EXPERT GROUP MEETING ON THE RIGHT TO INFORMATION LEGISLATION

23 July 2020

Pullman Kuala Lumpur, Bangsar Malaysia.

Organised by:
Legal Affairs Division of the Prime Minister's Department (Bahagian Hal Ehwal Undang-Undang, BHEUU)

Photo Credit: CIJ

In collaboration with the:
Centre for Independent Journalism (CIJ) &
Coalition of CSOs on Freedom of Expression

CENTRE FOR INDEPENDENT JOURNALISM
Advocating Media Freedom and Access to Information

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Executive Summary

The Expert Group Meeting on the Right to Information Legislation was jointly organised by the Legal Affairs Division of the Prime Minister's Department (BHEUU), the Centre for Independent Journalism (CIJ), and the Coalition of Civil Society Organisations (CSOs) on Freedom of Expression on 23 July 2020 in Kuala Lumpur.

The Meeting opened with welcome remarks by Wathshlah Naidu, Executive Director of CIJ, and a keynote address by Tuan Abdul Aziz bin Mohd Johdi, Deputy Director-General of Policy and Development in BHEUU. Both speakers emphasised the importance of a multi-stakeholder consultative process towards the formulation of a Right to Information (RTI) law to enhance openness, transparency, and accountability in Malaysia.

During the meeting, experts from various countries presented five key topics related to the RTI law, followed by a final session to formulate a roadmap towards an RTI bill for Malaysia.

In the first session, Dr Toby Mendel from the Centre for Law and Democracy discussed the scope of exemptions in an RTI law and the need to balance national security with the public interest. He presented the three-part test wherein all restrictions on the right to information must be subject to tests of legitimate interest, whether the disclosure of information will cause harm to the legitimate interest and public interest override. The RTI law should override other laws, while exemptions to the RTI law should be subject to time limitations, and exceptions should be clearly defined. Toby also emphasised the need for good procedures and an impartial oversight system.

Next, Dr Sonia Randhawa from CIJ spoke on how RTI laws at the state and federal levels could generate beneficial competition. Comparing the cases of Australia and Japan, she highlighted the differences in their systems and noted that in both countries, state RTI laws paved the way for federal RTI laws. In Malaysia, the federal RTI law could be drafted to meet the minimum standards of RTI laws, while the states can then independently improve upon the law within their jurisdictions. The federal legislation should encourage and not prevent the right to information.

The third session was by Ainuddin Bahodury from the Access to Information Commission, Afghanistan. Continuing from the themes in the first session, Ainuddin presented the experiences of Afghanistan. He touched on the challenges faced by the Commission, including the lack of clarity in defining national interest and national security, lack of buy-in from lawmakers, federal-state jurisdictions, inability to process requests and the issue of punishments.

After that, Daren Fitzhenry from the Scotland Information Commission shared his experiences as a Commissioner regarding the powers and enforceability of decisions made by the Commission. Parties to the Freedom of Information (FOI) Act have three main duties: to respond to requests, to publish information, and to advise and assist. The Commission promotes good practice and the dissemination of information and has the ability to intervene and solve systemic issues related to information requests. Daren identified two key challenges, namely that the law must be able to work in practice, and that there must be a change in culture towards openness and proactive publication of information.

The fifth session by Ashwini Natesan and Kishali Pinto-Jayawardena from the Right to Information Commission of Sri Lanka offered research findings and examples of how the RTI law in Sri Lanka has been used. The research assessed publicly available data, as well as data from CSOs and the Information Commission, to conceptualise the links between the RTI law and its impact on reducing corruption or increasing transparency. Three criteria were used for assessment: Sustainable Development Goals (SDGs), responsiveness, and information disclosure. The findings indicated that authorities were in general responsive towards information requests and that the RTI law has shown promise towards transparency, accountability, and better governance in Sri Lanka. Issues that remained to be solved included procedural matters, culture and political environment, and the impact of the COVID-19 pandemic on the right to information.

Last but not least, Dr Punitha Silivarajoo from BHEUU and Wathshlah Naidu from CIJ led the session on action planning and opened the floor for comments. An important part of the process would be to create public awareness on the right to information and to engage various stakeholders, including bureaucrats, lawmakers, academics, media, and community groups. A key objective would be to encourage a shift in culture and mindsets towards openness and transparency. While the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU) has already instituted an open data charter, the system leaves much to be desired. As there is no RTI law, civil servants are uncertain about what information could be made public. CIJ and its CSO partners have already prepared a draft RTI law. The next step would be to prepare a roadmap or timeline, with step-by-step plans, to bring the RTI bill to Parliament. Dr Punitha assured the participants of BHEUU's commitment towards an RTI bill, in collaboration with civil society organisations, including CIJ and the Freedom of Expression (FOE) cluster.

Welcome Remarks

WATHSHLAH NAIDU

Executive Director, Centre for Independent Journalism (CIJ)

Good morning and *salam sejahtera* to Yang Berusaha Tuan Abdul Aziz bin Mohd Johdi, Deputy Director General of Policy and Development, Dr Punitha Silivarajoo, Director, Legal Affairs Division of the Prime Minister's Department (BHEUU), esteemed speakers, experts and observers.

Welcome again to the Expert Group Meeting (EGM) on the Right to Information Legislation, jointly organised by BHEUU in collaboration with the Centre for Independent Journalism (CIJ) and the Coalition of CSOs on Freedom of Expression.

This is another cornerstone for us and the second collaboration between civil society organisations and BHEUU in our shared vision of seeing the birth of a new legislation on the right to information. The National Stakeholders Consultation jointly organised in November 2019 brought together more than 90 participants from civil society organisations (CSOs), representatives from different government agencies, media, academics and international experts, to deliberate and discuss the overarching principles and content of an RTI legislation, in the context of the current legislative and political framework.

As we move forward on this shared agenda, we aim to engage key stakeholders and practitioners from relevant countries, government agencies and CSO experts to deliberate on specific outstanding issues. These include the development of a coherent and aligned legal framework that would address the challenges in Malaysia and eventually focus on creating a roadmap to support the government in promoting and upholding the RTI through an enabling legislation.

We also thank our international experts who are joining us remotely and sharing their invaluable insights and expertise to enrich our discussions today. They include: Commissioner Kishali Pinto-Jayawardena of Sri Lanka's Right to Information Commission; former Commissioner John Fresly from Indonesia; Commissioner Daren Fitzhenry from the Scotland Information Commission; Commissioner Ainuddin Bahodury from the Afghanistan Access to Information Commission; Dr Sonia Randhawa from CIJ; and Dr Toby Mendel from the Centre for Law and Democracy (Canada).

We have seen significant development in relation to RTI in the recent years. This collaboration comes after many years of government initiatives and numerous efforts led by committed civil society organisations and actors who had initiated the National Campaign for a Freedom of Information (FOI) Act in 2005 and supported the drafting of the Selangor and Penang state Freedom of Information Enactments.

In the current turbulent times, especially as we continue to battle the COVID 19 pandemic and related infodemics, right to information guarantees access to timely, trustable, and verifiable information. This in turn will facilitate the public in being rightly informed and in being able to form opinions on issues that affect us, including holding the government

and its related bodies and officials accountable for their decisions or actions that affect the general public. It promotes constructive participation in any debate or discussions related to specific decision-making processes and/or of public interest, thus ensuring transparency and enhancing participatory democracy, good governance and strengthens rule of law.

In line with our hashtag, it is #MYRightToKnow and to have timely access to information on public expenditures, national resources, public health, safety, and the environment!

In the context of Malaysia, as we anchor our position within Article 10 of the Federal Constitution which provides a constitutional guarantee of freedom of expression; and the Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Civil and Political Right (ICCPR) which provides the fundamental right "to seek, receive and impart information and ideas through any media and regardless of frontiers", we note that we face numerous legislative challenges that create barriers and limits our right to information.

A key challenge is the Official Secrets Act (OSA), which allows any document to be classified as secret, with no requirement for harm and without clearly demonstrating any relation to national security, international relations or defence. There are no time limits for documents classified secret and the Act ousts the court's jurisdiction to review the classification of the document.

We strongly belief that right to information or freedom of information legislations should reflect the fundamental principle of proactive and maximum disclosure on the 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.

As such, as civil society we hold the position that for a new legislation to promote right to information, it should be contingent on the repeal of the OSA in its current form. It is acknowledged that that the right to information is not absolute, as such the restrictions as noted in the OSA would be the basis for the considerations and inclusion of provisions related to exemptions to maximum disclosure.

There are many here who have been on this journey for many decades, and I hope with the pooling of all the expertise around the room we can maximise the opportunities, deconstruct the barriers and be able to establish the necessary analysis and develop a practical roadmap that would inform and support the government's commitments towards a new legislation on RTI.

Let us replace the culture of secrecy with a culture of openness to meet the growing public demands for transparency and accountability at all levels of governance.

On that note, it is with great anticipation that we welcome all of you to this Expert Group Meeting.

Thank you.

Keynote Address

TUAN ABDUL AZIZ BIN MOHD JOHDI

Deputy Director General, Policy and Development, Legal Affairs Division of the Prime Minister's Department (BHEUU)

Assalammualaikum w.b.t. and very good morning to Ms Wathshlah Naidu, Executive Director of CIJ; Dr Sonia Randhawa from CIJ; Mdm Kishali Pinto-Jayawardena, Commissioner, RTI Commission of Sri Lanka; Dr Toby Mendel, Executive Director Centre for Law and Democracy, Canada; Mr Ainuddin Bahodury, Chairman Access to Information Commission, Afghanistan; Mdm Ashwini Natesan, Consultant Legal Researcher, RTI Commission of Sri Lanka; Mr Daren Fitzhenry, Scottish Information Commissioner; representatives from government agencies and civil societies.

Firstly, I would like to thank the Centre of Independent Journalism (CIJ) for organising this Expert Group Meeting (EGM) on the Right to Information Legislation, in collaboration with Legal Affairs Division of the Prime Minister's Department (BHEUU). Today's session marks the continuous strategic collaboration between the Government and Civil Societies in emphasising the importance of the Right to Information (RTI) legislation for Malaysia.

This endeavour is in-line with the Cabinet's decision on 11 July 2018 for Malaysia to formulate the Freedom of Information Act. Nevertheless, the decision requires an in-depth study to ensure that the formulation of a legislation will not contravene any existing laws especially the Official Secrets Act 1972. Besides, it also requires proper and thorough engagement with all quarters to ensure that the views of all parties are taken into consideration.

Ladies and Gentlemen, Article 10 of the Federal Constitution states that every individual has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice. In Malaysia, RTI legislation was initiated in 2010 and 2011 through the Selangor and Penang Freedom of Information Enactments which seek to recognise and uphold the right of individuals to obtain information owned by the respective state governments. Thus, RTI promotes transparency and accountability of the Government and strengthens the public's right to be informed.

In general, RTI works efficiently in friendlier information environment with quick and easy access to public information by an individual. Nevertheless, this should also come with safeguards on certain exemptions on information that are pertinent to National Security and Public Order. These are some of the policy issues that need to be addressed with all relevant stakeholders.

