





A SURVEY ON STATUTORY REFORM FOR THE RIGHT TO IMPART PUBLIC SECTOR INFORMATION IN MALAYSIA



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ABSTRACT

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The aim of the research is to propose a statutory reform for the right to impart public sector information (PSI) in Malaysia. Malaysia neither have a specific law nor constitutional provisions for the right to information. As former British colony, Malaysia inherits secrecy, sedition, printing and publication laws that impede the exercise of the right. The research conducts a survey involving respondents representing government agency, independent statutory body, civil society and academia. The survey is aimed at finding statutory measures deemed appropriate for statutory reform of the right to impart PSI in Malaysia. Prior to the survey, the research analysed various statutory measures enabling, protecting and promoting the right to impart PSI from selected Commonwealth countries. These statutory analyses become the basis for the development of the survey instrument of the research. The survey instrument covers 11 statutory measures for reform in six critical areas of law i.e. constitutional, secrecy, sedition, publication, whistleblower and evidence laws. The findings of the survey indicate that all 11 statutory measures are deemed appropriate for statutory reform of the right to impart PSI in Malaysia. The findings further indicate that statutory reform is necessary for three colonial era laws i.e. secrecy, sedition and evidence laws. Statutory reform is also found to be necessary for three other post-colonial laws i.e. constitution, publication and whistleblower laws. The findings of the survey have been used as an input in the proposed statutory reform for the right to impart PSI in Malaysia.

Contribution/ Originality: This study is one of very few studies which have investigated the right to impart PSI in Malaysia. The paper's primary contribution is the findings that statutory reform is necessary for three colonial era laws (secrecy, sedition and evidence laws) and three post-colonial laws (constitution, publication and whistleblower laws).

1. INTRODUCTION

Lor and Britz (2007) classify 'Public Sector Information' (PSI) that becomes the focal point of this research paper as the information produced or held by the Government or for the Government under law or in connection with official functions, businesses or affairs at federal, state and local government levels (Lor and Britz, 2007). According to Peled and Rabin (2011) the right to impart information is one of the preconditions of freedom of press and media. Another proponent of the right to information, Mishra (2013) links the right to impart information to the ability of the members of the public in a democratic country to seek and receive information.

Protecting and promoting the right to information in general empowers participatory democracy as this right opens up the line of communication and continuous amongst members of the public as well between the Government and its people (Centre for Media Pluralism and Media Freedom, 2016). At a more specific level, enabling, protecting and promoting the right to impart public sector information ensures transparency, accountability and answerability, which are the main façade of a responsible government. The participatory democracy principles dictate that any democratic Government should refrain from impeding the members of the public from seeking and receiving PSI deemed critical to exercise of their democratic rights either as voters or citizens (Thiru, 2016). This right is universally recognized through the formulation of Article 19 of the International Covenant on Civil and Political Rights that imposed an obligation on all elected Governments to enable, protect and promote the right to impart information in their respective countries (Ikhsan, 2014).

2. RESEARCH PROBLEM

The right to impart PSI is seriously impeded in Malaysia as Malaysia does not have Freedom of Information Act or Right to Information Act which enables, protect and promote the right to information. Neither does Malaysia recognize the right to information as a fundamental right in its constitution. While Article 10 of Malaysian Federal Constitution guarantees freedom of opinion and expression as fundamental rights, the Article stops short of recognizing the right to information as among the right. This lacuna is evidenced by the latest decision of the Court of Appeal in the case of *Haris Fatillah B Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] MLJU 45 that refused to recognize that the right to information is implicit in the freedom of expression guaranteed under Article 10 (1)(a) of the Federal Court.

In the absence of statutory and constitutional protections, *bona fide* members of the public who impart PSI in the interests of the public are subject to criminal prosecutions under the following laws:

- i) Release or disclosure of official secret: s 8(1)(c),(e),(d) of Official Secret Act 1972 (Act 88).
- ii) Issuing, circulating and distributing prohibited publication: s 8(2) of Printing Presses Publication Act 1984 (Act 301).
- iii) Issuing and circulation of court prohibited publication: s 10(1) of Sedition Act 1948 (Act 15).

While it has been argued that the main purpose of enacting these laws is to protect public order and safety as well as the national interest and security, these legislations however have the effects of impeding the public right to impart PSI (Anuar, 2014).

