter of the various interpretations from both- within and outside the Quran. As SIS works in the global scene, they see fiqh in many different areas, and is very much varied.

Shareena asserted that Malaysia adopted certain types of fiqh that were not necessarily representative of the majority view, carrying on the belief that these matters should be open to debate rather than avoiding the conversation as it is important to look at the objectives and the impact of implemented laws. She added that the law must also be distinguished from the Quran, as the laws in place are sometimes very much different compared to what was originally interpreted/written/intended in the Quran, to which she gave two examples on the matter.

Firstly, was the Domestic Violence Act 1994 as Shareena explained that during the course of lobbying for the act, it was the Islamists who pushed for the law to be inapplicable to Muslims, asserting the religious argument that in Islam, husbands were allowed to beat their wives, however, to the contrary, extensive research proved, time and again, that the Quran had no mentions of such rules, but now- years aeer the law is in place- Islamic authorities like mueis, abhor and vilify violence within marriages and relationships. It is a general consensus of how difficult it is to tear down the orthodox belief systems, especially at authoritative level, and it was necessary to acknowledge that the assertions made were neither proven nor encouraged under the religion.

Her second example highlighted the issue of child marriage. Shareena stated that one of the religious reasons expressed for the action against the ban on child marriage was that it was the practice of the Prophet, notwithstanding newer research that contradicted such lines of thinking. Shareena revealed in June this year that , the Al-Azhar University, the leading authority on Islamic matters, released a fatwa declaring child marriage to be illegal. As of now, many Islamic countries that have fiqh riddled through their laws and policies such as Indonesia, Egypt, Kenya, Pakistan and Jordan have adopted the purview that child marriage is (deemed/to be deemed) illegal.

She opined that these actions showed that Islamic thinking was not immune to change, where matters like promoting the welfare of women under Islamic law are prime examples that an area as such should not be immune from critical debate. She reiterated here of the importance of distinguishing between the law and the Quran, as the main barriers to challenging Islamic laws- because they are deemed sensitive, personal and political. She said to distance from the monolithic, closed view and to encourage more debates were needed in the move forward in Islam.

The Fatwa

In the second part of her speech, Shareena spoke on the fatwa issued by MAIS against SIS. Some of what the fatwa contained was that those whose beliefs were liberal or pluralistic were deemed deviant; they were required to repent and their publications, including those on social media, could be made illegal.

Shareena stated that upon finding out, their immediate response was to file a civil suit in objection to the fatwa on three grounds. Firstly, the principles of natural justice had not been adhered to, even though the fatwa was directed explicitly towards SIS, they were neither informed of the fatwa, nor given an opportunity to justify their actions or challenge their claims. Their second ground was that the fatwa challenged their Freedom of Expression. Shareena clarified that at SIS, they merely challenged the interpretations of Islam that brought bias to the laws and the efficacy of the laws in place; and have never intended to challenge the religion itself. Their third ground was that the fatwa issued went beyond MAIS's jurisdiction as issues pertaining to media and publication were matters governed under other ministries. In the suit, SIS named Fatwa Committee, MAIS and the Selangor Government as the defendants.

During the proceedings, the first issue appearing in front of the Federal Court was whether the case should preside in Civil or Syariah Court. It is obvious that SIS had preferred to have the hearings at the Civil Court in hopes of neutrality to the case. Aeer multiple visits to the courts, the High Court ruled that the fatwa was in fact valid as MAIS had adhered to the necessary procedure that was required to publish such a fatwa.

SIS is now pursuing action by challenging the transparency and good governance within the Administration of Islamic Law (Federal Territories) Act 1993, as Shareena advocates that the law (these fatwas), cannot be developed without consultations, et cetera as the impacts towards the public are severe.

In this case, the impacts of the fatwa are palpable as SIS now finds it difficult to reach certain sects of society, and the public is affected as sharia laws are now applicable to institutions, organisations and companies so long as the directing minds behind them are those who profess to the religion of Islam.

Aidila Razak, Special Reports Editor, Malaysiakini

At Malaysiakini, Aidila tries to use data and innovation to do better in creating engaging journalism, with the help of other journalists at the Kini News Lab. Her work has also appeared in the New Naratif, The Guardian, and BBC, among others, where she has covered politics and socioeconomics in Malaysia for about a decade, and is passionate about pushing for a more inclusive and just Malaysia.

Aidila opened her speech that centers on the views of those who (have worked/works) at Malaysiakini and made a disclaimer that she does not speak on behalf of all journalists. She went on to say that she would be presenting on how journalists operate in a nation without freedom of information and to address that, she discussed two key points; the challenges the media face in obtaining timely and reliable information and the impacts of it on their work as journalists.

Challenges and Impacts

She asserted that the first challenge is that **it was not about what you knew, but rather who you knew.** In Malaysia, gaining access to information was more about finding the right person to entertain you and tell you where information related to the public was kept rather than a person's knowledge on the procedure of obtaining information. She provided two examples to illustrate the challenge and its impact to their work.

Aidila's first example was a story they had tried to do on the Lynas Plant in the first quarter of the year. At that time, information of the amount of waste the plant produced, the radioactivity of the waste and the actual problems surrounding the safety of the plant were unavailable. When the committee in charge of the study into the plant finally tabled their report in Parliament, the information that surfaced was that the water underneath the plant contained high levels of heavy metals and the levels of various types of unascertained nickel were much higher than what was considered as safe.

They considered the matter ridiculous and were unable to (question/answer) the information that was dated from 2015-2016, although the report was provided in 2019. In their quest for the latest data, they had gone to the local Department of Environment (DOE) that was located in Pahang and the department at the federal level, but the extracted data was of no help to Aidila and her team. When they finally enquired with the Minister, she told them that the issue was not of the levels of heavy metals per se, but rather the fact that the local community was consuming from a source of heavy metal-polluted water like those from the nearby wells for daily consumption, including that of drinking.

Upon mentioning this to the local officials, they had stated that that was no longer a problem and rationalized that the locals were now drinking bottled water. They then tried to pester the Minister for the information once again, however their efforts were to no avail. They finally received some input from the Deputy Director General under the Minister who had stated that the recent reports showed the situation to be fine and that they were willing to publish the data. However, despite multiple messages, the report never came and consequently, Aidila and her team were unable to publish the data.

The second example was a story they had tried to do on children growing up in ethnic bubbles in Malaysia. Aidila explained that the rationale behind the article was that when children grow up without friends from other communities, they might not know how to behave around those of a different race and as a result might form wrongful perceptions of others, or be unaware when behaving in an offensive manner.

Aidila advanced that it was arguably more common to see racial diversity at a Chinese vernacular school as compared to national school. Upon application to the particular Ministry for datasets on school enrolment to examine if the opinion was true, they had received data from 2000-2016. This was considered unsatisfactory as they had requested statistics from the 1960s in order to better analyse trends. Aeer months of going back and forth, Aidila received a letter from the Ministry stating that the information requested was confidential in nature, although it was in the possession of the Ministry. Aidila noted that the data should not be considered controversial and highlighted that enrolment data from other nations was easy to obtain, citing the United States as an example of a multicultural nation that made the information public knowledge. She also stated the **loss of time** was a challenge as well, since officers were rarely upfront about their inability to release the data in question, keeping the journalists waiting for long periods of time.

Aidila raised the concern that **the government might not even have the data requested**, which would be the worst-case scenario. If reporters were told that the data is contained somewhere else, they could proceed to search for it, or they could ask a Parliamentarian to request for data in Parliament. Aidila additionally questioned whether the government's claim of not collecting requested data is true, or if they merely routinely destroyed the data they have.

Wishlist

Aidila then advocated for key requests from journalists related to ROI. The first was for the government to give data in more accessible formats. Instead of giving infographics- which would require data entry and later analysis to use the information, data should be forwarded in the form of Excel spreadsheets, emphasizing on the preference to have the actual soecopy of the file containing the information rather than a pdf file of pictures of the information, for example.

The second was for information to be released from paywalls. She cited an example from the Sabah tourism statistics that had cost a colleague of hers 52 USD, as she opines that the information was collected under taxpayer money and should, therefore, be information that they are supposed to have the right to know over.

Her third request was for all ministries to instate information officers as Aidila expressed that currently, the framework made it possible for them to only meet with press secretaries who were oeen not equipped to provide journalists with the information needed. Proposed Information officers or a related team should know where and how to look for data. This would facilitate those looking for information to avoid searching across multiple channels to try and obtain data.

She also affirmed the request for an FOI Act. Here, she stated an example of a conversation she had with a journalist from the US whereby she had expressed admiration on how detailed their work is and had asked how they had gotten the information. The answer was that they simply have to submit an application called 'Freedom of Information Application' and were then able to access the information with ease; something she too wished for.

Lastly, she stated that she calls for more application of the FOI law in Selangor and Penang as the enactments are hardly utilized in the respective states. She believes that even if the law exists, they need to ensure that people can make use of it and for it to be practical. She said at present, the making of a request under the enactment took just as much time as the normal process, which involved sending out emails to try to gather data.

Question-and-Answer Session

- Dr Ngo Sheau Shi from Universiti Sains Malaysia (University of Science, Malaysia, USM) inquired if good data was available to the public, whether the media be prepared with the infrastructure to support good journalism. In response, Aidila said yes, further stating that data journalism and normal journalism is different, with data journalism taking up tenfold amount of time. In example, she referenced the minister's keynote address earlier, stating that her team was already working on three possible stories in conjunction with it whereas the earlier story regarding student enrollment had already taken up to three months, with half of those spent on trying to access the dataset. Adila explained that they want the option of being able to do those types of stories without having to give them up just because of the lack of information.

- Sashaleena from MACC shared that infrastructure was needed to enforce the law, and the development of the infrastructure would require funds as well. She said that the law would need to be passed with a budget allotment, with the funds to be channeled directly towards providing trained officers to handle the applications.

  Information should not be handled by untrained or at random officers as there are still laws in contravention with the RTI.

Cynthia responded by stating that within the MACC laws itself, there were clauses preventing the public from knowing the status of a case that has been referred to them. She cited the 1MDB scandal as an example, saying that once the investigation was complete, it was not disclosed to the public that the matter had been referred to the AGC which had the power to prosecute. It was also in the MACC laws that the MACC had no obligation to follow up on matters with the applicant, unless the applicant sent a letter to their Chief Registrar. She argued on behalf of public interest that these matters must be made as public knowledge.

Sashaleena clarified that complaints, when received through MACCMobile (an app), were immediately sent for investigation and the following outcomes and status of the case would be sent to the complainant. She furthers that issues would only arise when there were anonymous letters, as all complainants are accorded a reference number that they could use to follow up on the statuses of their cases and in cases of anonymity, the MACC would not be able to contact the complainant for lack of information.

Cynthia then notes that the FOI Act would help immensely with the issue of feedback from institutions, as currently, there are laws preventing the access to information to which people tend to write their own stories and speculate in hopes that the authorities respond and investigate further. This would then impede the reliance on speculative information, as she cited the example of the 1MDB case where the inaccessibility of information went as far as being a matter of contempt of court, and acting as reparation to the situation, the FOI law must be able to deal with these scenarios.

Shareena also commented that it was not just a problem of data availability, but also a matter of what and the way data is published. In the 2000s, statistics on child marriages caused a public outcry, as the number of married children under the age of 14 was alarming. In 2010, the data released only provided statistics for those between the ages of 15 to 19. Currently, the number of younger married children is hidden and is worrying, further stating that the manner in which data is curated will impact its usability.