Since 2019, BHEUU, JPM has continuously initiated deliberations and consultations with various stakeholders in studying the feasibility of drafting a new RTI legislation. These include meetings with relevant Ministries/Departments and jointly organising programmes with CIJ like the National Stakeholders Consultation on the RTI Legislation which was held on 27 to 28 November 2019.

Ladies and Gentlemen, I would like to draw your attention that today's meeting provides a platform for key practitioners from relevant countries, government agencies and CSO experts to deliberate on specific outstanding issues related to the formulation of RTI Legislation. We will also be listening to inputs from the experiences of international experts from countries with RTI legislations. By the end of the session, all inputs and discussions will be recorded and will contribute to the policy decision by the government in promoting and upholding the Right to Information.

Once again allow me to thank CIJ, all experts and all present here today, I hope today's session will be a fruitful one as we share our knowledge and experience to further pave the way for the Right to Information in Malaysia.

Thank you and have a good day.

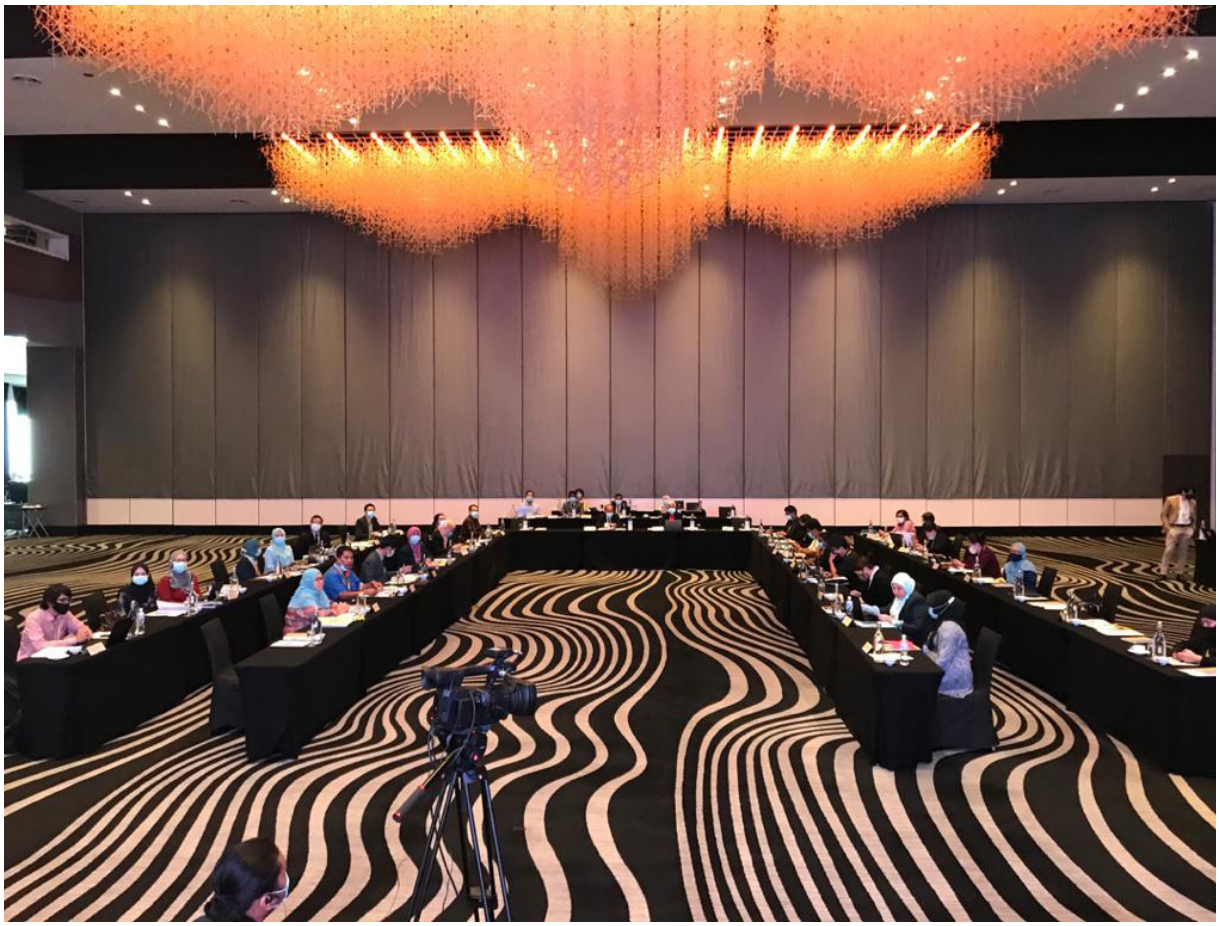

Photo Credit: CIJ

Session 1: Exploring Means of Mitigating the National Security Imperatives

DR TOBY MENDEL

Deputy Director General, Policy and Development, Executive Director, Centre for Law and Democracy

- Restrictions on the right to information must be subject to a three-part test: legitimate interest, whether information disclosure would harm the legimate interest and public interest override.
- The RTI law overrides other laws. Exemptions to the RTI law should be subject to time limitations and clearly defined. The drafting of the RTI law should involve multiple stakeholder consultations.
- Protection should be provided to officials who release information in good faith, even in the event the information is found to be sensitive after that, and to whistleblowers who release information about wrong doings.
- All public bodies and related outsourcinng bodies and contractors under public conntracts using public money should be covered by the RTI law.
- Classification should not serve as grounds for secrecy, only the standards in the law should do this; despite this, classification should still be based on good procedures.
- There must be an impartial oversight system wtih an independent administrative body that has full powers to investigate and review the release of national security-related information to the public.

Toby Mendel is the Executive Director of the Centre for Law and Democracy, a Canadian-based international human rights NGO that provides legal and capacity building expertise regarding foundational rights for democracy, including the right to information, freedom of expression and the right to participate. He has collaborated extensively with inter-governmental actors such as the World Bank, UNESCO, the Organization for Security and Cooperation in Europe (OSCE), and the Council of Europe – as well as numerous governments and NGOs worldwide. His work ranges from legal reform, analysis, and training, to advocacy and capacity building. He has published extensively on freedom of expression, right to information, communication rights and refugee issues.

This session focused on how the scope of exceptions within the RTI law to protect national security could be limited. There were two parts to the presentation. In the first part, Toby described general standards of the right to information, taking into account national security issues. In the second part, he elaborated on specific standards that apply to national security.

General standards on RTI exceptions with a focus on national security

The right to information is not an absolute right. Under international standards, all restrictions to RTI must meet a three-part test. The first part of the test is that the restriction aim to protect a legitimate interest, as defined by law, such as national security. All RTI laws include restrictions to protect national security so that, if national security is genuinely at risk, the information should not be released.

The second part of the test is that restrictions should only apply where disclosure of the information is likely to cause substantial harm to national security. It is not sufficient for the information simply to pertain to national security; disclosure must risk harming security. In that context, Official Secrets Acts (OSA) often restrict access to information despite the fact that its release may not cause any harm. For information to be restricted, a specific threat to national security must be identified; for example, obstruction of an ongoing military operation.

Toby provided an example of a case in Jordan where government officials deemed as sensitive information about the number of tanks owned by the country, and refused to disclose it. They were unaware that the information was already freely available online. When people are used to secrecy, they tend to assume that information needs to be kept secret, even though it's release would cause no harm.

The third part of the test is the public interest override. Information in the public interest should be released, even if it would harm social interests like national security, privacy or commercial interests. There should be examples of types of public interests in the RTI law, such as information that could expose corruption, human rights violations, or environmental harm, or information that facilitates participation in governance.

Toby then explained the relationship between the RTI law and other laws. Under international standards, the three-part test should be set out in the RTI law and then the RTI law should override the other laws in the event of any conflict, such as with other older legislation like the OSA. This is because the right to information is a human right, which is important for democracy, freedom of expression and many other social interests.

In terms of national security, other laws may elaborate on the specific nature of national security restrictions, but they should not go beyond the standards (i.e. the three-part test) set out in the RTI law. By implication, even if a document is marked as classified, that cannot trump the RTI law. Classification is, ultimately, simply a bureaucratic process which cannot logically override the provisions of a law. If a request is made for the document, an assessment should be made as to whether the information, if released, would cause harm to national security (or privacy concerns or other interests) as set out in the RTI law. The decision of an individual to classify a document cannot beat the standards contained in the legislation. Toby provided an example of how he was surprised that almost all documents in Canada were marked as classified as a matter of habit, even though this had no impact when a request was made for those documents (because at that point the rules in the Access to Information Law applied).

Exceptions to the RTI law should be subject to an overall time limit, for example 20 to 30 years. This is because the sensitivity of information declines rapidly, particularly if related to national security, defence strategies, and weapons capabilities. Where information remains sensitive even after the time limit, the law can provide for exceptional procedures to continue the secrecy of certain documents, or sections of the document, if necessary.

Toby asserted the importance of two types of protection for individuals: one to officials who release in good faith and pursuant to the RTI law information which may be found sensitive afterwards, and another for whistleblowers or civil servants who release information about wrongdoing. Whistleblowers serve as the “safety valves” of important information. If hiding sensitive information is doing harm, it should be provided to the public. A good example is Edward Snowden, who worked with the U.S intelligence services before becoming a whistleblower.

Probing the specific standards that apply to national security

Toby further addressed the definition of national security. Firstly, the principle is to define exceptions clearly, so as to guide the decision on whether to refuse or disclose information. It is, however, incredibly difficult to define national security. Laws that define national security often end up with general terms that are too broad.

The whole process of drafting the RTI law must involve multiple stakeholders. During the drafting of the Tshwane Principles (The Global Principles on National Security and the Right to Information), Toby chaired the group on defining national security. After going into great detail about the relationship between national security and access to information, the committee decided not to define national security as it is complex and context dependent. For example, the movement of troops in a conflict situation should be confidential. But in the 2003 Iraq War, the movement of troops to Iraq was announced as a way to intimidate Saddam Hussein. Exemptions for national security could include the locations of live operational plants, military capabilities, weapons systems, intelligence operations, et cetera, but all of these are still subject to the harm test and public interest override.

Secondly, all public bodies should be covered by this law, including the Ministry of Defence, Armed Forces, intelligence services and relevant outsourced services such as private contractors that supply weapons systems. Contractors supplying services under public contracts are using public money and must uphold public principles.

Thirdly, classification should not serve as grounds for secrecy. Information officers must go back to the legislation and analyse whether providing the information will harm national security. Classification can be good practice if done properly. Even if the RTI legislation states that classification is not grounds for secrecy, the vast majority of civil servants are unlikely to release information deemed classified, even if the classification happened long ago.

Toby suggested instituting good procedures for classification, for example, having a group of senior bureaucrats engage with classification instead of an individual, bringing more than one point of view and sharing responsibility. Documents could have different levels of classification, being embargoed for various lengths of time, from two or three years up to 20 years. These should be reviewed regularly, with the list of classified documents made available although their content is classified.