The legal impediment to the right to impart PSI in Malaysia also arises from the prohibition imposed by Act 711 against whistleblower imparting information on any improper conduct in the public sector, directly to the public. Act 711 strictly requires the whistleblower to disclose any misconduct to an enforcement agency, department or other body established by the Government. In addition, s 11(1)(d) of Act 711 gives the statutory power to the Government enforcement agencies to revoke the statutory protection provided to the whistleblower in circumstances where the information disclosed questioning the merits of the Government policy. Section 6(1) of Act 711 further impede the right to impart information in Malaysia as it does not protect disclosure of any information that is prohibited under any statute currently in force in Malaysia (Johan, 2013). Members of the public who imparts any information in contravention to the Official Secret Act 1972 (Act 88), the Penal Code (Act 574), the Printing Presses Publication Act 1984 (Act 301), the Sedition Act 1948 (Act 15) and the Evidence Act 1950 (Act 56), will find themselves not to be protected under Act 711.

Further, under Malaysian evidence law, s 123 of Act 56 prohibits the production in Court of any unpublished official records pertaining to affairs of State, or to give any evidence derived there from, except with the permission of the Head of Department of the relevant Government office, subject further to the consent from the relevant Minister. Section 124 of Act 56 also prohibits a Government servant from being compelled to disclose or answer any question relating to official communication in court. The Act vests the Head of Department of the relevant

Government office with the power to decide whether or not disclosure of an official communication is prejudicial to public interest. To illustrate the problem arising from Act 56, the Court of Appeal in the case of *Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors* [2013] 1 MLJ 61 supports the Minister's decision not to disclose official documents to the respondent since that there is no law which recognizes the citizen's right to information.

Based on the problem highlighted above, it is deemed significant for Malaysia to undergo a statutory reform for the right to impart PSI in this country.

3. LITERATURE REVIEW

Literature on the right to information in Malaysia widely report the *lacuna* in this area of law due to the absence of constitutional provisions and *sui generis* law at federal level to enable, protect and promote the right to information (Venkiteswaran, 2010; Ikhsan, 2014; Eusoff, 2018). Haas (2016) reports on the Malaysian Official Secrets Act 1972 that prohibits the right to impart PSI classified by the Government as confidential, regardless of the public interest justifications. Steven (2016) reviews the Freedom of Information Enactment introduced by Selangor and Penang, the only two states in Malaysia that enact freedom of information law. Steven comments that, being the laws enacted at the State level, the Enactments only apply to the two States and are subject to the federal laws, including those which impede the right to information.

At the international level, literature published in the first decade of the 21st century widely report on various initiatives undertaken by inter-governmental and non-governmental organisations to reform the right to information. Daruwala (2003); Banisar (2006) and Ackerman and Sandoval-Ballesteros (2006) report on the initiatives to enable, protect and promote the right to information undertaken by the UN Special Rapporteur on Freedom of Opinion and Expression, the Commonwealth Human Rights and the Open Society Justice. These leading initiatives have established the general principles of the right to impart public sector information. Apart from the establishment of the international standards on the right to information, Mendel (2008) reports that the Commonwealth Secretariat has introduced two model laws, known as Model Law on Access to Information for Africa and Draft Model on Freedom of Information Bill. The general principles and the model laws have been adapted in the right to information law of more than 100 countries around the world.

At the Commonwealth level, Nasu (2015) and Transparency International (2014) review the right to impart information in selected Commonwealth countries. From their studies, it was found that in the UK, Canada and New Zealand, members of the public can impart most of the information otherwise classified as sensitive information under the Malaysian. Another study by McGinness (1990) reports that Canada and New Zealand have repealed Official Secrets Act, a colonial law introduced by the UK. Bartlett and Everett (2017) also report on the classification guidelines that enable disclosure of secret and official information either by merit/case by case basis or by releasing it using secured redacted format that have been introduced by Canada and New Zealand. From the above literature, it is discovered that UK, Canada and New Zealand have either repealed or amended the Official Secrets Act that impede the right to impart PSI in their countries.

Similar to secrecy law, Palmer *et al.* (2007) report that that the UK and New Zealand have repealed sedition law, while Canada has narrowed down the definition of seditious offences. On the contrary, Balakrishnan (2016) reports that the Malaysian Government has decided to retain and strengthen the application of sedition law, that could further impede the right to impart PSI in Malaysia. With regards to the protection of the whistleblower, Sharma *et al.* (2018) work indicates that the UK, Canada and New Zealand whistleblower laws allow the employees to disclose wrongdoings direct to the public apart from the authorised body. The repealed or modification of the secrecy and sedition laws could further enable, protect and promote the right to impart PSI among the members of the public.