- Tehmina Kaoosji from the Institute of Journalists Malaysia (IoJ) commented on the issue of sustainability in the media industry. In October 2018, when interviewing Lynas CEO Amanda Lacaze, she had to refer to a 2013 Yale report on the toxic impact of Lynas as that was the latest information available at that time. In addition, Amanda had come in expecting a public relation (PR) stunt as the company had paid for the interview, and when put on the spot, was unhappy and refused to answer the questions posed. Following the transition of government, Lynas also went on a massive PR campaign to manage public perceptions. Tehmina stated that it was an issue that the media in Malaysia, especially legacy media, gave out paid interviews particularly for mega corporations, in those cases, they should disclose the facts of it being paid PR campaigns. Therefore, the issue of media sustainability was something important when discussing matters on RTI. In response, Aidila said that every time people received money to write something, they should advertise it; that was well understood in terms of journalism ethics, and not doing so was a breach of ethics.

- A representative from PACOS Trust Sabah commented that there was difficulty in gaining access to timely information especially in the interiors of Sabah. She stated that members of the community got hold of fake data, are unable to get updates and gain access to more than one story on a particular matter. Next, in regards to the Lynas plant, she asked if the media asked members of the community for information instead of relying on the parliamentarians and the departments. She said that in Panampang, Sabah, the community was facing a similar issue in regards to a dam that is being built.

In response, Aidila stated that while the community has provided a lot of information on the matter, as journalists, they could not rely only on information from those who had vested interests in the project. Information from government departments is required for neutral information. She also believes that in regards to the dam, it is important to pressure the right officials for information, as statements from parliamentarians are questionable in terms of its reliability. While Aidila acknowledged limited access to the internet in rural or interior areas as a significant challenge, it was highlighted that in urban areas with higher access to information, the public faces the challenge of being constantly misled. She regrelully noted that this particular session could not sufficiently delve into the issues on the lack of access to information due to internet connection problems, et cetera.

Session 2: Understanding the Fundamental Principles and Modalities of a Right to Information Legislation

This session aimed to examine the principles and modalities of a RTI law based on international standards, with two speakers: Toby Mendel, Executive Director of the Centre for Law and Democracy; and Dr. Sonia Randhawa, Director of CIJ. The panel was moderated by Nalini Elumalai, Malaysia Programme Officer of ARTICLE 19.

Dr. Sonia Randhawa, Director, CIJ

Sonia presented a framework for an FOI law in Malaysia. She shared that the Coalition of CSOs on Freedom of Expression was set up aeer GE14 last year with the focus to monitor the country's freedom of expression, the freedom of information, media freedom and democratisation, with the emphasis on openness and transparency. She expressed hope for the adoption of an FOI law in the future that meets international standards and gives citizens, and all in the country, information on key national interests.

Sonia explained that there is a need to define the **types of information** covered by the Act. The way information is held - recordings, photographs, maps – is open to discussion. She raised the question of whether only public bodies funded by tax is covered by the Act, and proposed that all entities that can receive public funding – NGOs, companies – should also be covered by the Act. In precision, a full public body that only receives public funding is to be covered under the Act, though if there is only 5% of public funding for a project run by (a/ the) body, then only the project should be covered by that Act.

The next question would be the type of information that should be kept secret. While **exemptions** can be provided; there should not be an overreaching exemption that excludes all information related to police or criminal investigations from the FOI Act. Exempted categories information must be specific and precise in identifying information that could be used to cause harm to an investigation. There can also be partial leaks of information that will not jeopardise the prosecution of those involved in criminal acts, while certain documents may be redacted before being made available. Other areas of exemption may include those related to security, not all, but those that could harm national interests, international relations, trade and the right to privacy. An important factor is, the person requesting for information should not be required to demonstrate that the information requested does not fall under the exemptions. For instance, should they file a request for the 1MDB report, the onus should be on the public body to establish justify denial of full access to the document and why some redacted documents are not allowed to be shared. In other words, the burden now lies on the legislation to establish the classification of a document and its public accessibility.

The RTI law must enshrine the **ease of access.** Based on the experiences of other countries, when access to information is cheap, the law is used more frequently. The public pays taxes, hence the information does not belong to the government, but to the people, and any costs should only be related to the cost of releasing the document, CD or photocopies. Communities affected by infrastructure projects are prevented from accessing Environmental Impact Assessment reports because they cannot afford the cost of doing so. The RTI Act needs to be universal and indiscriminately allows anybody to ask for information without the need to give reason or supply personal details to prevent the misuse of the process. In the UK, it was found that journalists are more likely to get their access to information requests denied as some freedom of information laws require applicants to give a reason and could be penalised if the use of the information is not in accordance to the reason given. This poses a real problem for when the purpose of requesting for information, say, is to uncover corruption and this reason is stated on the application, it will most likely not

be granted. The information should be allowed for other purposes, for example, if an investigation into water pollution uncovers corruption. The information should be accessible and could be made available online, even to people with disabilities, for example, in audio form. Languages do not necessarily have to be the official languages in Malaysia, and even imposing time limits should be set on the government agency in responding to information requests.

Agencies responding to FOI requests must be **independent.** In terms of how a body can be set up, Sonia admitted that Malaysia does not have any **commission** that can command confidence across the broad segments of society. The selection criteria and processes must be open, members must be competent and are reflective of the diversity of the society, with women, indigenous groups as such from a variety of backgrounds and competences. The members can be appointed for a 5-year term, with the commission to be adequately funded, with the budget prepared by the commission under the Ministry of Finance. Some public information should be published as a matter of court - minutes of meetings, annual reports, water surveys. It is the government's duty to publish continuously at an increasing rate, with the commission to be the oversight and advise the public bodies on how to set guidelines on what to publish proactively, along with a minimum standard on how records should be maintained and kept.

In addition, Sonia asserted that the **burden of proof** needed to be shieed: instead of penalising public officials and civil servants for revealing information, it should be their duty to provide information, with a higher likelihood of being penalised if they act obstructively. Furthermore, should the information be deemed to no longer do harm, it can be listed in the public domain, in other words there must be a timeline for the classification of documents.

Finally, the **complaints process and remedy** should be cheap, as access to justice should not involve heey lawyer fees. There can be multiple layers of appeal- from the independent information commission to the judiciary and to impose sanctions for non-compliance to openness from the information commission. The OSA needs to be brought in line with the FOI Act.

Toby Mendel, Executive Director, Centre for Law and Democracy

There are key international standards on the right to information. Toby began by noting that the term “right to information” is preferred to “freedom of information” or “access to information”. The main source of the standards is international law, where the right to information is recognised as a fundamental human rights, based on the freedom of expression. People have the right to speak and express themselves, which also includes the right to seek and receive ideas.

Specific sources of the standards come from international court decisions, statements by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, reports from the United Nations (UN), as well as regional systems on human rights in Africa, America, and Europe. These standards clearly outline the right to information.

Toby shared the methods with which his organization has worked with, by accessing every RTI law according to international standards. He laid out the development of the global scenario that Malaysia is on the cusp of stepping into.

In 1990, only 14 countries in the world had RTI laws, all were western countries and currently there are 129 countries and counting. In ASEAN alone, there are Thailand, Indonesia, the Philippines, and Vietnam. In Cambodia, Malaysia and Myanmar, this right is recognised. In 1997, the countries enacting RTI laws were one per year, but now has increased to about four per year.

Toby emphasised that it is important to know that the quality of these laws over each 5-year period has been increasing, observing that since 1990, Malaysia has seen itself in the frame of reference. He then outlined seven key standards that should guide the RTI law.

1. Presumption

This refers to the thrust of laws. In most countries, it is presumed that information is not open, but these laws reverse the dynamics to create a presumption that all information is open. The RTI law covers anything in a recorded form, in which if a talk is in progress but is not being recorded, it will not be covered under the RTI law.

There was a case of someone requesting data on the cookies on the Swedish Prime Minister’s computer. This is data in a recorded format, which allows people to see how the Prime Minister used the Internet via RTI law; it is of public interest

2. Scope

The law is broad and extends to all three branches of the government, all levels, statutory bodies, state-owned enterprises, private bodies which undertake public functions such as private hospitals and education institutions et cetera.

3. Who gets the information [proactive disclosure]

Some laws have restrictions on this, but the international human rights law (IHRL) states that all should have access to the information, even non-citizens. The act of requesting for information is at the heart of this law, but most do not make requests, and this would mean that governments need to inform the people what they can access and to provide relevant plalorms. This can be a challenge due to its capacity issues, where five years since the law was enacted in India, only 5% of proactive obligations were met, whilst on the other side of the globe, in Canada, every single public body is required by law to have proactive disclosure.

In order to balance contradictory strands of law, a country may build in laws that increase proactive obligations over time, beginning with minimum standards, with the system to increase them over time.

4. Procedures to request and access information

During the year of 1997 in Thailand, all went well and people were using the law, but it was until the officials then realised that there were no timelines to respond to requests. This shows that without legislating timelines, this hinders any process that involves the law and the Thai law died because of this missing element.

It must be simple to file requests through any means, including electronic, with no need to provide excess information, with only what is needed and how it can be reachable to the applicants. Assistance must be given to those with special needs or those who are illiterate. Furthermore, there should be no requirement to give reasons for data request; this is a human right, there is no need to justify. Receipts should be given although the process should be free. If a request is filed with the wrong public body, it should be transferred to the proper body. Timelines are important, and the officer should respond as soon as possible. There could be time limits of 10-15 days and can be extended for any complex requests.

The applicants have the right to stipulate which format they want the information in- in electronic form or photocopies. Fees should be limited and only charged upon the cost of the reproduction of the information, though there could be a set number of free pages, perhaps 10-15 pages and It has been known to cost public authorities more to process the fees just for 10-15 pages.

There should also be no limits on the reuse of information and should be free for any legal uses. Public information is a huge industry with billions generated, legitimacy interests do need to be protected as national security and commercial restrictions may be exceptions but they should not undermine the FOI law.

5. The relationship between RTI and secrecy laws

According to IHRL, the RTI law, in the case of conflict of interest, could/should override inconsistent provisions in secrecy laws. Should both the OTA and RTI law be in place, the RTI shall override the OSA, to which a three-part test is applied.

Firstly, the law must provide the full list of the types of interests that are protected, the same applies across countries, it must describe the interest and not the information of public bodies. The law does not cover information related to decision-making bodies or anybody for that matter,

but provisional advice. For example, the army is not protected by the secrecy law as an institution, but only if the information is protected in the interest of national security, as the element of interest enters the fray. In terms of commercial interests, there can be an investigation into how it may bring harm, acting as an important filter to lessen the constraints of the scope of exemptions. Public interest must override all other interests, even national security, and if certain information will expose corruption, it needs to be made available.

Secondly, the government may also disclose partial information with time limits imposed on all exemptions, around 20-30 years. Given the passing of time, the information should lessen its sensitivity or no longer be sensitive anymore. Thirdly, there must be oversight; the decision on whether to disclose should not be lee to public officials. There can be three stages, from internal appeals at the level of lower officials, to higher officials. The decision- making is diffused and information can be disclosed at that stage, though this tends to be costly, with an administrative appeal with an independent administrative body.