While Toby also noted that it was important to consider emergency situations, he did not delve into this except to note that restrictions for health emergencies might differ from national security emergencies or conflict emergencies.

Toby also advocated for an impartial oversight system for national security information. Applicants for information, if rejected by a public authority on grounds of national security, should be able to go to an independent decision maker to review decisions made, and even to the courts where it could be adjudicated. He believed that the systems in Afghanistan, Indonesia and Sri Lanka were good systems with independent administrative bodies which have full powers to investigate and review the release of national security-related information to the public.

In Canada, the Information Commissioner has the right to review any national security information and is subject to the highest national security clearance (Signals Intelligence, two levels higher than Top Secret). No information can be refused to be provided to the Commissioner, including information that could only physically be viewed at the intelligence bureau which has the necessary security systems. The Commissioner can order information to be disclosed and if there is a disagreement, the case can be brought to court.

In his concluding remarks, Toby acknowledged the importance of protecting national security but opined that, in many countries, governments have gone far beyond the natural boundaries of national security and national interest. His presentation provided examples on how to keep this important exception within proper bounds in the RTI law.

Firdaus Husni, Chief Human Rights Strategist of the Malaysian Centre for Constitutionalism and Human Rights (MCCHR), posed the first question on classification processes and recommendations. She asked whether it should be more than one person or a group of diverse interested parties giving input. She also enquired if there were existing models in other countries for classification processes.

Toby explained that a group would consist of officials at the public bodies that hold the information, for example, defence officials. Outsiders cannot be brought into the process as the information must be protected. Security clearance must be given to view the information. Some countries in Latin America e.g. Brazil have sophisticated and effective systems, or specific regimes, for classification. Many ministries in Jordan also have systems for classification. If classification was left up to one person, they may be constantly worried about the ramifications of not classifying enough information. If there was a committee of three persons, at least one of whom was a lawyer, the responsibility would be shared and decisions could be made in line with RTI principles.

Dr Cheah Swee Neo from SUHAKAM requested for more clarification on the three-part test, particularly the third part.

Toby reiterated the three-part test: legitimate interest, whether the disclosure of information would cause harm to the legitimate interest, and the public interest override. The third test meant that information should be disclosed if the benefits outweigh the harm, even where disclosure would harm national security. For example, an improper purchase of weapons involving too much public money should be exposed.

Ashwini Natesan, consultant legal researcher for the RTI Commission of Sri Lanka, asked what constitutes a public emergency and whether it can be considered an exception, as the public health emergency is being used as an excuse in Brazil to prevent the disclosure of data related to COVID-19. She asked how disclosure can be turned into the default practice.

Toby stated that his presentation focused on national security, but the Centre for Law and Democracy released a report a month ago detailing the right to information and public health emergencies, analysing general principles as well as specific standards under emergencies according to international law. A regime under international law allows exceptions on certain rights in situations of emergency "to the extent strictly required by exigencies of the situation", according Article 4 of the International Covenant on Civil and Political Rights (ICCPR). The harm and public interest test are basically equivalent to this standard.

From a substantive point of view, additional exceptions during emergencies can be made based on the judgement of whether the disclosure of information would cause more harm to a legitimate interest, privacy or national security, than it would benefit the public interest. From a procedural point of view, in health emergencies, public bodies are constrained as officials may be prohibited from entering their offices. Then, requests for information on paper could not be processed, or letters could not be received.

In Canada, public offices were not closed entirely. It was possible to maintain social distancing in the office and the processing of information requests continued. In Brazil, the government tried to close down the access to information system on grounds of a public health emergency, but the Supreme Court ruled that it was not legitimate and overturned the government's refusal to process requests. The Centre for Law and Democracy has a COVID tracker to trace any legal constraints on RTI by governments based on the pandemic. Many countries delayed or suspended the processing of information requests in a manner that was not legitimate as they were too blanket in nature and did not take into account the actual situation.

National security-related emergencies are different as that could mean countries are at war. National security exceptions are the same in principle but, when at war, there would be more operational information about military operations covered by the exemptions. The nature of the exceptions would not change, but the context in which the requests were evaluated would.

Question-and-Answer Session

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Wathshlah Naidu, Executive Director, CIJ. Photo Credit: CIJ

Session 2: Beneficial Competition: State and Federal Right to Information Legislation

DR SONIA RANDHAWA

DIRECTOR, CENTRE FOR INDEPENDENT JOURNALISM

- In Australia, there are distinct procedures for access to information under the state and federal legislations. In Japan, there are intertwined linkages in the bureaucracy from the central government to the prefectures. In both countries, states acted as incubators for innovation appropriate for the federal RTI regime.
- The draft RTI bill lays out a premise for access to information, for disclosure rather than secrecy.
- The federal RTI law can require states that do not have RTI legislation to release information to the public as a right.
- The OSA must be amended to be in line with the RTI law, to provide penalties for revealing information that falls under narrowly defined exemptions.
- States may release information that falls under federal exemptions within the OSA after declassifying the classified material via a positive action.
- The federal law must meet the minimum standards for the right to information, while the states can independently improve on the law.
- For there to be political will, the push must come from the people to put pressure on politicians. Civil servants play important roles in understanding the concept and acting as advocates for the right to information, to improve governance in Malaysia.

Dr Sonia Randhawa is a founder and director of the Centre for Independent Journalism, Malaysia. She has been working on freedom of information in Malaysia since 2004. She has published two books on access to environmental information, the first being "A Haze of Secrecy" which was published in collaboration with Article 19. Her PhD was on women journalists and the representation of women in Berita Harian and Utusan Malaysia.

This session explored the federal-state division of powers in the Malaysian, Australian and Japanese context with regards to the right to information and possible lessons that can be drawn. Article 74 of the Federal Constitution of Malaysia which the division of powers between the federal and state governments under the Federal List, State List and Concurrent List. Australia and Japan were chosen because both countries have dynamics between federal and state, or federal and local levels.

Australia: Decentralised

In 1901, Australia became a single, federal nation, a coming together of different elected governments. The Australian system guarantees sovereignty of the states and there are clearly defined jurisdictions. In contrast, federalism in Malaysia was dictated by colonial powers. The powers of the Malaysian monarchies were weakened by colonialism, so to a large extent had few options to negotiate the form of federation. This legacy is apparent in the comparative independence of the states in Australia and Malaysia: in Australia, the state government has greater powers to raise revenue and to implement legislation, including over access to information.

In Australia, information is viewed as a public right. Under the Federal and various state acts governing the right to information, there is clear-cut jurisdiction. The state legislation covers procedures to information regarding the state, whereas the federal legislation covers the federal government. In Malaysia, it is less clear. For instance, there are several officials working in the state but under federal payroll, which makes information legislation complex.

Each Australian jurisdiction has its own distinct procedures for access to information. Where a document falls under more than one jurisdiction, one could access information from each jurisdiction, depending on which authority holds authority over the document.

Over the past few decades, there has been a discernible movement from more to less restrictive right to information laws.

For "old-style" FOI legislations, Rick Snell in 2006 highlighted three key characteristics. First, they were not ambitious. Second, review mechanisms were toothless and lacked power as compared to keeping secrets. Third, there was cultural resistance from bureaucrats to release information. Information was seen as belonging to the government unless it was forced to be made public by law. These characteristics are, for example, still apparent in Victoria.

In 2009, Queensland introduced a new FOI law. Unlike the previous version, this law provided for a "push mechanism" whereby the government was expected to help the public gain access to information, instead of waiting for the public to make requests through publications. Maximum disclosure of non-personal information was part of this reform.

In 2010, the federal legislation underwent reforms when the new government came into power, which was inspired by the Queensland reforms. Research by John Lithgow indicates that there was still a cultural hangover from the old regime. However, the exercise showed that states can be incubators for innovation appropriate for the regime. In Queensland, the government Commissioned a 300-page report on the existing RTI regime, which contained 141 recommendations. All but two recommendations were adopted in the 2009 reforms. Federal reforms were made possible because of this body of research.

Japan: Centralised

In contrast, Japan has no federal system, but it has a centralised system with a few features devolved to local governments. Despite this, the Malaysian system is more similar to Japan than it is to Australia. There are intertwined linkages in the bureaucracy from the central government to the prefectures, unlike the clear-cut federalism in Australia. Politically, national level parties are dominant at the state level. A departure from Malaysia is that at the prefecture level, there is democratic experimentation. Although political parties are the same, locally elected politicians are more sensitive to the nuances of local concerns.

In the late 70s to early 80s, there were conflicts within local and national politics. Local politics were focused on the social and environmental impacts of growth, while at the national level, economic growth was a key driver of policies. In 1982, the governor of Kanagawa Prefecture promulgated RTI legislation in response to a citizens' movement. In 2001, a national level law was implemented.

Kanagawa had an important impact on the national level legislation. Over two decades, the success of the law in Kanagawa allowed the government to learn how to manage FOI requests. Since the national level law came into effect, thousands of requests have been filed.

In Selangor and Penang, the requests have been slow but accelerating. It takes time for people to feel that they have a right to information. The federal law in Malaysia can adopt general principles from the Selangor and Penang enactments.

There are limits to the right to information in both states, particularly because the federal OSA constrains the implementation of the state FOI laws. The first three items on the Federal List relate to internal and external security – external affairs, national defence, internal security - all of which fall under the OSA. When the government shifts to adopting RTI, the question of information management would be repositioned as a question of rights-based access. Not all information under the OSA would belong to the Federal List. Some information would belong to the State List, or to the general public.

Although there are limits as to what the RTI enactment in Penang achieved, its achievements should be recognised. Despite the challenges, the legislation managed to build capacity among civil servants, who began advocating for a more open information system after seeing its benefits and how it works. Acceleration in requests for information also showed increasing public engagement with the law. This dispelled the myth that the RTI needs a large bureaucracy to support it.

Solutions for Federal-State Conflicts

States in Malaysia have jurisdiction over areas explicitly defined in the State List, as opposed to Australia, where states have jurisdiction over anything not specifically under the federal government. In Malaysia, the states are constrained by what is defined, in all other areas the federal government takes precedence.

If there is conflict between the state and federal governments, questions arise on who holds the information, that is, whether the information is with the federal or state government, and whether the federal government has the authority to instruct states to release the information. The federal RTI law can require states to release information, even in the absence of state-level RTI legislation, as a fulfillment of a fundamental right.

The proposed regime in the draft RTI Bill lays out a premise for access to information. Disclosure rather than secrecy should be the norm. It covers both state and federal governments, which are intertwined in functions, duties and finances, with no clear delineation.

There will still be an OSA, although it must be amended to be in line with the RTI law. The law would provide penalties for revealing information under the narrowly-defined exemptions which fail the public interest test, or the three-part test (see Toby Mendel's presentation, above).

The current draft RTI law for Malaysia applies to states too, as they need to meet the minimum standards covered by this law. There is merit in allowing innovation by states, similar to Australia and Japan, so they can push for information to be proactively published. The federal law must could be seen as laying out the minimum standards of the right to information in Malaysia, while state enactments could improve on that law.