Literature review strongly suggests that the UK, Canada and New Zealand have undertaken substantive statutory reform to their secrecy and seditious laws, which have the effects of enabling, protecting and promoting the right to information (Liang, 2018). In contrast, similar statutory reform is yet to take place in Malaysia as evidenced by the absence of constitutional rights and *sui generis* law to the right to information, along with the presence of a myriad of laws that impede the right. Due to the identified gaps, it is high time for a statutory reform for the right to impart PSI in Malaysia to be proposed. In order to propose such reform, there are two research questions that need to be addressed by this research:

- i) What are the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI in Malaysia?
- ii) How should the statutory reform to the right to impart PSI in Malaysia be formulated?

4. RESEARCH METHODOLOGY

The research is classified as legal research as the research problem is derived from the fact that there is lacuna in the right to information law in Malaysia. The research is designed as an applied research as its objective is to propose a statutory reform for the right to impart PSI in Malaysia. The research adopts inductive approach by using a two-pronged research questions to narrow down the scope of the research. In terms of data collection, the research adopts a postpositivist research design by employing both quantitative and qualitative data collection methods, that are divided into two phase.

In the first phase of data collection, a library research was conducted to analyse statutory measures adopted by selected Commonwealth countries that are known to enable, protect and promote the right to impart PSI. The UK, Canada and New Zealand were chosen as sample countries since these countries share similar legal system with Malaysia and have inherited similar colonial-era legislation. Altogether, 11 statutes were collected for statutory analysis in Table 1, listed below:

Table-1. Statutes enabling, protecting and promoting the right to impart PSI from selected commonwealth countries.

United Kingdom	Canada	New Zealand
<ul style="list-style-type: none"> • Freedom of Information Act 2000 c. 36 • Public Interest Disclosure Act 1998 	<ul style="list-style-type: none"> • Access to Information Act R.S.C., 1985, c. A-1 • Public Servants Disclosure Protection Act S.C. 2005, c. 46 • Security of Information Act (RSC 1985 c O-5) • National Defence Act (R.S.C., 1985, c. N-5) • Canada Evidence Act (R.S.C., 1985, c. C-5) 	<ul style="list-style-type: none"> • Official Information Act 1982 • Crimes (Repeal of Seditious Offences) Amendment Act 2007 • Evidence Act 2006 • Protected Disclosures Act 2000

In the second phase of data collection, self-administered survey questionnaires were distributed by the researchers to the respondents who are representatives of government agency, independent statutory body, society and academia. The purpose of the survey was to determine the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI in Malaysia. A cross-sectional survey was conducted between 1 January 2017 to 1 April 2017 with 20 legal officers from the Attorney General's Chambers and Malaysian Anti-Corruption Commission who agreed to participate. For data triangulation purpose, 20 respondents who are civil rights activists and academic experts in constitutional law and human rights law were also surveyed. The respondents were selected using stratified, purposive sampling based on their occupational roles and expertise in enforcement, human rights and constitutional laws.

The survey questionnaires contained 11 variables that was developed based on the analyses conducted on the statutes of the selected countries. Prior to data collection, the survey instrument was validated by language and

content experts. A pilot survey was conducted to ensure trustworthiness of the survey instrument. The language of instruction for the survey was English and the researchers distributed the survey forms to the respondents by hand. Each respondent was allocated approximately thirty minutes to answer the self-administered survey.

The statutes were analysed using doctrinal and content analysis by interpreting textual material. Both doctrinal and content analyses apply positive analysis approach to understand what are the statutory measures adopted by the selected countries to enable, protect and promote the right to PSI in their respective countries. Statistical Package for Social Science (SPSS) software was used as a statistical tool for quantitative data analysis. The survey data was analysed using descriptive and statistical data analysis. The nominal data was analyzed using descriptive analysis to find the Mode. The ordinal data was statistically analyzed to rank and to find the Median for each statement in the Likert scale. The Mean was used to describe the scale. The survey findings were used as the main input for the proposed statutory reform for the right to impart PSI. In formulating the statutory reform, a normative analysis approach was used to determine what are the statutory measures that ought to be adopted in the statutory reform for the right to impart PSI in Malaysia.

5. FINDINGS

This section reports the findings of the survey conducted with 40 respondents to determine the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI. The respondents comprised of 10 officers from the Attorney General’s Chambers; 10 officers from Malaysian Anti-Corruption Commission, 10 civil rights activists and 10 academic experts in constitutional law and human rights law from local universities.