In Mongolia, appeals are heard by the National Human Rights Commission; in South Africa, by similar existing bodies. Right to information is usually a secondary issue for these bodies, which have a wide range of responsibilities. It is better to give this issue to a body specially created for the access to information, which is independent of the government, as it needs to review decisions made by the government. How this body can achieve its independence depends on the system of appointing individuals, the members' tenure, the difficulty in removing people before the stipulated term, political connections and more. There must be a clear line of responsibility, and a budget where funding cannot be used to control this body.

This body must investigate complaints (from reviewing classified documents to whether the exemption is legitimate, call on witnesses to testify or to inspect premises of public bodies). It must have the power to make appropriate disclosure and order bodies to disclose when appropriate; there must be structured order-making powers. If people do not take remedial action, it must train people. Appeals should be free. The burden is on the public body to prove non-compliance with the law as it is impossible for the applicant to prove that the information should not be exempted as they haven't seen it.

6. Sanctions and protections

Where officials obstruct access to information, there should be sanctions. Canada has had the RTI law for more than 35 years, and there has not been a single criminal case. Sanctions can be less heavy, just fines, and on the flipside , officers who give information in good faith should also be offered protections for, as there should be no fear to disclose information.

7. Provisional rules

Officers must be appointed to the commission to receive and process requests. The central body must play a provisional role to raise awareness of this law, in schools, hospitals, the police force and more. The right place to go to get documents must be identified, information officers to be trained, a centralised system of reporting on what has been done to implement the law, public authorities must maintain records in good conditions. Toby then concluded his talk by commending Malaysia on its exciting move towards joining the 129 countries with RTI laws. He also volunteered to assist in any way.

Question-and-Answer Session

Firstly, moderator Nalini summarised the scope of the international standards for the RTI law as presented by Toby and Sonia.

- The right to seek and receive information is a human right and this should be reflected in RTI laws. All public data that is recorded should be made available.
- Information officers should be proactive. Response to applications should be friendly and open to all with time limits.
- The first 10-15 pages requested should be provided free of charge.
- There can be exceptions in terms of secrecy laws, but the laws may override each other and the question would be which law should be prioritised. If information released would cause harm, only then should the information be withheld. There should also be time limits for secrecy laws.
- The responsibility to provide information should not be on public bodies completely.
- There must be an independent oversight body that is competent and made up of members from various backgrounds including indigenous groups and LGBT representatives.
- There should be sanctions and protections, as well as promotional measures.

Chan Kok Onn from Forever Sabah noted that according to Toby, there should be proper records kept by public bodies and they should be encouraged to publish information. However, public bodies do not maintain proper record keeping, nor collect information, which made him to further query how countries overcome this problem, giving the example of Lynas, where should the DOE refuse or delay the testing of groundwater quality, that would defeat the purpose of RTI legislation.

Sonia explained that this is the role of the oversight body. If the government says there are no documents or no information, the information official must verify that that is the case. Toby then added that the success and non-success of the law depends on the independence of the oversight body, as there must be sanctioning powers, to fine people who do not follow the law or even the power to inspect offices, cautioning that the public will catch on aeer a few inspections. In Canada, he shared that the commission can walk into any public office, even the military. There is a need to build the relationship between officials and the people, and sharing information is the way forward.

On how to ensure that information will stop being tampered with because it will be in the open, Sonia noted that maintenance guidelines are important. In Canada and British Columbia, the information commissioner includes the duty to document. There needs to be a package of rules; the independent commission is one way to do that.

Session 3: Taking Stock of the Different Models at the National, Regional and International Levels

This forum of five panelists aims to explore the draeing of the Right to Information legislation and its processes as well as to understand the law itself and its implementation around the world. The session was moderated by Kuek Ser Kuang, a data journalist and trainer at Data-N.

Kuek began the forum by introducing each of the panelists. First was YB Nik Nazmi Nik Ahmad, current MP for Setiawangsa and former state assemblyperson in Selangor who was involved in draeing the FOI enactment in Selangor. The next panelist was Meena Rahman from Sahabat Alam Malaysia, (an NGO based in Penang) who has had extensive experience in dealing with the Penang FOI enactment. Joining the Malaysian panelists was Kishali Pinto- Jayawardena, an RTI Commissioner from Sri Lanka who was involved in the process of advocating for and then draeing the RTI legislation in Sri Lanka. This law is considered one of the best examples of RTI legislation in the world. John Fresly Hutahaen was the fourth panelist, a former commissioner of the National Information Commission of Indonesia. He was also a member of the draeing committee in Indonesia. The final panelist was Matthew Bugher, the Head of the Asian Programme for Article 19, an organisation that involves itself in advocacy and aide in relation to realising RTI legislation in nations across the world.

Background, drading processes of the RTI laws in each country and the lessons learnt

Nik Nazmi began by sharing his experience with the Selangor FOI enactment. He shared that the idea behind the conception of the enactment was a report that the CIJ had published. From then on, the state cabinet and the state legal advisor had worked together to put the idea to practice. However, the first drae of the act had barely seemed like FOI legislation, and was then decided that a select committee, which included Nik Nazmi along with Hannah Yeoh and a few others, would be set up to work on the draeing of the bill and the culmination of their efforts was the bill that was passed and is active today.

Nik Nazmi also noted some of their challenges in the form of the state opposition who had dissented to the passing of the bill as their support would have painted them hypocrites in the face of the secrecy laws imposed by the federal government. He believes that their opposition also hampered the efficacy of the application of the FOI enactment.

Kishali shared, thereaeer, that in Sri Lanka, the process of enacting the RTI legislation was one that took not only a long time, but was done in stages. The first stage consisted of a committee headed by the Prime Minister that included the Attorney General, senior lawyers and academicians from her country that worked on creating the first drae of the bill using international standards in the Sri Lankan context in 2003. The change of government to a more authoritarian one halted their progress until power shieed again in 2015, and by that time, they had taken cues from other nations like Pakistan and India and had revamped their bill to what is being enforced today.

Kishali explained that the principles behind their RTI legislation was that no institution or entity was exempted from the law, which meant that while there was an emphasis on bodies that received public funding like GLCs and the government bodies, other entities like private firms, corporations, and CSOs were not excluded from the law, with the purpose to further accountability. She also emphasised that the RTI laws were not made with the public sector in mind as an enemy, rather as a collaborator, as they had implemented provisions to protect whistle-blowers and those who had released information from disciplinary action. She forwarded that from her experience, it was public officials who seemed to benefit greatly from the implementation of the law. Kishali believes that support from the public sector is essential to the success of the law, therefore affirming the involvement of equity in the draeing process.

Next, John explained that in Indonesia, the process of draeing had included an amendment to the Indonesian Constitution whereby Article 9, on the right to seek and receive information was adopted. In 2002, a coalition of journalists and CSOs, supervised by Toby Mendel had draeed a model cohesive with the international standards on RTI. However, challenges surfaced in the form of reluctance from the government to drae the bill. Aeer much effort, including a bill from CSOs, the government finally tabled their own bill in 2007 that provided for some bargaining opportunity between the CSOs and the government, to which he argued that one major loophole, however, was the powers of the government to control the commission via the process of budgeting as they had complete control over funding, adding that such a loophole was important to keep in mind when draeing legislation.

Best practices in drading RTI legislation

Matthew answered by stating that there was a wealth of expertise and examples that could be looked toward in the process of draeing the RTI legislation, from international groups, to other nations, to even corporations that have RTI policies that seem very much like law. Among the examples he cited were, firstly, the work done by people like Toby Mendel on the international standards of RTI law as well as Asia Disclosed, a survey from Article 19 on the RTI legislation in Asia. He also advanced that referencing other nations like Sri Lanka and Indonesia were recommended instead of looking towards nations like the United States, the United Kingdom, or other European nations, citing Japan and Thailand to besome of the early adopters of RTI legislation in the Asian region. Matthew's third point was that it was important for Malaysia to reference their own experiences from Penang and Selangor, in the process of draeing the RTI law. These were similar actions that China and Japan had taken as they were the first few countries that had state level legislation in place before it was implemented at federal level.

The perspectives and involvement of an NGO with the Penang FOI Enactment

Meena explained that the members of CSOs had been tremendously excited at the prospect of an FOI enactment as information was critical to their work. She said that the move, which was an initiative under the Penang government was a step forward in the principles of transparency and accountability. She did, however, clarify that while it was a move away from the secrecy framework implemented by the British, there were still pros and cons to the legislation.

Among the pros was the fact that it was expressly stated in the enactment that the law existed for the public to understand the workings of the government. She also commended the mechanisms that had been implemented, such as the availability of an officer to guide you through an application for information that could be done for a small fee. The cons, however, were the fact that while there was a law in place, legal literacy on the law was not sufficient as she explained that people needed to understand the basics of filling in forms, what they actually meant and the exemptions available to the government.

To understand the situation better they had tested the law by applying for meeting minutes from the State Planning Committee regarding a hill-side development project. Their application, however, was rejected. Pursuant to a proviso on exempt information, information regarding planning was, by automatic action, considered classified information and could only be released on a discretionary basis by the public authorities.

Meena and her team had appealed on the grounds of public interest in conjunction with their constitutional right to speak, be heard and in turn have access to information. While they won the case, she stated with

disappointment that even the appellant board had not known that the proceedings were that of an open court, they had had to argue for the hearing to be public, adding that while the appeal was allowed, it had taken time.

There should be a presumption that there is access to information as the current system puts the onus on the applicant to prove that they deserve the information in question. She also believed that information should only be denied in certain circumstances whereby the information was prejudicial to state interest and went on to explain that a big problem now is that, sometimes, even when the document is not sensitive or prejudicial, it can still be considered to be classified information.

Comments from the floor

Hariati from The Star asked John on whether the Indonesian Commissioners received their budget from other ministries if they did not have their own budget.

John clarified that the budget for the RTI Commission in Indonesia was under the Ministry of Communication and Information, and it was not under an independent allocation. He argued that the lack of funds made it difficult for the commissioners to work efficiently and illustrated by saying that if they wanted to inquire into the actions of a public institution, they would have to examine the document from the side, not directly. He also explained that the implementation of the law at regional level, (for which each of their 34 provinces have 5 commissioners), is also difficult due to lack of funds, to which he opines that it is important to consider the implementation of the body to oversee the RTI law. Kuek then interjected, asking if John felt that it was necessary to consider implementation at the draeing stage of the law. In short, John's answer was a firm yes and he believes that this was one of the major lessons learnt from the experience in Indonesia.

Samuel from Harus, Sabah then forwarded a question to Kishali asking about the consensus reached in Sri Lanka on information that is sensitive to national security such as information that could be used by terrorists against the nation.

Kishali responded by stating that while national security was a ground for denying information, the ground was oeen applied loosely. She cited two examples: the first was a corruption scandal that had caused the formation of a select committee to review and investigate the matter. When a journalist had requested to view the special committee report, she had been denied on the grounds of national security, but upon appeal, the commissioners had found that the information was not concerning national security, rather the disbursement of monetary funds. The appeal was allowed and affirmed by the Attorney General.

Her second example was a report on the rehabilitation of the LTTE. It was the opinion of the commissioners on that matter that since the group was dormant, rehabilitated and in addition, the information had been released prior, the issue before them was obviously not one of national security and they had allowed the appeal.

Kishali did, however, state that the commission did not deliver administrative orders mandating the release of information, but rather they convinced the public authority that it was a matter of practical effect and public interest to release the information. She stated that in practice, they have received up to 99.9% compliance from the governmental institutions and that they had so far not received an application that did in fact concern national security.