What happens when states release information that are classified as federal exemptions? The minutes of state executive committee meetings, for example, are considered secret under the OSA. The draft RTI law does not specify types of information, but taking this as an example, if a state chooses to release its minutes, this is still permissible under section 2(c) of the OSA.

However, the chief minister would need to declassify the classified material via a positive action. Whether this could become an automatic process should be explored. Instead of sending directives that orders all such information to be automatically classified unless stated otherwise, under the RTI law, the information should not be taken out of the public realm. Again, ideally the federal legislation provides the a strong RTI law which enumerates the minimum standards that states must abide by, but if states go further and provide more information, the federal legislation should encourage this.

Next Steps

The relationship between the federal and state governments in Malaysia is not decentralised but intertwined like Japan, with less well-defined jurisdictions compared to Australia or the United States. This will impact both federal and state RTI laws. But the laws can co-exist and federal law can have provisions that allow the states some freedom. States can trial legislative innovation, serve as a training ground for civil servants and the public, and strengthen the preparation of the federal government.

Question-and-Answer Session

1. Abdul Aziz from BHEUU raised two concerns. First, this requires political will. What are the challenges faced by Malaysia with the change of federal government? Second, how could civil servants, particularly higher ranked officers, be pushed towards professionalism, to implement the act and ensure it is practiced well?

Sonia shared that a lot of work has been put in by civil society to create awareness. For there to be political will, the push must come from the people to put pressure on politicians and civil servants. The latter plays an important role in understanding the concept and acting as advocates. Before the Selangor legislation was made, there were a lot of insecurities and concerns, which were addressed by having the legislation in place. Everyone needs to work together to build capacity and keep talking about the right to information in order to improve governance in Malaysia.

Next, professionalism would come from a well-educated and well-resourced civil service. If there is political will, the civil service will rise to the challenge. INTAN can train the civil service on participation in an open government partnership, which is the pillar of an RTI regime. Malaysia just needs to get the political will and break the final hurdle towards enacting this legislation.

2. Khairil Yusof from Sinar Project asked how laws could be harmonised if each state has its own FOI enactment. Penang and Selangor have their own FOI laws. In Malaysia, as the federal law could override state laws, there would be a minimum standard, rather than 13 different laws for each state.

In contrast, Sonia explained that diversity is good. The federal government should indeed set a minimum standard. In Penang and Selangor, a key difference lies in the cost of access to information. The draft federal RTI law states that this could be standardised. But if states want to make information available for free for certain groups, there is a provision in the federal law for that. The state could even expand the number of groups entitled to freely available information. States could also decrease the costs of translation. They could make a certain number of pages available for free. The state laws need not be the same. This way, there can be innovation which will push the federal government to improve.

3. Wathshlah Naidu, executive director of CIJ, followed up with a question for John Fresly, the former information Commissioner of Indonesia. In the context of state-federal harmonisation in terms of laws, processes, and systems, how is Indonesia different? Did decentralisation impact how the RTI law was implemented?

John responded that Indonesia first adopted decentralisation in 1999, across 34 provinces. A local Commissioner would be sent to a locality to apply the right to information in local governments. The centralised government would supervise the local governments, but the local Commissioner has the authority to implement the law in his jurisdiction. His decisions can be overthrown by the central government via judicial review.

4. Wathshlah further enquired whether a continuation with state-level enactments before proceeding towards an RTI law, with a possibility of federal law superseding state law, would render the state enactment superfluous. There is also a risk that state laws may have lower standards if the federal law does not supersede the state. There could be a mandatory requirement that only state laws could be applied in certain contexts, such as for information related to land. Should there be advocacy towards only one set of federal law, and do away with state enactments?

Sonia noted two parts to the question. Firstly, Sabah and Sarawak are different in context; there are more powers at the state level. Second, while the OSA is clearly in the Federal List, the RTI is not as clear and could be in the Concurrent List, where the federal legislation takes precedence over state legislations. It is possible to have a federal legislation, and for states to build upon it to improve the access to information.

This goes back to political will; there may be resistance. Citing the ongoing dispute prior to May 2018 between the federal and Kelantan state governments over the latter's financial management and adherence to the federal government's anti-corruption standards, Sonia cautioned that there might be resistance to openness and transparency at the state level. Civil servants play key roles in the standardisation and harmonisation of state and federal laws, and the education of politicians.

Sabah and Sarawak have more state powers, which means their RTI ordinances would cover different types of information than the federal law. Concerns have arisen on the different standards of disclosure in Sabah and Sarawak. In Australia, it depends on who holds the information. Victoria has a weak FOI law, but should one wish to access information held by the Victorian government, they are subject to that law. One cannot use the Queensland law to access information held in Victoria. There is a clear-cut distinction on who holds the information; this may not apply in the peninsula but possibly in Sabah and Sarawak.

5. Gayathry Venkiteswaran from the University of Nottingham also pointed out that except for Sabah, no other states have expressed interest in a state level legislation. It is less about who holds the information; Sabah and Sarawak have more authority as data producers and holders. As they hold more information in more areas, they should have state laws, but the other states might not need it, since a federal level legislation would affect the whole country. Penang and Selangor can subsequently raise their standards and offer more openness.

However, the federal law must be a reference point to supersede state laws in terms of interpretation. She urged that state-level conflicts are not major concerns as the federal law sets up minimum standards, and if states want RTI laws, they must meet or surpass those standards. If they cannot meet the standards, they would be unconstitutional. This would provide incentives to perform better. For example, the states cannot charge more than provided for by the federal law for access to information.

Dr Punitha Silivarajoo, Director of Policy and Research, Legal Affairs Division, Prime Minister's Department. Photo Credit: CIJ

Session 3: Exploring means of Mitigating the National Security Imperatives

AINUDDIN BAHODURY

CHAIRMAN, ACCESS TO INFORMATION COMMISSION, AFGHANISTAN

- The primary exemptions to access to information in Afghanistan are matters of sovereignty, independence, national interest and national security. Other elemennts connsidered include strained international relations and the release of private and prejuiced information.
- Among the challenges to access to information in Afghannistan are, a lack of clarity onn the definations of national interest and national security the prevailing political will culture and tradition state jurisdication the multiple avenues to request for information the lack of clarity on punishments.
- Advice to Malaysia in drafting our own RTI law is to ensure the presence of clear definitions of national interest and national security.

Ainuddin Bahodury is the chairman of the Access to Information Commission (AIC) in Afghanistan. A lawyer by training, he has been advocating for the rule of law, access to justice, and law reform since 2008. Ainuddin has also served as a Legal Assistant in the Ministry of Justice, Director of the World Bank Awareness and Legal Assistance Project at the Ministry of Justice, ANL Legal Advisor, Head of the Young Afghan Lawyers Network at Global Wrights, and Legal Advisor to the Afghan Journalists Committee.

This session explored the scope of exemptions on classified information by discussing the issues of public interest, and whether the harm test would prevail over the public interest test in Afghanistan, as well as other elements that limit access to information.

Exemptions in Afghanistan and Other Elements that Restrict Access to Information

In Afghanistan, the primary exemptions to access to information are provided for by Article 16 of the Access to Information law of Afghanistan; including matters of independence, sovereignty, national interest, and national security. Additionally Article 16(2) specifies that exemptions apply where the disclosure would harm Afghanistan's political, economic, and social relations with other countries. Exemptions would also apply in the case of personal prosecutions, where an investigation against a person is being carried out; in regard to criminal issues where release of the information would interfere in the process of fair trial; and information that concerns the privacy of individuals, such as commercial and private property where details such as bank account numbers may be listed.

Challenges to Access to Information

A critical issue regarding access to information is the lack of clarifications on the exact definitions of national interest and national security. Many Asian governments including Pakistan and India interpret national interest and national security in broad terms, always expressing concerns in these areas when considering exemptions. At the same time, no international standards are accepted by the states in Afghanistan. This only aggravates the problem of defining national interest and national security.

To illustrate his point, Ainuddin spoke of a case in Afghanistan where the Minister of Defence was embroiled in a matter regarding information requests on contracts worth millions. As usual, access to information was denied on grounds of national interest and national security; a problem faced in many nations. The Afghanistan Access to Information Commission and the Pakistan Information Commission were however able to successfully communicate with the Minster of Defence who was told that the information did not fall within that category. They did this by first, demanding why the matter fell under national interest or national security, and then proving otherwise. They also did so by utilising the harm test. In cases that have elements of corruption or public interest, the Afghanistan Access to Information Commission may order the disclosure of information at first opportunity. Agencies around the world usually try to categorise these issues under national security, but discussions

with the Minister of Interior Affairs and other experts found these matters to be outside the realms of national interest and national security. In the end, the information was provided to the requestor.

The next challenge faced in Afghanistan, and also in India, is that the parliaments do not consider access to information laws as having the power to override other laws. There was an information request regarding a certain minister who allegedly was not from Afghanistan. The ministers constantly apply their administrative positions and rules to the RTI law. However, when they interpreted the law and discussed the specialised law and harm test, they were satisfied and released the information.

Another element impeding access to information is the cultural issue; that a ratified law is still subject to the working cultural biases that influence the interpretations of exemptions to the RTI law. When they spoke to the ministers, civil society, ordinary people, and elders, they thought that the harm test relates to national interest rather than the interests of different entities. These cultural issues help in interpreting the exemptions to the law.

“Tradition” could help in Afghanistan. There are some cases in the south where tradition helped with the exemptions. In southeast Afghanistan, there are still extremists and the Taliban. When the Commission faced cases in the south, the cases appeared to be on national security issues where information should not be provided. However, when they connected with ordinary people, the people said that the information should not be classified and should be released upon request.

Ainuddin then expounded on the challenge of federal-state jurisdiction. He stated that in the Malaysian context, if there is a different alignment of regulations between state and federal levels, then the access to information law may not work well. In Afghanistan, there are some problems with the national administration. Civil servants interpreted the laws and confessed that they have issues with classification. Working with the parliament as well as with parliamentary sub-committees in Afghanistan tasked with law-making, the Commission would deliberate on comparative issues and submit opposition letters with suggestions, for example, how the access to information law should override other laws.

Afghanistan recently launched a global system where anyone could make requests from around the world; the reason they had been facing many limitations and exemptions was mostly due to physical security systems. The Commission has also had to engage different ministries and agencies who hold information.

Another challenge would be the multiple avenues to request for information. Ainuddin believed that increased flow of requests often result in the officers responsible being unable to process all requests. Therefore, parties seeking information tend to resort to other methods to gain access to the requested information.

Finally, the penalties awarded in Afghanistan are not always clear. Recently, warnings were issued to ministries for non-compliance with the Commission. While the Commission wanted to impose the reduction of salaries for the ministers, albeit not large ones, such avenues of penalties were not available to them. He believed that the Commission should have more powers to implement the law.

Advice to Malaysia

Should Malaysia want to ratify a new law in line with international standards, there must be clarification on what constitutes national interest and national security. There should be some indicators for and definitions specific to different agencies. He believed that these issues may clash with other laws such as those governing media, criminal acts and cyberspace. If the definitions are not clear, there will be critical issues with access to information. There must be a minimum requirement for exemptions on national security so that in times of heightened security threats, the exemptions are not misused.