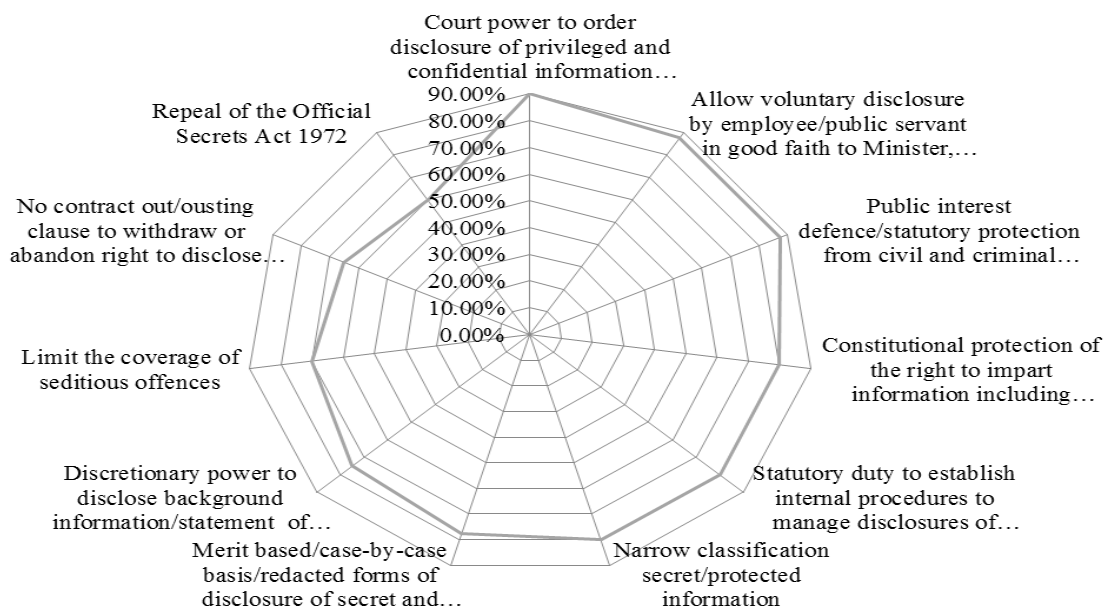


Figure-1. Distribution of percentage of “Agree” and “Strongly Agree” responds to 11 items measuring statutory measures deemed appropriate to enable, protect and promote the right to impart PSI.

Figure 1 illustrates the distribution of percentage of “Agree” and “Strongly Agree” responds to the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI. Out of 11 items measuring the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI, 6 items received the percentage of agreement above 80%. Those items are: i) Court power to order disclosure of privileged and confidential information in judicial proceedings; ii) Allow voluntary disclosure by an employee/public servant in good faith to Minister, Ombudsmen, his employer, other responsible person and public; iii) Public interest defence/statutory protection from civil and criminal liability for protected disclosure; iv) Constitutional protection of the right to impart information including freedom of the press and other media communication; v) Statutory

duty to establish internal procedures to manage disclosures of PSI; vi) Narrow classification secret/protected information.

For 5 other items in the survey questionnaires, the percentage of agreement ranged between 60% to 77.5%: i) Merit-based/case-by-case basis/redacted forms of disclosure of secret and official non-sensitive information; ii) Discretionary power to disclose background information/statement of the reason for administrative/policy decision making; iii) Limit the coverage of seditious offences; iv) No contract out/ousting clause to withdraw or abandon the right to disclose information; v) Repeal of the Official Secrets Act 1972. From the above responds, it is found that all variables received majority agreement i.e. above 50%, which indicate that they are deemed as appropriate to enable, protect and promote the right to impart PSI in Malaysia.