Technicalities, limitations and weakness of the law and its implementation

Nik Nazmi asserted that Malaysia is very much a centralised state and that apart from a few matters, such as Islam and land, jurisdiction fell under either the Federal List, or the Concurrent List shared by the federal and state governments. It was the opinion of lawyers that it was then impossible to go beyond the powers clearly outlined in the State List, therefore, the FOI legislation should be draeed at the federal level. He also proclaimed that the lack of support from the opposition for the FOI law did not aid the efficacy of the law.

Next, Nik Nazmi observed that it had taken time for the law to effectuate as the public and CSOs needed time to understand the technicalities of the law before they could fully utilise it. He noted the cost involved in applying for information, but conceded that it was not much of an issue here; rather, it was an issue of technical knowledge and awareness of the law.

He also advanced that it was important for the law to be made known to the public. He acknowledged, for example that there were, even at the state level, discrepancies in regards to the declaration of assets. He said that while the information was out there, it was only useful if the media and the opposition used it to hold the government accountable for their actions. He said that this was a delicate issue as the government would need to work hand- in-hand with CSOs to educate the public, adding that RTI should be more than just a law and he believed that the work of legislators who had risked their careers because of the OSA deserves to be upheld.

He added that he too believes that it is important for the RTI legislation to be a collaborative effort with the government as is the practice in Sri Lanka. He opines that it was oeen the civil servants that suffered when politicians made wrong decisions and that they deserved to be protected as well.

Conversely, Kishali declared that the implementation of the law in Sri Lanka was not difficult as the law had been carefully draeed. The law was also utilised by a wide range of sects of society, as she then outlines the key strengths of the Sri Lankan RTI law.

The first was that the RTI law nullifies every other law previously passed, with that the government cannot claim indemnity via the OSA. The second strength was the implementation of a definite time frame to effectuate requests for information, to which officers were given two weeks to respond, although they may apply for extensions if they deem fit. She also stated that in scrutinising the exemptions to the law, the overriding principle would always act in public interest, which can even supersede the interest of national security. In example, issues of finance were automatically construed to be a matter of public interest. Another strength was the affordability of the fee schedule, which was created and implemented by the commission to make the process of gaining information more accessible. She later clarified that in Sri Lanka there was no requirement to disclose reasons for requests as they believed that it was against the principles of FOI.

On implementation, Kishali shared that one of the main concerns they had faced was the delay in appointing information officers, although the mandate that the leader of the organisation would automatically become the lead information officer quickly solved the problem. She also stated that while they had been lax in implementation to allow public officials to accustom themselves to the law, the commission did have powers of prosecution that would take effect if there were an attempt to subvert the RTI law.

In the case of Indonesia, John expressed that it was mandated in the law that institutions were required to have a special office for information and documentation. They were given two years to set up those offices as John also highlighted two weaknesses. The first was the application process for information consisted of a two-step process, the first step being proactive disclosure. Since there was no definite period of time specified, officials could delay answering requests indefinitely. The next weakness was that applicants were required to justify their application for information and if they were unable to, their application would be rejected.

Matthew then continued the discussion by dissecting solutions to issues of implementation globally. He argued that flaws in the legislation existed because oeentimes governments did not want to disclose their secrets. Among what needed to be avoided was the definitions of information that were either too narrow or too ambiguous. For example, the Cambodian drae defines information as official documents, thereby possibly limiting the access of any data, even simply computerised information. Wide or ambiguous definitions to the exemptions also provide the government with high leeway to decide on what is considered confidential information, further mentioning that in deciding these definitions, there must be a harm test as well as a public interest test. For example, the 1MDB scandal, in which the exposing of information may have resulted in harm to the nation, though however, as it was a matter of public interest, it should have been disclosed.

Matthew also asserted that the burden to prove necessity for the information should not be placed on the requestor as information should also be accessible without the requestor needing to supply personal information where it could potentially become dangerous to the individual. The next point was the necessity of an independent commission to hear appeals and to prevent conflicts of interest. The laws are weakened by the conferment of power to ministers to hear the appeals on requests for information. Matthew also clarified that while the laws in Cambodia are heavily criticised, the laws there are still better than the laws, in the US for example.

Meena agreed that one of the flaws in implementation was the burden placed on the requestor. In Penang, upon asking for information, they are to disclose the purpose of the information and even during appeal, they would also have to disclose their grounds of appeal.

She also spoke on the necessary training to implement the law, as she cited her experience in a hillside development project where, upon their request for information, the committee was supposed to have asked the state authority if the information could be disclosed, however, they had not done so.

Meena also argued that the Appeal Board was also in need of training and should also be more neutral in nature. Appeals processes now favoured the government as the burden was on the requestor to prove their need for information.

On the flipside, she acknowledged that it was good that the law provided protection for those that disclosed information, and also acknowledged that recently, upon utilizing the FOI enactment, her team was able to gain access to the information they wanted.

She believes that while there is much to improve on and that the government must move away from operating behind a veil, and with the resulting trust that forms would define good governance.

Comments from the floor

A participant asked about the period of time it took for the administrative agencies to get accustomed to the law aeer it was passed in Sri Lanka. Kishali responded by explaining that they had decided to only implement an intensive 6-month training period for Information Officers under the Ministry of Media overseen by the RTI Commission. They believed that a lengthy preparatory period would not ensure a lack of problems as evidenced by the UK that still faced many problems even though they had implemented a 5-year training period. She stated that the process of transforming and educating the public and the authorities was continuous, and they are still in the works of convincing the authorities that the law benefits them too.

Firdaus Husni from the Malaysian Centre for Constitutionalism and Human Rights (MCCHR) questioned that, since Matthew believed the US RTI legislation to be bad, what were the other forms of bad law that needed to be considered?

Matthew clarified that his experiences with the US law were more personal rather than researched. He believes that the biggest problem they have, similarly to Thailand is a lack of imposition of time limits. For example, his request for information was only answered three years later and even so, the information was both wrong and insufficient. He advised that the RTI ratings were something to be utilised in determining what should be taken note of, as they ranked each nations' RTI legislation and scored them.

The implementation of the FOI enactment in Selangor

Nik Nazmi asserted that they had pushed for the appointment of information officers in every department as well as the appointment of the Appeals Board, although he conceded that the implementation in some departments was still lagging. He also advanced that loopholes to the law were only discovered during the appeals processes, and suggested that more engagement with CSOs were necessary to both combat such loopholes and to educate the public on better utilising the RTI law. As of now, notable use of the law was in Petaling Jaya, when residents were against the development of a plot of land, providing the explanation that while the law was utilised, it was partly because Petaling Jaya was largely urban and middle class. He believes that it is important that such a law be accessible to all sects of society.

Nik Nazmi also claimed that it was important to educate the civil service that the law would not be against them as they were now coming out of a system that had the OSA laced through its framework. He cited the case of the woman who had planted a recorder in the 1MDB audit meeting, asserting that she would be an example of a civil servant who would be able to receive protection from the FOI law.

Operations of the RTI Commissions in Sri Lanka and Indonesia

The budgets, functions of the committees, sizes of the operation in Sri Lanka and Indonesia were discussed, particularly the question of whether the civil service considered the RTI Commission an enemy.

Kishali first explained the appointment process of the commissioners, by using Sri Lanka for instance, a select few institutions, like the Bar Council, were allowed to nominate commissioners based on a few criteria (for example, being eminent in their field of work). A council of three eminent people and two judicial commissioners would then review the nominations. They are allowed to reject the nominations, but only

if they can give reasoning for their decision, and the final step is for the President to appoint the person. Appointed commissioners also had security of tenure of five years although they could be expelled for misconduct.

Kishali then spoke on the independence of the commissioners, where she shared her own experience of being conflicted in accepting the position of a commissioner as she is an avid columnist who is very critical of the government and did not wish to stop writing. She believes that while people can oeen misconstrue that the commissioners are appointed by the state, the independence of their voice was vital to the enforcement of the law. In her case, she had continued to write critically of the government, even though she was an appointed commissioner.

Next, she spoke about the enforcement practices employed, as she advanced that the Sri Lankan RTI Commission had persecutory powers and functioned like a court of law. For example, in claiming that documents were destroyed, government officials were required to produce a legal affidavit to state so in order to ensure legal accountability. This also proved effective in enabling the law, as in most cases, they usually returned with the document. She further explained that while they functioned similarly to a court, the commissioners do not sit formally as one, but to the contrary, the process was informal (similar to mediation). They did not use their powers in a challenging, authoritative or hierarchical manner and thus far it has proved effective in gaining compliance from the government.

Her next point centered around understanding that the commission would have to deal with very strong corporations and institutions that had a vested interest against the law. She cited the two cases where there had been non-compliance with the commission and the parties had appealed to the court. The first: a case in which there had been a request for the declaration of the Prime Minister's assets. On appeal, the legal team had advocated that the Sri Lankan law prohibited the disclosure of such information, however, the commissioners report had reasoned in detail why, in this modern age, politicians should make their declaration of assets public. The appeal was dismissed, and the Prime Minister was required to disclose the information. The second instance was an issue of misappropriation of funds from the People's Bank to private lawyers, which in the end was deemed to be a matter of public interest and again the appeal was dismissed.

Kishali later explained that the Sri Lankan RTI law provides for the commission's budget to be taken from the Ministry of Finance, which was extremely problematic for them. In their case, the government had tried to cripple them via funding and for the first eight months, the commission had to function without funds, in which during that period they had received external funding and aeer a year the Ministry began to commission their budget. She stated that the law must, instead, clearly provide for allocation of funds in the National Budget itself, rather than a mandate for Parliament to provide funding.

Following from that, John proceeded to share his Indonesian experience. He firstly explained the structure and powers of the commission; in Indonesia, the commission operated at both federal level with seven commissioners, and at provincial level with five commissioners at each. He stated that the commission had quasi-judicial powers and enforcement consisted of a two-step process- the first was mediation and the second, an appeal in court.

He then spoke on the nomination of commissioners, which was done in an open bidding manner. Of the nominees, 21 would be elected by Parliament. From 2009-2013 most of whom were elected were either journalists or CSOs and therein lay a problem as most of them had no prior experience in handling litigation matters. He also disclosed that the two- step process culminated in 90% of the decisions involving the government going on appeal.

He then explained the process of inquiry, to which he said that the government had 17 days to entertain a request for information aeer which they have 30 days to appeal if the commission has mandated that they release the information. The commission then had 14 days to process the enquiry and another 100 to investigate the matter. He acknowledged that the length of time involved lee them wanting on the implementation front.

On the matter of funds, John asserted that the situation in Indonesia was problematic as the commission's budget derived from the Ministry of Communication and Information's allocations, to which they, therefore, technically do not have the budget to carry out investigations etc.

Case examples on implementation in the region

Matthew argued that implementation of the law was key. As examples, he stated that there must be penalties implemented for non-compliance and that whistle-blower protection needs to be provided, either via the RTI law itself, or via separate law.

He further argued that it was important to understand that we did not have to start from scratch, as he stated that laws are improving and that the draeers could learn from the experiences of those here and around the world. He stated that with the model from CIJ and the guiding principles on The Right to Know provided by Article 19, they had added reference to in draeing the bill.