Conclusion

Ainuddin concluded by stating that certain matters require careful attention when drafting the law, otherwise it would be difficult to be implemented. The harm test is an international principle. For example, when working with international funds or agencies, the exemptions to information need to be clarified and disclosure or prohibition must be very clear. He believed that the broad issues of national security and national interest are critical issues that need to be considered thoroughly, especially for instances involving multiple agencies.

A participant from a government agency sharing her views. Photo Credit: CIJ

Question-and-Answer Session

1. Wathshlah Naidu, Executive Director of CIJ first asked for clarifications on the limitation or established threshold on national security and national interest. She also asked of the mechanisms in place to support the classification of information before it is subjected to the public interest or harm test.

Ainuddin stated that Article 16 of the Access to Information Law 2018 allows the Commission to set a standard against all agencies. The agencies are then able to classify information according to the set standard. In the cases of political issues, should the politicians be able to decide on the classification standards, Ainuddin believed that everything would be classified. Therefore, it is the duty and the authority of the Commission to address such issues through the imposition of the standards.

2. Wathshlah further noted that the Afghan law clearly outlines the right to privacy as one of the exemptions. She enquired on the method to balance or reconcile the right to privacy and personal data protection against the right to information, in relation to the harm test.

Ainuddin believed that privacy is not a critical issue for the time being as Afghanistan does not have a privacy law. Unfortunately, in most cases there are breaches of privacy in Asia, especially on health issues, or political candidacy issues, for example ministers' disclosure of properties, which could result in their privacy being harmed. The Commission is trying to push the Afghan government to enact a specialised law on privacy and data protection (there is already a cyber law guiding the digitalisation process) however, until such a specialised law is realised, it would not create conflict with access to information.

3. Dr Khairie Ahmad from Universiti Utara Malaysia asked about the Commission that governs the RTI law in Afghanistan, what they are, the process of their elections, the process of classification and the challenges faced to maintain those classifications.

Ainuddin clarified that the Commission is an independent agency under Article 50 of the Constitution and the specialised Access to Information Law 2018, parked under the Ministry of Information and Culture. The ministry will announce the positions, anyone can apply, and the Commissioners are chosen from the pool. The president will then be chosen from the members. Furthermore, the president is not able to remove any member of the Commission, save for major issues such as if found guilty of committing a crime.

On the process of classification, Ainuddin highlighted the importance of the court mandate in ensuring transparency, accountability, and the upholding of human rights. On challenges, the access to information law was ratified in 2014 and it has since been revised based on input from civil society, international experts and other stakeholders in 2018.

Other challenges include security issues and the interpretation of national interest. There are around 60 staff and the online system was recently launched, yet terrorism presents a challenge, wherein people in war-torn areas are not comfortable enough to release information. The closed, regimented state also lacks transparency. However, currently, Afghanistan appears to be moving towards liberal values and rights values, and they seem to be doing well and in a better position to implement the access to information law on a rights basis, with new staff provided.

4. Wathshlah further asked for examples where public interest overrode the exemptions allowed under Article 16.

Ainuddin cited a case involving the Minister of Defence, which was a critical issue that usually would have been exempted. While defence issues are usually classified, they considered this instance to be outside those confines as it concerned roads and workmen. As it may have been a corruption issue, the information was ordered to be released as corruption overrode national security.

Additionally, in cases involving soldiers or teachers in schools where the information was previously restricted, the Commission ordered disclosure of the documents as enough time had passed to warrant it. In sum, where national interest may be a concern, an independent investigation is necessary to entertain the request, especially where there are different agencies involved. As long as they are satisfied that the information does not involve a national security issue, the parties must disclose the information. Additional examples include instances of requests on the cost of business trips. To close, Ainuddin noted that political cases frequently occur.

5. Dr Ngo Sheau Shi from Universiti Sains Malaysia asked if the Commission has an annual budget contained within the law, whether there is allocated funding for the Commission and if the Commissioners have security of tenure.

Ainuddin stated that as an independent organisation, the Commission is awarded around 55 million Afgani and their expenditure must be recorded and reported to the Ministry of Finance. He advanced that they are currently working on different ways to set up offices in the provinces as they are a national-level organisation, not a state-level one. A Commissioner's tenure lasts between three to five years. Ainuddin clarified that at present, the law as devised by parliament allows for two other members to be added. Commissioners may be nominated for another term, for a maximum of two terms.

Session 4: Mapping the Powers and Enforceability of Decisions and the Oversight Body (Right to Information Commission)

DAREN FITZHENRY

Commissioner, Scotland Information Commissioner

- The rights framework and the powers and duties of the Scottish Oversight Body are contained within the Freedom of Information (Scotland) Act 2002. The right is widely framed and extends even to non-citizens.
- Among the duties of public authorities are to respond to requests, publish information and to advise and assist.
- The Scottish Oversight body functions to promote the observance of good practice, to assess whether the authorities are following good practice and to promote the dissemination of information to the public.
- The powers of the Scottish Oversight Body include the power to make decision notices, information notices and enforcement notices, the power to obtain warrants of entry and insepction and the power to ensure notices are followed.
- Appointment of the Commissioner follows an open application process even though the invidual is appointed by the Head of State.
- The Commissioner has complete functional independence and is allocated a budget. He is however fully accountable as the Commission's financial reports must be audited and the Commissioner may be called to Parliament to give evidence should he need to.
- Among the challenged to freedom of information are ensuring the law works in practice and facilitating culture of change.

Daren Fitzhenry took up post as Scottish Information Commissioner in October 2017, for a fixed term of six years. As Scottish Information Commissioner, Daren is responsible for the enforcement and promotion of Scotland's freedom of information laws. This includes handling appeals about the way in which Scottish public authorities respond to information requests, promoting good practice and monitoring and assessing FOI performance. He is strongly committed to the principles of freedom of information, recognising the significant benefits that FOI brings to society, not least its key role in enabling the public's participation and engagement in the issues which really matter to them.

This session provided an in-depth look into the powers and enforceability of the Scottish oversight body: mapping out the details of their system and how it functions in practice to offer an example of a framework for Malaysia's own RTI law.

The Freedom of Information (Scotland) Act 2002 and the Scottish Oversight Body

The powers, duties and structure of the oversight body in Scotland are informed by the code of information rights present in their system, and the constitutional framework of the jurisdiction they operate in. Daren believed that the mandate of the oversight body must be connected to the laws of the jurisdiction for it to work in practice.

The powers of the Commissioner are framed under the Freedom of Information (Scotland) Act 2002 (FOI Act). Freedom of information itself is a widely framed right in Scotland, and those who request information from a public authority are entitled to receive it with limited exceptions. Under the Scottish law, the right to make use of the law is extended to non-citizens as well. Individuals who file requests for information also do not need to explain their reasons or purposes. Additionally, the information may only be withheld for very good reasons.

Parties Subject to the 'Act'

Section 3 of the above Act states that the parties subject to the law are, as contained within Schedule 1 of the FOI Act, the bodies designated by Ministers in a Section 5 order or publicly owned companies. The list of bodies outlined in Schedule 1 is extensive, some being listed by name and some by category. The list includes, but is not limited to, the central government, police, education authorities, the national health service, and parliament. The law also recognises that the situation is ever changing with more and more public matters being contracted out. Therefore, when public functions are being carried out, Ministers may extend the FOI Act to other bodies under a Section 5 order.

These parties are subject to three key duties. First, the duty to respond to requests. Public authorities have a legal duty to respond to all written requests for information promptly, within a maximum period of 20 working days. This applies to recorded, pre-existing information only, be it in the form of a document, email, spreadsheet, file or even note. The information may only be refused under certain circumstances and in order to qualify for refusal, the

exemption must be expressly stated in the law. Some established exemptions are substantial harm to commercial interests, where it is required for the purpose of safeguarding national security, or in cases of substantial prejudice to defence. Should a requestor not receive an answer within the stipulated time, or be unsatisfied with the answer, they may ask for an internal review by someone higher up within the organisation. These review requests must also be responded to within 20 working days. If the response is unsatisfactory, or the time limit has passed, the individual may appeal to the Scottish Information Commissioner.

Second, the duty to publish information. Proactive publishing of information into the public domain is extremely important, since this is how the public access information. People generally hope to be able to access information via basic searches on search engines like Google. Therefore, this duty is facilitated by a publication scheme. Information on services provided, decisions made, the cost of those decisions, and the facts and analyses upon which the decisions were made are examples of information that need to be published. The standard applied is that people should be able to simply search for the information and have access to it, thereby reducing cost and increasing the standards to RTI. Additionally, the publication scheme used by the Scottish public authorities is something that needs to be approved by the Commissioner. In practice, they have a model scheme that all public authorities are subscribed to. Daren believed that by putting so much information in a public domain, it provides a route for people to access information without asking for it. This is something that they want to include in the Act when it changes in a few years.

Third, the duty to advise and assist, which is a customer service duty. This simply means that public authorities are expected to advise and assist individuals seeking information.

Functions of the Scottish Oversight Body

Among the functions of the Scottish oversight body is to promote the observance of good practice by public authorities. Daren believed that the higher the compliance with the law, the sooner people will have access to information, thus reducing the number of appeals as well as general cost. Public authorities must therefore be given proper guidance and made aware of their obligations, especially their duty to advise and assist, and create a good compliance system. The Commissioner's role includes providing guidance, training, and a platform for discussion amongst public bodies.

Another function is to assess whether an authority adheres to best practices. This is a role that Daren is particularly keen on and wants to expand upon. He believes that the proactive enforcement of duties must be maintained. One method at the Commission's disposal is the ability to have an intervention. Through this, they may scrutinise the FOI practices of an authority, usually upon receipt of a tip-off or analysis concerning non-compliance. This allows the Commissioner to tackle systemic issues that do not only involve one case. This could range from phone calls to the relevant body to understand what is happening, to full-blown investigations into the public authority's practices. To support this process, they regularly monitor the performance of the authority and require it to submit details of information requests every three months, so they can determine if the authority responded on time, if

they didn't provide information or reasons for refusal. From there, the Commissioner is able to draw up a good picture of the information disclosure process of the public authority.

Yet another function is to promote the dissemination of information to the public. Daren opined that should the public have the right to access information but are not aware of that right, then that is a huge opportunity lost to them. The Commission also has a duty to make proposals to Ministers on the extension of the list of public authorities.

Powers of the Scottish Oversight Body

Among the powers of the Scottish Commissioner is to make decision notices. When the Commissioner is unhappy with the decision of the authorities, the Commissioner may make a legally binding decision that is enforceable via a notice. The Commission may also determine if an authority has complied with the Act. During the course of carrying out his duties, the Commissioner may provide the authority with a notice that forces the disclosure of the information, for example if it has not been voluntarily provided. This is known as an information notice. The final notice is the enforcement notice, which exists to make an authority comply with the Act and sets out the timeline for complying.

Daren noted that each of the notices are legally binding upon the parties it is served to and may only be challenged in court. There is the right to appeal. Should the public authority fail in their appeal, the notices remain legally binding upon them. The failure to comply with the notices allows the Commissioner to certify it in writing to be sent to the Court of Session in Scotland. The court would enquire and take submissions from that authority, which may result in a decision of a contempt of court. A finding of contempt of court would allow the imposition of a fine or potentially imprisonment, but the power has never had to be used before.

The Commissioner also has the power to get a warrant of entry and inspection. Should an authority fail to comply with the Act, and the Commissioner has evidence of such actions he may apply to a court for a warrant to search, enter, seize, inspect, operate, and test any material, such as computers. While the Commission has never had to utilise this power, Daren opined that it is important that provisions to support this are in force in case the power needs to be used.

Finally, there is the power to issue practice recommendations.

In addition, it is a criminal act to alter, erase, conceal or destroy any information when a request for information has been made and the erasure etc. is made with the intention of preventing disclosure of the information. Such actions are chargeable offences.

Appointment of the Commissioner

Under section 42 of the Act, which is the primary legislation pertaining to freedom of information in Scotland, the appointment of Commissioners is done by the head of the state (the Queen) upon parliamentary recommendation. The appointment of a Commissioner is for a fixed, maximum term of 8 years. An appointed Commissioner is not only restricted from other jobs, he is to abide by the conditions imposed upon him by the Scottish Parliament.

The Commissioner may be removed from office via two methods; on his own request, or by the Queen's dismissal following a motion passed with a minimum two-thirds majority vote in parliament. In the second instance there must be a reason for the passing of the vote; the Commissioner must be in breach of his terms and conditions of service or parliament must have lost confidence in his willingness, suitability or ability to perform his duties and functions.

The Independence and Accountability of the Commissioner

The Scottish Commissioner exists with complete functional independence as they face no interference in decisions, interventions or use of powers. In terms of their budget, the Commissioner is awarded a sum from parliament. Here, Daren opined that there is great importance to having a properly funded oversight body, and that this is recognised by the International Conference of Information Commissioners.

Additionally, in Scotland, the approval of the Scottish Parliamentary Corporate Body (SPCB) is required for certain matters such as staff recruitment number changes, sale of property or change of office.

The Commissioner's independence must be balanced with accountability. Therefore, the Commissioner is required to produce an annual report on the exercise of his functions. All annual reports are audited and reported to parliament. Furthermore, the Commissioner must always be available to be called to parliament to give evidence.

Challenges

To conclude the session, Daren advanced the importance of practical application of the law. He stated that no matter how beautifully drafted the law, it must be able to work in practice, lest it be worse than useless. He used such harsh terms as he believed that laws of this sort provide a veneer that claims to prove that something is being done, while in reality there is no result. Daren believes that the practice of training the authorities, sufficient good guidance, and adequate scope of powers need to be awarded to regulators of the law.

In the same breath, he acknowledges a far more difficult challenge: culture change. The culture of the authorities must change to one which is more open. He wishes to see a reality where authorities want to push out information, making such endeavours a part of their core business. The goal is to achieve proactive publication of information and develop a positive attitude in responding to requests.

Question and Answer Session

1. Wathshlah asked whether the decisions of the Commission on exemptions, if made into precedents, would support the classification system and whether those decisions form the thresholds that the Commissioner and the authorities must adhere to.

Daren stated that the Commissioner operates independently of the classification system; such matters are governed by legislation as the exemptions are expressly stated in the Act. The general rule is that information should be disclosed unless it falls within an exemption. In cases of information, there are instances where it is overclassified, especially over time. The Commissioner may order the disclosure of the information, even if it is classified as secret, should they see fit as their position overrides the classification system.

2. Wathshlah sought clarification on the matter of appointment, asking if it was a direct appointment by parliament. This is especially considering parliament's ability to remove a Commissioner by a two-thirds majority vote, in the event of a breach of terms and conditions of service. She also enquired after the mechanisms to ensure the Commissioner's independence from interference by the parliament.

Daren believed that the appointment process is not a political one. He explains that there is an open application process, similar to a normal job application. A five-member Scottish Parliamentary body which includes the non-partisan head of parliament, will make a recommendation to parliament after reviewing the candidates. Parliament then needs to decide whether to go ahead with the suggestion, although it is rare that they do not. The nature of the appointment ensures the independence of the Commissioner.

3. Wathshlah then enquired as to how the Commissioner dealt with exemptions, particularly concerns of national security and confidentiality, and how distinct are the roles of the authorities are compared to the Commissioner. She also asked if the Commission applies the public interest or harm tests.

Daren advanced that such matters vary according to the exemption invoked. The exemptions must generally undergo a harm test to determine if the information would cause significant harm or prejudice. For example, in cases of relations within the United Kingdom (UK), exemptions would apply if the information sought would or would be likely to substantially prejudice relations between administrations in the UK. For most of the exemptions to apply, substantial prejudice must therefore be shown. The Commissioner expects the public authority to apply that test and should their decision go on appeal, the Commissioner would need to see evidence of that test in each case. Fanciful evidence is also not accepted, instead the higher tests dotted throughout the legislation need to be applied. At the same time, many of the exemptions also require public interest consideration. If the public interest in maintaining the exemption is not greater than public interest in disclosing the information, then the information must be released despite the significant prejudice it may cause. To conclude, Daren stated that the default position for most (though not all) exemptions is to show harm and apply the public interest test; on the general balance, disclosure is favoured.

4. Dr Cheah Swee Neo from SUHAKAM asked if the information released can be used for all sorts of purposes, and if there is any gradation for use of the information.

Daren replied that as a general rule, information that is publicly available can be used without regard for the purpose. There are some instances of limits, although very unusual (for example copyright). More and more authorities are disclosing information publicly at the same time that they give it to an individual, meaning they publish the information on their websites at the same time a request is made. Cheah asked if it was an all or nothing policy, to which Daren stated that the general approach was to allow further use of disclosed information.

5. Wathshlah asked if the Scottish FOI law is in alignment with the UK FOI law. She stated that the UK also has the Official Secrets Act (OSA) and secrecy laws, and wondered if those laws applied to Scotland, to what extent they are rendered ineffective and/or superseded by FOI law.

Daren explained that the Scottish system has jurisdiction over all Scottish public authorities, meaning all authorities founded under Scottish enactments. The UK Act does not apply to those authorities, nor does it have the same terms and conditions as the Scottish FOI laws. The only area where the UK Act applies is when it involves UK institutions in Scotland, such as those under the Ministry of Defence. On the OSA, there is an exemption whereby disclosure is prohibited by another enactment. Therefore, if an enactment states that certain information may not be disclosed, then the exemption will apply and information will not be provided. There can however, be specific statutory prohibitions on providing information other than in OSA and these will be binding, but, there are not many specific laws setting out such prohibitions. At the end of the day, due to the way the UK OSA is drafted, secret documents may be disclosed under freedom of information laws if they do not meet the standards of an exemption.

6. Wathshlah asked if the UK FOI Act allows for cabinet veto power, citing Section 53 of the Act which allows a Cabinet Minister to veto the decision of the Commissioner. She stated however that it is unclear as to what degree are such powers subject to judicial review.

Daren stated that a similar provision exists in Scottish law, and it is one that they do not like. He believed that it might be appropriate for the provision to be removed in the next iteration of the law. The legislation allows the first minister to state that there is no non-compliance with the law. As of yet, the law remains unused; this is evidence that there is no use for it, and it should be removed. Daren believed that the provision existed for the time when the law was untested and the people were more cautious about the implementation of the law. Wathshlah then commented that it completely empowers the parliament and she hoped Malaysia would not be adopting such a provision.

7. Adibah Hanim Abdul Hamid from the Prime Minister's Department asked if all types of state information fell under the Commissioner's scope of powers, and if a declassification process is needed before disclosure.

Daren opined that it was a matter to be dealt with internally, whether a declassification was necessary before disclosure. He believed that should exemptions not apply the authorities may initiate their own declassification process. Such a requirement should not, however, be a reason for undue delay of disclosure of the information.

8. Wathshlah asked about the enforceability of decisions, noting that action could be taken against parties when there is a failure to comply. She also asked after the sanctions in place, their scope and enforceability.

Daren commented that in Scotland, there are very few sanctions in place. While there is the ultimate power of the Courts to fine or to take more serious action where contempt of court is found to have occurred, they have experienced high levels of voluntary compliance by the authorities, therefore these powers need not be exercised. He believed that what is important is the law has sanctions available which work in the jurisdiction, and what will work varies from jurisdiction to jurisdiction. There is the risk of the court, as it can decide that there has been a contempt of court. They have never however had to say that the authority did not comply as the threat of it alone has been enough to ensure compliance.

9. Kuek Ser Kuang Keng from Data-N asked about the incentives available for public bodies to practice the release of information, besides the legislative powers in place. He also asked about the kinds of training and guidance provided to them. On Daren's earlier mention that one of the duties of the Commissioner was to promote best practices, Kuek asked how much of an incentive was it to public authorities.

Daren stated that traditionally, they have set out what they expect the authorities to publish and that they have implemented a model publication scheme for proactive publishing, which includes matters such as key decisions and how they are made. The Commissioner checks on them to ensure that there is compliance with the model publication scheme. Regular checks are also carried out to ensure that they are complying with the requirements of the Commissioner's guidance. They aspire towards changing culture and attitude, to go beyond the publication scheme, creating a code of practice. Information that is of utility to the people should be published and he hopes to see the authorities grow more open and work towards publishing more information. By doing so, they can improve their services, and such benefits need to be understood to prevent begrudging of the money and time spent on this initiative. Organisations like the International Conference of Information Commissioners and events like this meeting are important as discussions with other jurisdictions are necessary. Links with open data that would then push for a more open government are also useful. Daren also believed that the method of publishing information needs to be accessible to as many people as possible, not just "computer geeks" but to anyone who wants the information.

10. Wathshlah stated that an important point has been raised; there needs to be safeguards in place for cases where public officials publish information beyond the scope allowed, say, on matters exempted.

Daren clarified that in cases of personal data, or where the release of information is prohibited by law, the authorities must comply with the exemptions. Most exemptions are discretionary in nature. In cases of personal data being breached, there is a price to pay, therefore implying the importance of authorities having good internal processes to ensure that people are making good decisions to better minimise risk. He stated that the exact requirements would inevitably differ from country to country.

Session 5: Insight into the Use of Right to Information in Sri Lanka

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KISHALI PINTO-JAYAWARDENA

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- A study was conducted to assess whether the use of the RTI law resulted in increasing transparency and decreasing corruption in Sri Lanka
- There were three criteria for assessment: the achievement of the Sustainable Development Goals (SDGs), the responsiveness of the public authority, and the attitudes of the RTI Commissions.
- The findings of the study indicated that the use of the RTI law had led to watershed moments for commmunities and increasing transparency.
- The role of the RTI Commissions of Sri Lanka was key in ensuring that even politically sensitive disclosures were not censured. Importantly, a provision in the RTI law allows the Commission to inspect documents before releasing them to the public or applicant.
- Malaysia's concern about national security could be appeased by examinng Sri Lanka's experience. It is important to have a well-drafted RTI law and the rulings must be legalistic.
- The Commission faced two challenges: firstly, procedural issues and secondly, culture and political enviroment. Governments would not favour the right to information as it exposes the people in power.
- The advocacy for the RTI law was carefully strategized, involving a national process and letters sent to provincial councils beyond Colombo from 2015 to 2019.