He also commented that CSOs needed to be engaging in the process to ensure that what was happening in nations like Cambodia did not happen here, warning to be vigilant for traps laid out in the legislation.

Comments from the floor

Panelist Meena stated that in Penang, it was the consensus that everyone had access to information; however, if a document's disclosure is subjected to another law, the other law would prevail. She noted a development case where the information regarding the development was subjected to the local town planning laws that stated that, unless you were within a 20-metre radius of the development, you would have no locus standi to enquire about it. In this case, the local town laws had prevailed over the FOI enactment, even though the matter was one of public interest. She asked for feedback in regards to combatting this problem.

Kishali answered that, in Sri Lanka, they had adopted the purview that all previous laws are subordinate to the RTI legislation. She also explained that in practice, the issue of public interest should not come at the beginning of the process, only much later when there is denial of access to information. Even so, the burden was on the public authority to prove that their interest was higher than that of public interest.

Closing Remarks

Nik Nazmi first explained in relation to Meena's earlier question, that town planning was under the joint list. He stated that the state could only do so much if the government is not willing to move in tandem with them. As the legislation is now going to be draeed at federal level, he opines that there would be no excuse and believes that this is an opportunity to create a law that is far reaching enough to be useful and provides for an effective check and balance mechanism.

Matthew stated that even establishing RTI legislation was a big step forward and that even if the law had many problems, it was still better than not having the law at all. He said that at Article 19, they always encourage governments to move forward with FOI and urge them to adopt law of the best possible standards, and have always believed in establishing the presumption that information should be made public.

Kishali first emphasised the role of the RTI Commission as an enabling body stating that their mandate was to foster accountability. While they are a neutral body, they are pro- information releases. Next she stated that it was important that the law empowers ordinary citizens as she shared that upon enforcement, mothers had gone to local police stations enquiring aeer their children who had disappeared in the war, something that was incredible as the law should always empower the powerless. Her next point was that it should facilitate systemic policy change, in which her example being that aeer the enactment, parents were able to enquire why their children were not being admitted into schools. It was policy now that principals release a list of students who were enrolled each year and the criteria for their acceptance. Her last point was to caution that the commission would have to deal with strong entities that had competing interests that the law did not support. For example, a case whereby slighted pilots had come to the commission asking for the salary of the Sri Lankan airlines CEO. The lawyers had argued that release of the information would endanger the CEO as his salary was too exorbitant. There, the commission had not considered the argument valid and had commissioned the release of the information.

John's closing remarks centered on two points- first, the importance and benefits of the RTI legislation must be communicated to both the public and the public authorities, asserting that proactive disclosure was better for society than having to make requests for information. His second point was that in order to effectuate the law, the capacity of government officers to deal with information requests must be built.

Meena first expressed her disagreements with Nik Nazmi on the matters of planning as she believes that, while it is governed under the shared list, it is ultimately a state matter, and if the state wanted to effectuate the law, they would have to do more. She also submitted that such practice- in failing to effectuate the law only eroded the people's faith in the state- this was a matter of good governance and good administration. She also brought up the issues of accountability and transparency that would be aided by FOI law.

DAY 2

28 November 2019

Session 4: Stakeholders' Inputs on Key Elements of the Proposed RTI Bill

This session was conducted in a "world-café" style, with the aim of gathering input from participants on the key elements of the proposed RTI bill. This session was moderated by Firdaus Husni, Chief Human Rights Strategist of the Malaysian Centre for Constitutionalism and Human Rights (MCCHR).

All the participants were divided into eight groups, with each group assigned to one station that is focused on one topic of discussion. The groups were given ten minutes to deliberate on the topic and were required to collectively move to the next station to discuss another topic once the ten minutes were over. This continued for eight rounds, giving every group the opportunity to deliberate on each topic.

Topic 1 : Challenges and Opportunities in the Current Context	Facilitator: Tehmina Kaoosji

Accessibility of information

Among the key challenges highlighted by CSOs are the accessibility and availability of information available. Communities living in the interiors would be unaware of the law and they would have logistical problems to access information, again, pointing out the collective lack of awareness of the public on RTI in general.

The civil servants stressed that problems might arise if officers are given discretion on whether to release information. Besides that, sensitive issues particularly pertaining to race, religion and sultan (religious heads of states) could be manipulated and politicised. There is a fear of the unknown, of what would happen with this RTI law, which could be open to abuse and in order to improve the accessibility of data, CSOs noted that the data policy or information framework must be clear, with the scope outlined properly.

Aside from that, a government officer suggested that a single agency should govern the data through a national data sharing policy, pointing out the main challenge would be to develop a trusting relationship as no agency will share information without trust. Data trust and data ethics are important; whether the information provided would be used ethically, flagging that monetisation of the information should not be allowed. However, if the government is not allowed to ask for the purpose of the application, then it would not be able to address this.

The officer shared that the National Security Council was working on a data leakage protection policy and guideline, which was taken over by MAMPU. Data leaks among telecommunications companies have led to corruption and financial scams. Currently, there are data sharing policies business-to-business. Businesses are also obliged to share data with the government when required to. However, it is difficult to get data from the government, even for non-personally identifiable information.

CSOs need to address the concerns, limitations and constraints faced by the government to convince it to see the RTI law works in its favour- towards good governance and a government that the people would want, which would allow the government to maintain its mandate.

Availability of information and the duty to document

A lawyer noted that currently there is a dearth of data in Malaysia. Investigative journalism is extremely difficult; other areas with suspect data include the number of child marriages, the population of Orang Asli, the religious breakdown of the population, the number of foreigners in the country, stateless versus illegal peoples in Sabah, and more. She recalled that Toby Mendel brought up the duty to document and questioned whether the FOI will implement the duty to document. This adds on to the duty of departments, who already have duties subject to specific laws, deducing the challenges throughout Malaysia.

Nevertheless, an academic felt that this could be seen as an opportunity to focus on synchronising data and ensuring openness, whereas other government officers noted that the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU) and Department of Statistics Malaysia (DOSM) have open data policies. The civil service needs to be trained so they would not fear this law and view it as extra work.

With the RTI law, if data is not collected, the public has the right to demand that data be collected. The commission could check on the progress of data collection for marginalised groups, working alongside CSOs or private actors to be part of this independent body to ensure transparency and accountability. The language used should be Malay, however, for data collection from communities, it was suggested for data to be collected bilingually as translations might be inaccurate. There should be funding and staff for departments to gather data, highlighting that, few officers in rural Sarawak have good infrastructure with internet access, hence, there needs to be budgeting for infrastructure upgrading.

A DOSM officer explained that the department does not have sufficient resources to collect the data required and comply with the government's data needs; surveys and censuses are very costly. Another officer suggested for DOSM to leverage on existing data collection in the Ministries and further noted that workforce should not be a problem as Malaysia has one of the largest civil service in the world. The main issue lies in proper training for the workforce to collect and provide data with the correct statement to be made on the previous lack of data that led to the current data situation.

There were concerns from a civil servant that the law might open the floodgates to information applications and they wondered how the government could deal with that, particularly at the early stages. Questions also arose about how the information would be disseminated- whether there would be a website, any specific person in charge, how to use digital access to ease the process, whether it would be sufficient to allow the applicant to look at a concession agreement in hardcopy, et cetera. It was shared that the US has had an RTI law since the 1960s and each public office is structured to process and provide information.

An officer shared that each department should have a special officer to deal with the requests for information. Ministers and ministries should be empowered to advertise this new law. In 2014, the then Prime Minister agreed that each department should have an integrity officer supported by the MACC who would have knowledge of combating corruption as this placement of officers is not something new. The RTI law would be redundant if there is no one to implement it. A DOSM officer offered that currently, the DOSM enables data applications through the system, via email or by WhatsApp, receiving more than 100 applications per day and have limited resources to process them, especially for requests related to time series data over several years.

Restrictions under existing laws

Laws that might conflict with the FOI law include the OSA, the Personal Data Protection Act (PDPA), the Whistleblower Protection Act (WPA) and the Sedition Act. All these become restrictions on applying for information. The OSA has to be revised in such a way that RTI prevails and this would take time as the OSA set up the mechanism for the way that the civil service works and how they view information. They would need an adjustment period, perhaps two to three years from now. A CSO representative cautioned that it is important to prepare the people for change, as a lack of preparation from the PH government could lead to a backlash. The main objective of the RTI law is to help solve social justice issues.

Jurisdiction - Federal laws interacting with state laws (Sabah and Sarawak)

A lawyer from East Malaysia questioned how the federal FOI law that mandates the disclosure of information might impact Sabah and Sarawak, and how it would interact with other areas of autonomy under the two states, such as immigration, forestry, or land, shedding light that the Information on Native Customary Rights land is not available at all. A government officer volunteered that the types of data that could be disclosed must be studied alongside the State and Federal Lists under the Federal Constitution. Aside from that, Penang and Selangor have their own FOI law, leaving participants to wonder if there are conflicts between the state and federal level, how would it be settled.

Another government officer offered the example of the minimum age for marriage where certain state governments have refused to increase the age limit, again pointing out the limitations to federal laws.

Tehmina drew their attention back to Sri Lanka's RTI law, which stated from the onset that the RTI law overrides every previous law, emphasizing this to be a fundamental feature to all RTI laws. A government officer noted that this can be done as some Acts have this provision.

Conversely, an academic warned that although the RTI law can override previous laws, it cannot override the Federal Constitution. In Article 10(1)(a), it is stated that every citizen has the right to freedom of speech and expression, not the right to freedom of information. Under Article 10(2)(a), the Parliament may impose restrictions on the rights as it deems necessary in the interests of national security, morality, or to protect against incitement to offence, and effectively, the Parliament could overrule the RTI law. The Constitution needs to be amended otherwise, this RTI law would just be cosmetic. The RTI law would address the manifesto but the Parliament still retains power over it as she urged for the media, CSOs, academics and international organisations to inform the parliamentarians that the RTI legislation would put them in power continuously as it shows a more transparent and ethical government that cares for the people.

To increase the possibility of success with the RTI law, it was suggested that the examples of Selangor and Penang be leveraged upon to indicate that the law is not new. The law already exists at state level, and the federal law needs to be upgraded to take into consideration international good practices, pointing out Asian and regional examples. Particularly with regards to social issues, if other states refuse the law, this would make them look bad.

Implementation

A civil servant expressed doubts on the enforcement of the RTI law as there are many different agencies governing different data. Other legislations need to be amended, and there is information held by the state government as provided for under the Federal Constitution. Another added that public servants are used to being bound by rules to not reveal certain data. General public awareness on the right to information is extremely low.

Government officers suggested that in order to gain insights into behaviours, there can be the involvement of several departments, but the awareness drive must be headed by one Ministry, using plalorms that exist such as the Ministry of Communications and Multimedia, agencies under the Malaysian Communications and Multimedia Commission (MCMC/ SKMM), the Ministry of Education, or the Prime Minister's Department. The government must be transparent and must involve all parties. Mandatory sessions like this consultation would also be beneficial, to have a mixed crowd of CSO members and government officials.

A CSO representative proposed to look at the Ministry of Education (MOE) and how to integrate the RTI and fundamental rights in the curriculum based on SUHAKAM and MOE human rights model. There are opportunities in a citizenship subject, which is critical for socialising information.