Ashwini Natesan is a qualified legal practitioner from India, presently working in Sri Lanka, specialising in Technology, Media & Telecommunications (TMT) law, Alternative Dispute Resolution and Right to information. She divides her time between legal consulting, academia, and research initiatives. As a consultant legal researcher at the Right to Information Commission of Sri Lanka, she has worked on some projects and publications. She holds Master of Laws (International Business Law) from the National University of Singapore and a BA, LL.B (Hons) from the Dr Ambedkar Law University, Chennai, India.

Kishali Pinto-Jayawardena serves on Sri Lanka's first RTI Commission and is a senior civil liberties lawyer who has been in the forefront of drafting a RTI law as well as a Contempt of Court Act for the country. Editorial (legal) consultant for the Sunday Times, Colombo, she contributes a long-standing legal column for the newspaper and is the author of several widely referenced books on Sri Lanka's rule of law challenges.

This session covered two main areas. Ashwini presented statistics and data derived from new research on the impacts and utilisation of RTI laws in Sri Lanka. Kishali provided detailed case studies as examples.

Ashwini began by explaining the research project. Drawing from the Sustainable Development Goals (SDGs), the study assessed whether the use of the RTI law resulted in increasing transparency and decreasing corruption. The purpose was to analyse both supply-side and demand-side actors and ascertain their ability to work in cognisance with each other to better understand the impacts of an RTI law; this a test adapted from the state of Rajasthan, India.

Criteria for Assessment

There were three criteria for assessment: the achievement of the SDGs, the responsiveness of the public authority, and the attitudes of the RTI Commission. The data was taken from publicly available datasets, information provided by CSOs and data from the RTI Commission. This presentation only covered findings from Commission decisions and publicly available data, but not CSO data.

Among the issues focused on were employment, education, health, environment, public procurement, and gender equality. These are important areas to improve on to achieve the SDGs.

The findings of the study indicated the difference brought by the use of the RTI law, capturing stories that created watershed moments for communities. For instance, requests were made through the RTI legislation for the post-mortem reports of two young men. The reports revealed that no traces of alcohol were found in both deceased men, thus the cause of death was not alcohol consumption as claimed by the police. Police violence came to light, particularly in the northern conflict areas. These were widely reported in the media.

Another case was the pricing of packaged drinking water. A journalist requested for prices and found widely varying prices for similar products. The consumer association came up with a gazette setting a maximum cap for the retail price. A third case was when Transparency

International Sri Lanka disclosed documents showing proof of misappropriated funds amounting to RM40 million Sri Lankan rupees, for an infrastructure project in central and northern Sri Lanka. This led to a report filed with the bribery Commission.

Ashwini further shared a fourth case where villagers were stripped of their lands and had been organising strikes since 2010. Through the RTI legislation, key documentation was acquired. Local fishermen established a CSO for this purpose, revealing how RTI can create a difference in the community. Other initiatives include tracking budget promises, preparing databases and other tasks which are able to be realised thought the existence of the RTI law.

Key decisions made by the Commission were important. When it came to areas of institutional transparency, disclosure, and accountability, the role of the Commission came to the forefront, so that even politically motivated claims or politically sensitive disclosures were not censured.

In one instance, requirements related to consultancy for the construction of a defence headquarters in Sri Lanka were requested. The public authority, through the attorney general's department, objected to this saying it jeopardised national security. But the Commission ordered a disclosure. In another instance, Sri Lankan Airlines' salaries for the chief executive officer, head of human resources, and chief commercial officer were ordered to be disclosed by Commission.

Findings

Ashwini went on to present the findings of the research. In the area of SDGs, for publicly available data in media reports/traditional media/social media/Twitter and other alternative forms of reporting, most reports on RTI law and data requests related to "institutional transparency", followed by "employment and labour", then "infrastructure and construction", and "land".

Analysis found that 77 percent of information requests were disclosed. Meanwhile, the subject matter of appeals could not be fully classified in any particular category.

The second area of assessment was on the responsiveness of public authorities. There were two indicators for responsiveness: whether information was received, and how long the public authority took to respond. The categories for the timeline were 14 days, 28 days, 60 days, more than 60, and no response.

Meanwhile, appeals against Public Authorities filed at the RTI Commission were assessed by dividing such authorities on the basis of clusters. The Public authorities were divided into state and non-state actors. State actors were segregated as local/provincial, central, and district/division. This research wanted to clearly delineate state and non-state actors, but found that non-state actors were few. Non-state actors must fall under the ambit of Section 43 of the RTI law for them to be subject to the legislation.

The third area was on information disclosure by the RTI Commission. 83 percent was accepted, while 17 percent was rejected. Reasons for rejections were classified on basis of procedural and substantive rejections. Substantive rejections comprised of those under section 5 of the

RTI Act, which provides grounds for rejecting requests, including exemptions and information that are not in the possession or custody of the public authority.

Procedural rejection would occur in instances where an appeal was filed to the Commission without going through the designated information officer, or such other reasons under sections 32 or 43 of the RTI Act. Most of the rejections were on the grounds of substantive reasons as opposed to procedural.

Challenges in Research

The data examined were publicly available, provided by CSOs, or by the Commission. If there

were gaps in the data, it could not be filled up. The responsiveness of public authorities (Assessment 2) was divided according to administrative level and the researchers faced a challenge dividing them based on clusters. There was also a lack of gender segregated data. Although the case studies can substantiate the linkages between RTI and corruption, there is no data on national statistics on corruption and the use of the RTI law.

Other cases

This study presented two levels of impacts – individual stories and case studies – which indicated that the RTI legislation made a difference. At the micro and macro level, it increased transparency. This is showed by looking at requests when there was no proactive disclosure. The RTI legislation has been operationalised since 2017. Within a relatively short time, it has shown promise of transparency, accountability, and better governance.

Ashwini then flagged a few points. This was the first time she was presenting these results beyond the RTI Commission of Sri Lanka and the data was still being finalised. She emphasised that over the past few years, the RTI law has been used across group divides, by the majority Sinhalese, minority Tamils and minority Muslims.

Kishali provided more details on the cases related to the RTI law. For one information request, two Tamil boys died in an encounter with the police in the northern province. A Sinhalese journalist filed an RTI request for reports relating to their deaths. The police reported that the boys were drunk and had attacked policemen at the command checkpoint.

However, the post-mortem report showed that the boys were not drunk, and that they had been shot in the back of their heads. The police statement was fabricated. This was not based on conjecture or speculation as it was clear how the deaths occurred. In the end, this was not simply about the right to information; it went beyond that. It led to a contentious, troubling, and controversial public discussion of state accountability and responsibility.

Kishali related another scenario where an individual applied for the report of a cabinet sub-committee in a case of alleged corruption over the construction of the defence headquarters from 2004 to 2014. The government asked the attorney general to appear before the RTI Commission to say that the matter related to national security and that the report cannot be released.

Incidentally, there is a provision in the RTI law which allows the Commission to inspect documents before releasing them to the public or applicant. The committee knew the sensitivity of the case and used the RTI law to direct the cabinet to release the report to the Commission. Because this specific provision in the RTI law existed, the attorney general advised the cabinet sub-committee had to obey the provision and release the information to the Commission.

The Commission found that the report related to corruption in procurement, not national security. They then queried the attorney general on the aspects related to national security and found that national security was too narrowly defined. As the attorney general could not justify the withholding of the information, the report was released.

Malaysia's concern about national security and its parameters in relation to the RTI law could be appeased by Sri Lanka's experience. The rulings must be legalistic. It is also important to have a well-drafted RTI law. As the processes in all matters involving national security have so far been tightly confined to legal issues rather than political issues, Sri Lanka has not faced a situation where the government replied to the Commission saying the information requested cannot be released because of national security. Going forward, it is important to note the balance between national security and the right to information.

From the survey data, it was of note that public authorities were increasingly responding only when they receive a summons from the Commission. This was troubling as it meant they were not responding to information requests at the point of entry, or even after appeals at the institutions, but only at the second appeal at the level of the Commission.

The public authorities could be responding out of fear. If they did not respond to the Commission, they could be liable to two years imprisonment. Hence the process was not organic, the officers were not responding because they understood the importance of the right. This highlighted a key issue of how to overcome the lack of knowledge or understanding among public authorities.

According to Kishali, the first challenge was procedural. Applicants spend at least one year from the time they file a request to the time a decision is made by the Commission on their appeal.

The second challenge was culture and political environment. No government would be in favour of the right to information as it exposes the government in power. But because of popular pushback, the RTI law was carefully strategised through a national process and with letters sent to provincial councils beyond the urban environment of Colombo from 2015 to 2019.

Currently, there are new challenges for the Commission to implement the right to information because of the post-COVID-19 environment. Public service is burdened by demands of the pandemic.

Question-and-Answer Session

1. Wathshlah noted that the Commission in Sri Lanka requires information requests concerning life and personal liberty of citizens to be responded to within 48 hours. She enquired if this would be a part of the restricted grounds for disclosure and how the Commission put in place mechanisms to say that this has been met. She also questioned how to ensure consistency in practice when public interest is not defined in the RTI law in Sri Lanka. When should the public interest test be carried out, and how is serious harm defined?

According to Kishali, the 48-hour rule was adopted in both India and Sri Lanka, however, there was a lack of coordination. In India, the RTI law had no provision within which the 48-hour applications could be determined. Hence, the Commission decided not to adhere to that and maintained flexibility in terms of rules and procedures in dealing with the applications, rather than as specified in the Act.

Regarding public interest cases filed under the 48-hour rule, an example can be drawn from a case last year, when the president of Sri Lanka spoke to the public and said that six prisoners on death row would be executed for drug trafficking. The last execution in Sri Lanka was in 1976. The CSOs, including international ones, filed applications under the RTI law immediately. One to the president's department, one to the Commission, asking for the names of the prisoners. The president's department asked for 14 days to respond.

Within 24 hours, the CSOs went to the Commission and said they could not wait 14 days as the president had Commissioned the executions within a week, and they demanded the information immediately. The Commission summoned an urgent meeting with the six requestor CSOs and the minister of justice. The department had raised objections, insisting that they needed the 14 days. However, the Commission disagreed, and it was ordered that the information be gathered in 24 hours. The information Commission accepted that certain prisoners did not want their names revealed to the public while some agreed. A list of death row inmates was given, however four names under the president's list were not released; the department had not been informed of the individuals who were to be executed. It was later found that the president had mentioned the executions off-the-cuff and that it was merely a political gimmick.