Another CSO member mooted the idea of a commission funded by the Ministry of Finance and not the Parliament. The governance structure should capacitate; the challenge would be to establish trust in the commission. It must be an independent body with a separate allocation in the national budget, or a line item, that can empower the commission to do their work. The commission could also generate income from fees, although it should be kept low. However, there was concern on whether the government has sufficient funding for a new commission.

The approach taken in Selangor and Penang was to have a board, which is also a part of the state government. This board acts as an appellate body if applicants are not satisfied with the information officer, with the underlying principle being that this Act should help curb corruption; it should be presented to the Ministry with the argument that it will prevent leakages and it is worth investing in.

If the legislation is passed, a commission must be set up immediately, and simultaneously educate and communicate with civil servants for at least one year for them to be trained properly on how to respond to requests for information. Once the Act takes effect, it should also be a policy of the commission to give warnings to departments instead of sanctioning civil servants.

Topic 2 : Scope and Standards	Facilitator: Aisya Abdul Rahman

The definition of the Right to Information (RTI)

As a general consensus, the participants, from a wide range of backgrounds felt that RTI meant having the right to seek, receive and impart information, in line with the international standards. In addition, a participant also elucidated that the RTI meant the right to not be misinformed, as without data, continued misinformation would ensue.

The understanding on the right to seek and impart information

CSOs believed that the right should be accessible to all sects of society without restrictions if it involves matters of public interest. It was also agreed that in a democratic society, such a law was not a privilege rather a right. Such rights included the right to hold their elected officials accountable for their actions in governing the country.

An official from the MCMC argued on the converse that the RTI was about the benefit to the media in holding the government accountable more so than anything else. It was also highlighted that existing laws were archaic in nature and were only applicable in previous times. It is time for citizens to be able to enquire aeer their governments in the action for good governance

Hindrances

Among the hindrances mentioned was the language barrier that is especially applicable in the cases of those who live in more rural areas. Most participants also agreed that the current framework did not provide much access to information and the process of acquiring information was tedious. The lack of centralisation also proved to worsen the situation as oeen times, one problem involved data from many ministries or departments and individuals seeking information were not always equipped to understand where to go for the information they needed. Another issue was the requirement for access to information is tied to the seniority in the government departments (DG48 and above could view official secrets of the department) and in addition, the current framework allowed for each department to have their own procedure in determining what was considered an official secret.

Another issue was that oeen, the data requested is not data that they had collected and recorded, highlighting the difference in data and statistics, citing that as an example of the common mistake in assumptions that people make when trying to obtain information. Funding was also said to be a major hindrance as the processes of data recording and management required a specific budget.

Participants opined that data protection, right to privacy, whistle-blower protection and protection for those that released data needed to be balanced with the RTI and that could also prove difficult.

Elements to be incorporated into RTI law

The general principle to be applied is to have maximum access and minimum limitations, while some assert that there should be purpose to acquiring information and that acts like the OSA must not be contravened, most believed in the converse.

The law would also apply to varying forms of bodies, such as political parties, civil societies, private corporations (including big ones like Google and Facebook), GLCs and NGOs and this is the general consensus that all bodies that received public funding would be subject to the law.

Clear demarcations between exempt information and information that could be released needed to be outlined within the law and exemptions should be listed clearly. Suggestions on exempt information included central intelligence, trade secrets (to protect the competition between companies), contracts between the government and third parties (as releasing information on contracts could sometimes open the government to civil suits), and private health related data such as patient records.

The element of Free, Prior and Informed Consent should be included in the law, however academicians believed that no element of consent was required in obtaining information. The Selangor proviso providing a restriction in disseminating data that required third party consent was cited as problematic.

In addition, enough training for officials handling data was necessary and that those involved in record-keeping and data management also needed training.

The law should also include policies to prevent imposition of sanctions on those who provided information and that mechanisms would also need to be put in place to ensure that within the departments, civil servants were not subject to unofficial sanctions.

Topic 3 : Scope of RTI	**Facilitator: Khairil Yusoff**

Scope of the Information

Participants agreed that financial statements, and tax information should be included in the list of information the law would provide access to. It was suggested, however, that information like salaries should not be considered public information.

In cases of agreements, it was forwarded that itemized lists or meeting minutes were not necessary information to be disclosed, rather information on monetary flow (budget, etc). Each new agreement or contract awarded, however, would be considered public information.

Information would include restricted documents from the government aeer the time period of the restriction expires. The disclosure of documents could include those that have had sensitive information redacted.

The definition of data should also be stretched to include relevant documents, raw unedited data, videos and photos.

Bodies the law applies to

It was agreed that the law applied to statutory bodies, GLCs and anybody that received public funding, even if they are considered to be NGOs, while some suggested that a public body was defined as an institution that received a minimum 25% of proceeds from the government.

The law should also apply to private companies, citing the example that corporations that do not pay taxes where is why the information needs to be made public.

Charities, CSOs, political parties, schools, private universities, and religious bodies or facilities should also not be exempted from the law as those are involved in matters of public interest too. This includes contractors of large-scale projects (such as the MRT development) and people like village chieeains or members of the district office.

The only exception to the law discussed was the royalty.

Application of the Law

It was agreed that the law needs to be accessible, however not all parties needed to be privy to information. It was also agreed that federal level RTI law would override that of the state.

The process of acquiring information would include a request, then discussion. The process would incur an affordable fee (the prospect of making the information free as well as discounts for members of the academia was discussed). Some believed the process should not require disclosure of personal information on part of the requestor, yet some argued otherwise.

The custodians of the law were designated as the government agencies. In regard to that, there should be Information Officers to deal with data, not IT management. It was also shared that information departments should employ a different mechanism as compared to other departments; corporations should also have designated information units. It was established that requestors would need to go through this system and should not be able to go to the direct source of the information.

It was suggested that the time frame awarded to the government to produce the data depended on the medium, whether it was a soe copy or hard copy of the data. It was also suggested that information be acquirable from machine searches, where upon request, surface level answers were deemed sufficient, although, upon further enquiry, more information should be produced. Some participants, however, believed that information should be released in soe copy only and the timeline for response should be fixed at 14 days, while others believed that the body should have one week to respond to data requests and two weeks to produce the information. Some of the hindrances to the application of the law were banking secrecy laws, and internal secrecy clauses.

Topic 4 : Restrictions

Facilitator: Ding Jo Ann

Objectives of the Law

Among the objectives of the RTI law would be for society to be well-informed on the governance of their nation. It is also to better establish accountability and transparency in the government and to provide a more democratic promotion of human rights. The restrictions on the law would therefore have those objectives in consideration.

Restrictions on the Law

It was agreed that all manner of restrictions would be contingent on a harm vs public interest test and that there would be no exemption from other acts or legislation in place.

Among the restrictions were in cases of criminal investigations or scenarios where serious harm could be inflicted upon witnesses or complainants, underscoring that a person's personal security would always be taken into account when deciding the disclosure of information

Trade negotiations, especially those that are bilateral in nature, as well as the privacy of third parties would be subject to legal privilege. Cabinet discussions and papers should also be, in general, considered exempt although the overriding principle of public interest would designate such information to possible disclosure.

In terms of academic records, it was deemed necessary to be able to verify information such as if a person had actually enrolled in a certain university. Information like exam questions, however, were considered exempt information.

Laws protected by secrecy clauses would also only have a 20-year limit whereby upon expiration, the information would automatically become public knowledge. On the other hand, government data that would seriously affect policy making if disclosed were considered exempt information. Information to harm the royalty would also be restricted from public access for strategic reasons.

Topic 5 : Mandate of Commission

Facilitator: Fadiah Nadwa Fikri

Representation

The commission would require representation from a wide range of peoples. Among the types of representation would include gender, age, people with disabilities, people of different ethnic backgrounds (including the Orang Asli/Orang Asal). There would also have to be representation from people of different professional backgrounds such as from the law, media and public service; community leaders and public administrators may also be included. The SUHAKAM format of choosing commissioners was cited as an example on the process of appointment, as it was suggested there to be 7 commissioners and minimum the quorum would be 5.

Competence and Criteria

The commission would be considered as a quasi-judicial body that was independent from the government, as the body would also have to be independent of political parties to avoid conflicts of interest.

In terms of criteria for selection, commissioners selected would also have to be eminent in their fields. With regards to enforcement, auditing should be done on all Ministry data and the declassification of data should ensue aeer a specific period of time. In cases of non- compliance, other acts or laws may be referred to by the commission to support their cause, an example being the laws of the MCMC.

Selection Process

The selection process of commissioners would have to be equitable and transparent in nature. A public nomination process would be carried out by groups like the Bar Council or journalists and those who are aware of the situations on the ground. Parliament would then have a specific period of time to filter through the applications and support those they want to elect via debate in Parliament.

Accountability

The commission itself would allow for check and balance as commissioners would not have political immunity. Commissioners would be required to table reports in Parliament every 6 months and would be required to adhere to international standards in carrying out their duties, viewing the principle of public interest as paramount at all times.

Public proceedings via live streaming would also be allowed to facilitate accountability. The only exceptions being in the case where sensitive information such as matters of national security, information regarding minors, and ongoing criminal investigations were the topic of review. It was established that public interest would still override all those circumstances.

The commission would also be required to publish their own fund declarations and would have to make known the monetary flow of their commission.

Terms of Service

Commissioners are to be given security of tenure of 5 years or a 3-year tenure with possible re-appointment once. Commissioners would be subject to impeachment when at parliamentary level, they were found to be involved in gross criminal misconduct or offences. Other forms to end tenure would be incapacity or resignation.

It was debated whether the commissioners were allowed to work on a part-time basis or whether they were required to work full-time, similarly to judges to avoid conflicts of interest.

Budget

The funds for the commission would derive from special allocations in the national budget, not an allocation from the Ministry of Finance. Commissioners themselves would be given a say in determining the funds needed, but the Commission is not to receive any political or politically affiliated financing and receiving such funds would be punishable. The salaries of commissioners would be similar to that of those on the Electoral Commission or that of Judges. The source and details of all funds received should also be declared as public information.

Staffing

No specific number for staff was decided, although Mexico was cited as an example in that they had nine commissioners, and 700 staff. The staff would include a Director-General to oversee the commission and it was considered the responsibility of the commissioners to train the staff

Topic 6 : Complaints and Sanctions	**Facilitator: Thigayu Ganesan**

Disciplinary actions suggested included show cause letters, amendments to the Regulations for Public Officers (P.U.(A) 395/1993), order to supply the information requested, fines (department or individuals), as well as reciprocal sanctions for the abuse of information given. However, the participants raised several questions regarding the following issues: Can sanctions be imposed on the state and federal governments? What are the existing laws on sanctions that can be imposed on public servants (including in the case of destroying records or the misuse of information)? What happens in the event of vicarious liability? How can public servants be protected as well, and punishment only meted out for those who acted in bad faith?

Topic 7 : Models and Implementation	**Facilitator: Ahmad Maa'ruf bin Mohamed Anuar, BHEUU**

There could be a one-stop centre for the application of information, to avoid confusion on which agency possessed which information. The implementation of the new law should be carried out in two tiers with the commission at the highest level functioning to oversee the implementation of the law overall. Each agency, each source agency must also prepare application channels. The federal and state bodies must have these channels to entertain applications for their information. Another issue was whether this law should be applicable to all as sources of information could come from government agencies, federal and state statutory bodies, and also private bodies and agencies involved in public matters.

Another point of discussion was whether this law should consist of offence provisions and the power to enforce the law. For internal compliance from the information officers, there must be the power of the commission to take action on those who fail to comply within the stipulated time frame. A question also arose on enforcing certain liability to the person who obtained information from the law from a public body. One suggestion was for a non- disclosure agreement to be signed so that information will not be misused; however, thismwas strongly advised against. One participant proposed maintaining the spirit of the law.

Upon application for information, no reason is needed, but if the application is turned down and on appeal, where the application is heard at the commission level, they must then ascertain their reasons to apply for the information, as well as the reasons why the source department would not provide the information, only then can the commission make a ruling on whether to allow the application.

Topic 8 : The Way Forward	**Facilitator: Nalini Elumalai**

The participants suggested “harmonising” the OSA and the RTI, to maintain some elements of the OSA and have the RTI as a separate law. Some OSA provisions can be incorporated into the RTI law to detail and define secrecy provisions for public order and national security. The WPA must also be detailed on how it would fit with the RTI law and publicised. Besides that, the process of applying for information must be easy to avoid attempts to get information “illegally”. Another concern was the power of the minister, where if civil servants signed off on documents, the question arises as to how ministers could be held accountable for their actions.

For the next steps to be taken, firstly, the outcome of this consultation should be shared to all, furthering the suggestion for more research on existing systems and international guidelines, a study trip to other countries with RTI laws (Sri Lanka, Afghanistan), and a review of existing laws that might come into conflict with the RTI law. There must be engagement with federal, state and local governments; to educate the public, there must be public consultations, roadshows, online campaigns, training for civil servants, and the set-up of a commission within two to three years. There must also be fact-checking, and publication of information. Another proposal was for six months to be dedicated to training, while implementation begins within one year, with monitoring and reporting aeer one year. One suggestion was for the UK Information Act to be examined for the long-term implementation of the RTI, to revise the OSA, Penal Code and Printing Presses and Publication Act and more over a period of three to seven years.

Session 5: Report Back and Synthesis of Recommendations

During this session, the facilitator for each topic presented a synthesis of the feedback and comments by the participants. This session was moderated by Firdaus Husni from MCCHR.

Challenges and Opportunities

Tehmina Kaoosji observed that one thing which came up in almost every group was the OSA, which proves to be the biggest challenge. She responded to the groups by reminding them how Sri Lanka's RTI law supersedes all former Acts.

- One participant, an academician, warned that there was another key challenge facing the RTI law. Constitutionally, a two-thirds majority is required in Parliament to change the Federal Constitution to expressly state the right to information on top of the right to freedom of expression.

- Besides that, there must be clear delineations on what can be shared when it comes to sensitive information, and concerns on a lack of awareness among the general public was raised, which is currently very low.

- Some actionable solutions were suggested as information must be given to the public and the Ministry of Education (MOE) can play a role. The right to information can be included into the SUHAKAM human rights modules with the MOE. Mass awareness campaigns are needed but an effective way to get the RTI legislation into the public domain must be developed and the commission must start work immediately to create awareness among government agencies. They must each have an information officer.

- A lack of preparation is a major concern. There was a recommendation that it should take two to three years before this can become an active legislation, with more capacity building among departments so that they are not inundated by the opened floodgates, and are also able to supply and provide for qualitative data.

- In Sabah and Sarawak, the quality of data and access to data is an issue with outlier and rural regions, which also meant that there must be a wide variety of channels, as intersectional as possible, to disseminate the information, digitally or via hard copies.

Scope and Standards

Aisya Abdul Rahman reiterated that the participants support the right to seek, receive and impart information, in line with the international standards, from the government, among ourselves and from the private bodies. This right should be examined as a whole before narrowing down to the access to public information

- From the perspective of indigenous peoples, the information should help them protect their right to free, prior and informed consent. From the perspective of government officials, their main challenge is that they are bound by secrecy laws and Standard Operating Procedures in the classification of documents, to which they are unsure on whether information on public procurement should be made wholly public, and to what extent boundaries should be set.

- Public information is not just held by government agencies but also government-linked companies, NGOs, and other bodies such as SUHAKAM. Access to information also relates to entities that receive public funding.

- There was a challenge raised by one of the government officials from the Selangor state government, when it comes to third party information. Selangor has an FOI law but when it deals with third party information, the law requires consent from the third party, which could be difficult to obtain, posing a difficulty for the law to be fully enforced.

- The lack of data is a major problem. This is something to look into, the need to increase the standards for data collection, before making data available.

Scope of RTI

Khairil Yusoff shared that this group discussed the extent of the FOI law, which agencies it should cover, whether it should cover all interactions, which involves the transfer of public funds. There were requests for information from NGOs, political parties, academic institutions, charities and religious bodies.

- There must be more specific details on which types of information, whether the law includes interactions involving government funds, contracts or agreements, and not just immediate contracts, but also sub-contracts. The question arose on whether people could get information on sub-contracts, sub-agreements, foreign contracts involving government agencies and foreign bodies.

- In terms of procedures, a majority supported an online request form. This is not feasible for rural communities; a better option would be an information officer at the point of request, at District Offices, village committees or village heads. However, the officer should be public servants, not political appointees. All agreed that there should be an information officer at the point of contact.

- The application form must detail how much information is required, or refer to specific documents instead of, for example, all contracts for the past year, and should be related to a programme or budget or project. If a company received a government contract, the FOI law only applies to that project and not other activities of the company or NGO.
- The applicant should be identified through their Identity Card numbers, though some participants said identities should be anonymous, with at least a name and number.
- There were suggestions for two weeks to be an acceptable time frame for a response to an FOI request, with one to two months given for gathering information.

Restrictions

Ding Jo-Ann noted that in general, most agreed that the purpose of this Act was to promote transparency and accountability, and protect the best interest of the public as well as good governance. She proceeded to provide a list of talking points from her topic.

- Where national security is concerned, the government must demonstrate that the information provided would jeopardise national security. In terms of criminal investigations, if information requested would jeopardise them, the information such as interviewees, suspects, witnesses, cannot fall under this Act.
- If revealing the information would harm the safety of someone, the WPA should be invoked.
- For trade negotiations and bilateral trade agreements, the participants felt that if the matter relates to public interest, corruption (1MDB and PetroSaudi), the request can be examined by the commission to see if the public interest test would prevail and should be exempted if it would jeopardise the trade relations.

  Relating to the privacy of the third party, private information in general can be exempted from this Act, including medical records and bank statements.
- Legal professional privileges also apply. In the event that the Attorney General provides a report to the government, they would not need to show the world the legal strategy.
- Anything that would affect the running of public bodies, notes, memos could be exempted. Information should be excluded if it will affect people doing their jobs, for example, public examination questions cannot be requested.
- Stating the exemption of anything that would seriously harm public order is too general, and many things would get lumped under public order.
- On the question of whether royalty should be excluded from providing information, Jo Ann suggested that strategically, only information that would harm the institution of royalty should be exempted. If the information is innocuous, such as how many officials they employ per year, this should be allowed despite being controversial.

- Next, the burden of proof should be on the data owner. They should provide reasons as to why their data should fall under exemptions. There should be time limits, with the presumption that aeer 20 years, no information is exempted even on national security matters.
- There should be a possibility for redaction. If the document affects national security, one part could be released and not another, or one name could be removed.

  Everything must be submitted to the public interest test, even if it might affect international relations or trade. If the information can show large-scale corruption, even if it would jeopardise international relations, the exemption can be overridden by an overwhelming public interest test.

Mandate of the Commission

Fadiah Nadwa Fikir observed that all emphasised that the government must ensure the independence of the commission. This commission would be a quasi-judicial body with similar powers to courts. She also summarised the discussions into points.

- There must be representation from different genders, races, age groups, people from Sabah and Sarawak, and persons with disabilities. While some felt that there was no need to specify, the reality is that women do not get top positions, hence it must be stated. There should also be commissioners with different expertise, with legal background, media, community leaders, public service; all must not have political affiliation to avoid conflicts of interest.
- The selection process should be a public or group nomination. Entities such as the Bar Council and the media can nominate candidates. The selection process should be carried out by the Parliament in a transparent, open manner, with reasons of selection to be provided like why A but not B was selected as stipulated in the Act.
- The commission is accountable to the people. It must report to Parliament every six months and present its financial reports. It is independent but acts in the interest of the public and received public funding, needing to explain how it allocates funding. A provision should be included on making the commission proceedings public so that the public may see how the commission deals with cases.
- In terms of service, there must be security of tenure. Bad commissioners may be removed, but publicly and transparently dealt with by Parliament. The tenure could be three to five years with the possibility for re-nomination.
- The budget should come from consolidated funds, as a separate fund allocation expressly stated so that the government cannot attempt to cripple the commission by restricting its budget and making it difficult to function. The commission must deal with training and investigate cases. The budget must be sustainable so that the commission can discharge its duty with independence and with integrity.

Models and Implementation

Ahmad Maa'ruf bin Mohamed Anuar, facilitator from BHEUU shared that the groups could not agree to a clear policy during the previous session and wanted more guidance before talking about procedures. However, several points could be surmised from the deliberaHons.

- There could be a one-stop centre for the application of information, to avoid confusion on which agency possessed which information.
- The implementation of the new law should be carried out in two tiers with the commission at the highest level functioning to oversee the implementation of the law overall. Each agency, each source agency, must also prepare application channels, with federal, state and statutory bodies to have these channels to entertain applications for their information.
- The two-tier model faces challenges particularly the autonomy of Sabah and Sarawak. The subject matter of information falls under the Ninth Schedule, the Federal, State and Concurrent Lists of the Federal Constitution. For information requested on matters under Sabah and Sarawak, for example, a study conducted by a Special Cabinet Committee to restore the autonomy of the states noted that the states should be able to decide whether or not to release information on mahers under their jurisdictions. Aside from challenges obtaining information at the state level, the class of information that may also provide more challenges is that of the three Rs – race, religion, royalty.
- Another issue was whether this law should be applicable to all. Sources of information could come from government agencies, federal and state statutory bodies, but the responsibility to provide informaHon should also be borne by private bodies and agencies involved in public matters.
- Another point of discussion was whether this law should consist of offence provisions and whether the commission should be given the power to enforce the law. For internal compliance from the information officers, there must be the power of the commission to take action against those who fail to comply with requests within the stipulated period. A question also arose on enforcing certain liability to the person who obtained information through the law from a public body. One suggestion was for a non-disclosure agreement to be signed so that information will not be misused; however, this was strongly advised against. One participant proposed maintaining the spirit of the law, upon applicaHon for information, no reason is needed, but if the application is turned down and on appeal, where the application is heard at the commission level, they must then ascertain the reasons to apply for the information, as well as the reasons why the source department would not provide the information. Only then can the commission make a ruling on whether to allow the application.
- The ideal tenure of appointment for the commission was proposed to be 2+1, so that if members are not performing, the commission may replace them.
- There must be checks and balances, with the commission reporHng to the Parliament and being responsible to the Parliament.

Complaints and Sanctions

Thigayu Ganesan reported that the discussions under this topic touched on all the other topics as well, and he reiterated them. While access to information is a basic premise, there are certain circumstances where that right might be denied as spelt out in the law under exemptions, but if the right to information is deprived beyond the exemptions, there must be an appeals process.

- There must be a proper definition on the types of complaints allowed within a time frame to ensure that all avenues are exhausted before complaints are lodged with the commission. Appeals or complaints can be made to the commission, which must be independent and transparent. The complaints processes must be simple and be able to cater to rural communities like the Orang Asli.