In another instance, people from landslide prone areas wanted access to a report that their housing areas were at risk because of landslides and rains. For some reason, the authorities did not want to release this report, which should legitimately be in the public domain. The relevant ministry was ordered by the Commission to release the report in 24 hours, and it was done. These were two instances when the 48-hour rule was invoked, the only exceptions in four years.

On the second question, the RTI law did not define public interest and left it up to the Commission to decide in their rulings, subject to certain points. For example, anything involving public funds would become a matter of public interest. One such case involved the People's Bank, one of Sri Lanka's major banks, and an allegation of misappropriation of funds regarding procurement papers. A requestor filed an application on the open tender system and on monies being paid out to private lawyers. Objections to this request were raised on the grounds that this would affect the privacy of the lawyers; the RTI law cannot be used to enquire after the amounts paid to private lawyers. The Commission however found that, since it was state funds, it was a matter of public interest.

2. Dr Cheah Swee Neo then asked how the three-part test can cover the right to personal privacy. Personal information related to public health are being released. Although names of COVID-19 patients are not given, but their designations are. Could the director-general release patient names if he wanted to?

Kishali noted that the Commission was careful in its ruling on matters related to individual privacy, such as names and addresses. For example, in the earlier case, prisoners' names were not released without their consent. Section 5(1)(a) of the Act protects statistics such as names, addresses and private details. When a journalist asked for information concerning the number of rehabilitated commanders of the Liberation Tigers of Tamil Eelam (LTTE) after the war ended in 2009, the Commission allowed the release of the information as it was merely numbers and not personal details of the individuals.

The Commission had not received any requests for information regarding COVID-19 patients, but should that happen, the same approach would be utilised. Privacy would trump other concerns. The Commission was cognisant of the possible damage that could come from the release of private information. Section 5 of the law regarding privacy was taken very seriously. For instance, in the case of admission of school students based on preferential treatment, the information was released only after careful consideration of the children's safety and privacy. Privacy would always be a major concern for the Commission.

3. Wathshlah raised the context of Malaysia, where Acts were introduced with no clear safeguards in terms of private security and who was managing the data. Moving forward, a key question would be on how to balance privacy and public interest.

Session 6: Developing the Roadmap to a Right to Information Bill in Malaysia

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WATHSHLAH NAIDU

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- This session covered multiple topics including the importance of training and awareness as well as understanding exemptions and restrategizinng the approach towards the establisment of the law.
- It was ascertainned that a reform of culture and mindset, and the relevant procedures and guidelines the civil service are subject to are both important to implementing the law.
- In drafting the law, the input and consideration of marginalised groups was deemed paramount. It was acknowledged that a review and redressal of the OSA was also necessary.
- The role of the media in educating society on the importance of the right to information was highlighted. In the context of political will, parliamentarians' education on the RTI legislation was also established.
- The importance of case studies and the possibilities on open data charters, partnerships and a national data sharing policy were discussed.
- The importance of creating a roadmap and detailed action plan on the RTI was ascertained.

Dr Punitha opened the session by stating that its objectives were to look at the way forward for RTI legislation and to see the plans for the near future. On behalf of the government, Dr Punitha clarified that they have not made any decision in terms of FOI legislation as they were still engaging with the various stakeholders. She believed this topic was rather sensitive, given the position of the OSA, but that the proposed RTI legislation from civil society groups would continue to be considered. She also stated that they are exploring a few of the options open to the government; whether the OSA can coexist with an FOI Act, whether the OSA needs to be amended or whether there should be only an FOI law. She propounded that this session was extremely important to BHEUU as policy interventions.

First, Gayathry stated that the last consultation had already provided detailed plans for the possible FOI law. As of now, the main issue she could see was how problematic would the drafting of the new law be. She proposed collaborations to raise public awareness such as the case of Sri Lanka, as the law would eventually benefit the public. Gayathry believed that for the plan to be implemented at national level, **training would need to start early and priority must be given to public awareness, not only by the CSOs but with the support of the government.** She opined that the report from last year mapped out a lot, but the government and the CSOs need to be more aware of the workings of the law. She also believed that the OSA needed to be addressed.

Dr Punitha acknowledged the importance of engagement, stating that there are two different matters regarding freedom of information that need to be understood: access to information, and access to secrets. She believed that there was a need to both **understand the exemptions and re-strategise the approach** to such matters. She advanced that engagement would have to be increased.

Next, Tuan Abdul Aziz Mohd Johdi from BHEUU stated that as mentioned by Gayathry, it is not just the government that needs to create awareness, **the media too is responsible for educating society on the importance of the right to information.** He believed that this was more than reform or political agenda, but included issues of transparency and the battle against corruption. He is also of the opinion that the FOI law must be about the sustainable development agenda and relevant information needs to be propagated to society. Additionally, he maintained that there needs to be **input from government agencies that** are close to communities, for example, local governments. He spoke of the importance of **considering marginalised groups and having them involved in these kinds of interactions** to have more input awarded to them. He believed that these two aspirations are doable within the current system and urges the media to play their role.

Dr Punitha then commented on the importance of **culture and mindse**t. She said civil servants tended to be cautious and that has almost always been the culture. She hopes that there is legislation to pave the way for them as this is a problem they currently face under the OSA.

Gayathry further opined that it takes more than a piece of paper to tell people what to do. She feels that having an open system would take much of the burden away from the civil service, as accountability is more easily managed with such a system in place. She stated that people are worried, and individual officers are concerned that they may be subject to reprimands. In terms of the OSA, she believed that they need to consider RTI and the OSA as well as other rules governing the civil service. **The procedures and guidelines they are subject to also need to be reformed** to further ease their burdens.

Next, Dr Cheah Swee Neo from SUHAKAM raised the issue of whether they believed that the Bill would be approved in parliament. She stated that last year, they had held a **session with parliamentarians;** similar sessions with them to better prepare and provide them with information on the bill would be best before it is sent in. She believed this to be necessary as they do not know the current perception of the parliamentarians towards the bill, especially since they have not been engaged yet.

Khairil from Sinar Project noted that **some of the biggest requestors of information are parliamentarians themselves.** He believed that it is important to impress upon them the advantages of the Bill being passed. Instead of having to constantly go to the government all the time to attempt to get information, having this information would help them have better chances at answering their constituents, thereby increasing their public service abilities.

Dr Punitha suggested the need to **re-sit with the committe**e that was established last year to look into the RTI law. The committee had already met several times. The topics discussed included an in-depth examination of the Selangor and the Penang FOI enactments to understand what happened and some of the challenges faced, as well as consultations with MAMPU and Chief Government Security Office (CGSO) to better understand the various types of information there are. This was all important to the discussion of exemptions as these issues have considerable impact. She agreed that there is a lot of work to be done, especially on the point of MPs as they are such a big voice. The law should be presented to them first before bringing it to Parliament and to award them a say in matters as they are involved as well.

Gayathry then asked if **case studies** would be useful to BHEUU, to which Dr Punitha agreed. She believed that similarly to the Sri Lankan cases, a look at the cases here would prove useful as individuals need to understand that issues are real. While they as a committee can sit and talk, there are no real problems or cases to be referenced in the Malaysian context, especially when consulting foreign experts.

A representative from MAMPU then stated that previous officers from MAMPU have in fact discussed having an **open data charter** and an **open data partnership** and this is an initiative the government is advancing under such schemes. She believed that the initiatives are all related to information and asked the participants if they were aware of the **national data sharing policy** under the Ministry of Communications and Multimedia. There is also one under MAMPU.

In response, Dr Punitha stated that while the data is open, it must be understood how different these types of data are and what data would be covered by the law exactly. Data journalist Kuek Ser Kuang Keng who was a frequent user of MAMPU's open data platform shared that he had personally engaged with MAMPU on multiple challenges and issues. For one, the data was not updated regularly, although, to understand their position, there may be no clear legal standing as to the disbursement of data. In his meeting with the World Bank, Kuek advanced that a major weakness was that the **civil service was scared to give out information as they do not know what can be shared and what cannot be shared.** He believed they need to know what can and cannot be disclosed as the current process involves multiple layers of clarification with their superiors. A standard law would be good to address this problem. Dr Cheah Swee Neo supported Kuek's suggestion, stating that the problem lies not only with MAMPU, but also with the statistics department. She spoke of how raw data could not be obtained, and how the only available data are the numbers published on the website.

Nalini Elumalai from Article 19 spoke of her experiences working with grassroots communities. She believed that people who are truly affected, like the Orang Asli, need to be met with as they have many stories to share on how the lack of information has affected their lives. She opined that while we are all stakeholders, engagement with these groups of people is a must. She believed that **the civil service needs to meet with the communities to take away the fear**; this extending beyond civil servants, to others who have doubts as well. She also emphasised that to **create a roadmap**, the ABCDs of what should be done needs to be spelt out along with year-by-year goals that must be achieved. In her opinion, public consultations are the most important as more engagement with various groups on these matters paint a clearer picture compared to merely talking amongst the experts.

Julaila Engan from CGSO then stated that they have **already reviewed some provisions in the OSA**. One of the matters they looked into was the classification procedure and the corresponding ICT issues, considering the rise in social media usage. She hoped the OSA will be harmonised with FOI, referencing the research done by Dr Punitha since 2016. Civil servants had worked to realise this law since then, but the decision has not been made by the government. Nevertheless, she believed that engagement with the multiple government agencies is important to realise it.

Dr Ngo Sheau Shi from USM noted that based on the experiences from Sri Lanka in the drafting of the legislation, a **more detailed law** would prove beneficial. She was of the opinion that the civil servants should continue perfecting the draft regardless of the political powers in place.

To that, Dr Punitha noted that efforts to update the draft had been ongoing since 2019. She guaranteed that the civil service would do what they had been tasked with regardless of the government of the day. A **working committee with the relevant ministries** had been set up. There is a need for more engagement with civil servants, as the National Stakeholders Consultation last November was insufficient. The government also needed more case studies, a timeline, and a concept paper. The next process would be the preparation of a cabinet paper to be tabled to the Cabinet, followed by a draft law or amendments that can be put forth to Parliament. She also believed that the research done by the CGSO on the OSA needed to be examined.

To conclude, Dr Punitha stated that the way forward would be to continue working with CIJ and report to the cabinet committee on this engagement. While there had been a lot of engagement from CIJ and other CSOs, there needs to be heightened engagement with more academics to better formulate a timeline and to ensure that substantial issues were being addressed. She believed that more case studies and better understanding of exemptions and the types of information were important to determine whether to harmonise the FOI law with the OSA, or repeal the OSA and replace it with the FOI law.

Wathshlah closed the meeting by expressing her gratitude for the commitment from BHEUU, stating that CIJ would also continue working closely with the FOE cluster. She advanced that the CSOs would continue to refine the draft law and continue the research that is already underway. She named certain collaborative partners, including Ho Yi Jian from the Jeffrey Cheah Institute who would test information accessibility and engagement in Penang and Selangor. Wathshlah said she looked forward to continuing engagement, discussions, and deliberations, and ended by thanking BHEUU and all other parties which had worked on RTI for decades.

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