- The commission will review the law and consider complaints and should be supported by a secretariat. The resources, power, functions, control mechanisms, appointment of the committee must be set out. A PSC can have the power to hire and fire (requiring approval of two-thirds of the PSC members), with the selection process being bipartisan and independent. It was also suggested for the committee's report to be tabled in Parliament like SUHAKAM's report and debated.

- The participants suggested that concerning the terms of liability for information officers not to share information, this liability should be shared with their superiors, in accordance with the concept of vicarious liability.

- Periods of 14-15 or 30 days were proposed for officers to respond to requests for information. Reasons for the non-disclosure of information must be stated and if there is no response, the applicant may appeal to the department, and then finally to the commission, which will take over aeer 14 or 30 days. The commission should sit once a month to review all the complaints.

- There must be a support system around the commission, financially and in terms of manpower. Show cause letters can be sent to the heads of department to enquire why information was not provided, and then the commission may decide whether to release the information. Officers must be trained to understand what information can or cannot be released. The appeal process should consider the PDPA; unless the RTI law supersedes the PDPA, the hands of the authorities are tied.

- The RTI law must compliment, not supersede, existing state laws and the Federal Constitutions, or the Constitution would need to be amended. The power of prosecution could be accorded to the commission.

- There can also be other disciplinary actions which would involve amendments to the Regulations for Public Officers (P.U.(A) 395/1993) regarding the order to supply information requested, fines, as well as reciprocal sanctions for the abuse of information given. The question was raised on whether fines would be for the individual or the head of department, or the agency, as well as whether the government could impose a fine on the government. More research

was recommended on existing laws to protect the agencies. There were strong objections to whipping and imprisonment; only fines should be given out. However, action can be taken in the event of the destruction of records, but the liability should go to the heads of departments. There must be protection for civil servants acting in good faith.

- Limitations can be imposed for national security matters. There can be three layers of appeal for information, where the case can be taken to the judiciary on national security matters, to debate if the information is protected in the interest of national security and other restricted areas. The complaint mechanism must be put in place but in the interest of the public authority and of the people.

The Way Forward

Nalini Elumalai reported that most participants agree with having the RTI law, however, they supported maintaining the OSA or to harmonise both laws, to include OSA provisions under the RTI law. An option would be to have both but to periodically abolish the OSA. When RTI is implemented smoothly, the OSA should be repealed and further noted that participants from Sabah and Sarawak insist that the OSA must be repealed.

- There is potential to look into the Sri Lanka model for Malaysia based on the similarities in terms of British colonial history and a multi-ethnic society, to see how to move on from there, particularly in terms of definitions, the power of the commission, the responsibilities, what must be detailed in the applications for information. The commission must report to the Parliament periodically and the law must avoid conflict with existing laws. More reviews and studies must be carried out.

- A concern that arose was that the access to information would be easy under the RTI law. If people seek information illegally and access information illegally, related mechanisms for implementation.

- Information shared should have gone through a fact-checking process before being made available to all. The people providing the information should be protected, say, if civil servants sign off on documents, and not Ministers, the question arises as to how the Minister can be held accountable. The proposal arose to study the OSA and examine each provision which can be removed.

- The list of exemptions must be clearly detailed. Overall, there must be political will to push this through, with public consultations to educate the public on their right to information, training for the government, study trips abroad to study laws from other countries, stakeholder consultations, engagement with local and state governments, only guidelines to the RTI law and more. There could be a target to train civil servants by June 2020 and have a 1-2 months buffer before implementation.

Summary

After the presentations by the facilitators, Firdaus opened the floor for comments. Kishali, from the RTI Commission of Sri Lanka, urged caution on two aspects.

- Firstly, she strongly discouraged obligations to give reasons for filing requests. It would be a problematic start to the RTI law and none of the Southeast Asian countries implementing RTI law for the past decade have had this provision. She shared that Sri Lankan people had the same apprehensions as Malaysians today, that the floodgates would be open for people to file endless requests. However, none of that happened, as there were safeguards in place. The commission was carefully formulated, made up of 12 people who knew the law. Another device is available which is the provision for people who file continuous, vexatious or abusive requests, who are abusing the process, to be banned. Sri Lanka did not have this, but they faced people filing 15 requests on the same matter. There are three ways of dealing with this: first, to summon the people in person; second, to send documents instead of summons. This is used so that the public authorities are not harassed. They could send a letter to the person to request that they stop; third, to have a prohibition like this in the law itself.

- The next concern of Kishali was the suggestion for applicants to sign non-disclosure agreements. Albeit going against international standards, the RTI is the opposite of non-disclosure. There should be a provision that allows any information by the commission should be able to be reused freely, as long as there is no abuse of the law. Kishali urged Malaysians to set the bar high, rather than be nervous and set the bar low. If any troubles occur, then the law can be amended to address them. Setting the bar low is a problem in itself.

- Another participant noted that in the interpretation of international standards, government officers and non-government officers are differentiated. In Indonesia, the government officers know the purpose of RTI legislation, but it is human nature to believe that if the information belongs to the government, then it doesn't belong to the people. As a principle, in international law, public information is open to the public and they should have access to it. The participant presented two important points to successful implementation: first, the government should promote this law beyond another national stakeholder consultation. This law should be promoted at the highest levels of the government. Second, all civil servants must have a basic understanding of this law, what it covers, which public body, et cetera.

- Next, an academician requested for all present at the consultation to be kept informed of the progress of the draeing of the RTI law. She expressed concern that the process might end up being cosmetic, just to show that something is being done, but in reality, it could not be carried out. She emphasised the need for this momentum and pressure to be continued, as there have been murmurings that regulators are unwilling to let go of secrecy laws. A mailing group could be an avenue to gather ideas.

- Last but not least, Firdaus wrapped up the session by surmising that the framework for a Malaysian RTI legislation is visible. The preamble can be formulated based on the right to seek, receive, and impart information as stated in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR). The scope outlined the concern and challenges facing the setting up of a Malaysian commission. Nevertheless, this consultation was only the first step towards the RTI legislation as she expressed hope that this will lead to further productive outcomes, with Dr. Punitha of BHEUU to provide guidance on where to go from here, and what the process is. She urged for all stakeholders present who are interested and invested in the process to take this further.

Launch of C4 FOI Report 2019 and Closing

The Report was presented by Ho Yi Jian, formerly with C4 but currently with the Jeffrey Cheah Institute. Yi Jian began by introducing the idea behind the report. He advanced that a lot of the discussion surrounding an FOI bill would be technical in nature and that there were many ways that a FOI bill could be curtailed. The report was created to document these technical details in a manner that was both comprehensive yet concise. In essence, the report was a FOI rights plan for Malaysia.

He then went on to explain some of the more salient features of the report, where he started by introducing the first chapter that contains information on human rights and the international standards regarding FOI law. It also contained comparative analysis into model FOI laws such as those from Africa and Latin America, in addition to the laws closer to home. The report highlighted the better features of the laws of each of those countries.

The report also contained a detailed schedule on exemptions. Some examples of information that would fall in that category would be trading agreements, or inter-government matters. Some FOI laws contain provisions that state that government-sanctioned training questions (such as public examination questions) cannot be accessed.

The report comprised an overview of the current status quo in other countries, among the nations analysed in the report are the ASEAN nations, the US and the UK, which while not the best, were the most prominent examples of the law, and, of course, the leading countries in the law, like India and Pakistan. Yi Jian mentioned that currently, Afghanistan holds the highest ranking in terms of FOI law.

The report also included a schedule comparing models of FOI legislation, among the items scrutinised were vexatious clauses as well as punishable offences and sanctions imposed in each nation. Yi Jian cited the example of the Philippines and the US that had little or no punishable offences, stating that the better versions of the law usually contained some sort of sanctions.

The report also examined other areas that were not discussed at length during the prior sessions such as trade agreements, government procurement processes and anti-fake news laws.

In addition, the report contained a background into the information landscape in Malaysia, among the issues discussed are the C4's position on OSA, procurement processes in Malaysia and open data under MAMPU. It was acknowledged that in the preparation of the C4 report, they were unable to obtain any reports on the Selangor state Select Committee of Competency, Accountability and Transparency (SELCAT) earlier than 2015, which Yi Jian opined was not good practice.

In summary, the FOI report presented a rights plan for Malaysia that pushes for presumptive right of access, a wide scope of application, a non-obstructive requesting procedure, clear rule-based exceptions, an independent appeals process, appropriate legal sanctions, the superseding of this law against existing secrecy laws and finally the promotion of the enactment of FOI law.

Closing Remarks, Cynthia Gabriel, Executive Director of Centre for Combating Corruption and Cronyism (C4)

Cynthia began by explaining the context behind the report. Even before GE14, aeer a consultation session with SUHAKAM where many government institutions were present, many ideas came up regarding an FOI law. She did note, however, that at that time, they did not expect a change of government and thought that they had to work within the scenario of existing restrictive laws.

She stated that while the C4 report was a jump-start, it was important to highlight the real expertise that was available in draeing the law. She thanked BHEUU and CIJ for providing the plalorm to bring people together to consolidate these varying thoughts and ideas and believes that the next moves are to have bigger consultation sessions involving more stakeholders like resident associations or community groups that are affected by issues like major development projects, as these are all about the access to information.

She opined that the report launched would be useful in comparing different countries, the framework they have and the laws they have in place. It was also important to note that the Minister had mentioned that the OSA would be replaced and the concern now should be the sections that would be imported into the FOI law. She closed by stating that before the change of government, it was difficult to envision a FOI law, yet now, there have been leaps in the process.

Closing Remarks, Wathshlah Naidu, Executive Director of the Centre for Independent Journalism

Wathshlah first expressed her appreciation to everyone involved in the programme and went on to state that it was the first time they had brought together such a diverse group of stakeholders who, over the course of the 2 days, which managed to engage in productive and non-adversarial discussion on the law.

She then went on to explain that this momentum should be maintained, outlining the plans that the CSOs want to effectuate, among those are that the CIJ and the coalition of CSOs on Freedom of Expression intend to consolidate the comments received over the course of the consultation and include them when finalising their drae bill.

They also intend to hold an online public consultation as an opportunity for people to provide feedback on the existing framework and hope to have more collaborations with not only BHEUU but also other ministries and hold events like roadshows and town halls on FOI. They are also working on training for the media.

Wathshlah expressed that while they will continue to pressure the appropriate parties, they will do so in a more productive manner to ensure that, at least, some elements of the bill they draeed are included in the finalised version.

She closed by expressing her appreciation to the BHEUU, the experts who had made time like Kishali, John, Toby Mendel and Matthew, the NGO coalition on FOI who had advanced time in the planning stages and in providing facilitators and finally the CIJ team behind the consultation.

Dr. Punitha Silivarajoo, Director of Policy and Development, BHEUU

Punitha began by awarding thanks to those who have made the time to be at the consultation session, especially the panelists, and hoped that the two days have been productive. She proclaimed that as a part of the government, they would be taking into account the information that has been tabled here. She did, however, note that they would not be able to do so quickly as procedure needed to be adhered to and they at the government would have to be careful in ensuring balance. She stated that a committee has been formed and the report of this event will be presented and deliberated by the respective ministries and agencies. She hoped that the stakeholders would bear with them through the process and also hoped to have more consultation sessions in the future. The consultation then ended on this note.

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