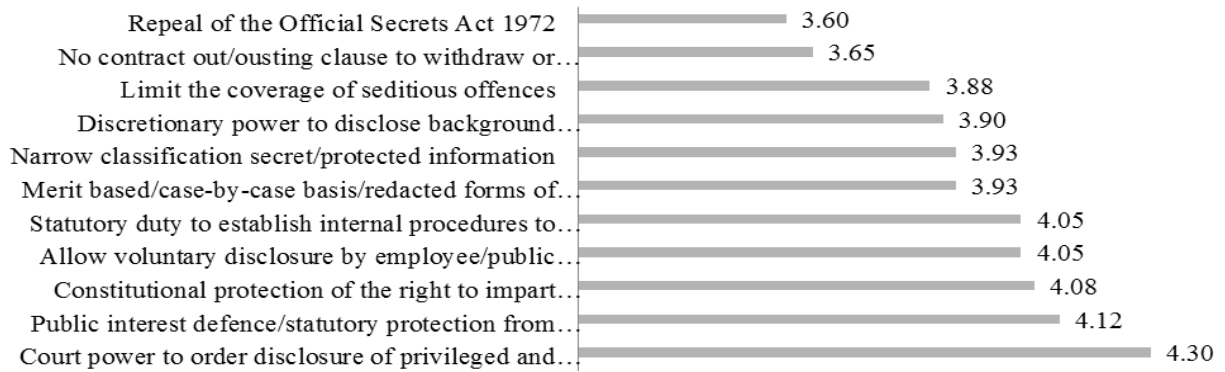


Figure-2. Mean Value of the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI.

Figure 2 illustrates the Mean Value of the statutory measures deemed appropriate to enable, protect and promote the right to impart PSI. In term of the Mean Value, none of the items received the Mean Value of 5.00 i.e. “Strongly Agree” respond. Five items with the highest Median Value only received “Agree” respond ranging from 4.05 to 4.30 Median Value. Six other items received below 4.00 Median Value ranging from 3.60 to 3.93, which indicate that the respondents are not totally in agreement as to the appropriateness of these statutory measures to enable, protect and promote the right to impart PSI.



Figure-3. Total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the government agency to enable, protect and promote the right to impart PSI.

Figure 3 illustrates the total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the government agency to enable, protect and promote the right to impart PSI. The respondents from the government agency are found to be neutral to the repeal of the Official Secrets Act 1972. None of the items

received “Strongly Agree” respond from the respondents from the government agency. Out of 11 items, only 6 items received “Agree” respond from the respondents from the government agency.

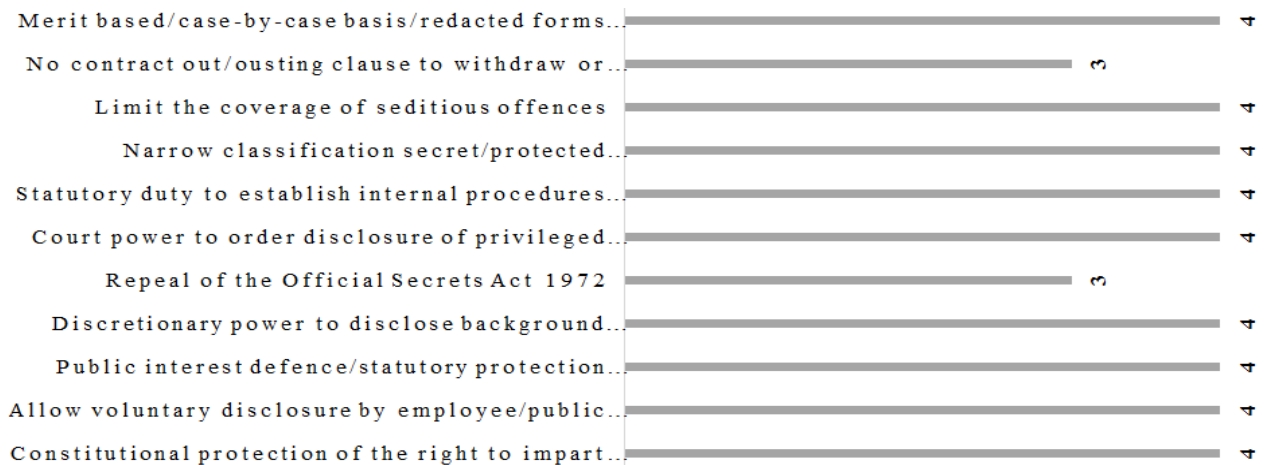


Figure-4. Total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the independent statutory body to enable, protect and promote the right to impart PSI.

Figure 4 illustrates the total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the independent statutory body to enable, protect and promote the right to impart PSI. The respondents from the independent statutory body are found to be neutral to the repeal of the Official Secrets Act 1972 and abolition of contract/ousting clause to withdraw or abandon the right to disclose information. Similar to the respondents from the government body, none of the items received “Strongly Agree” respond from the respondents from the independent statutory body. However, nine out of 11 items received “Agree” respond from the respondents from the independent statutory body.

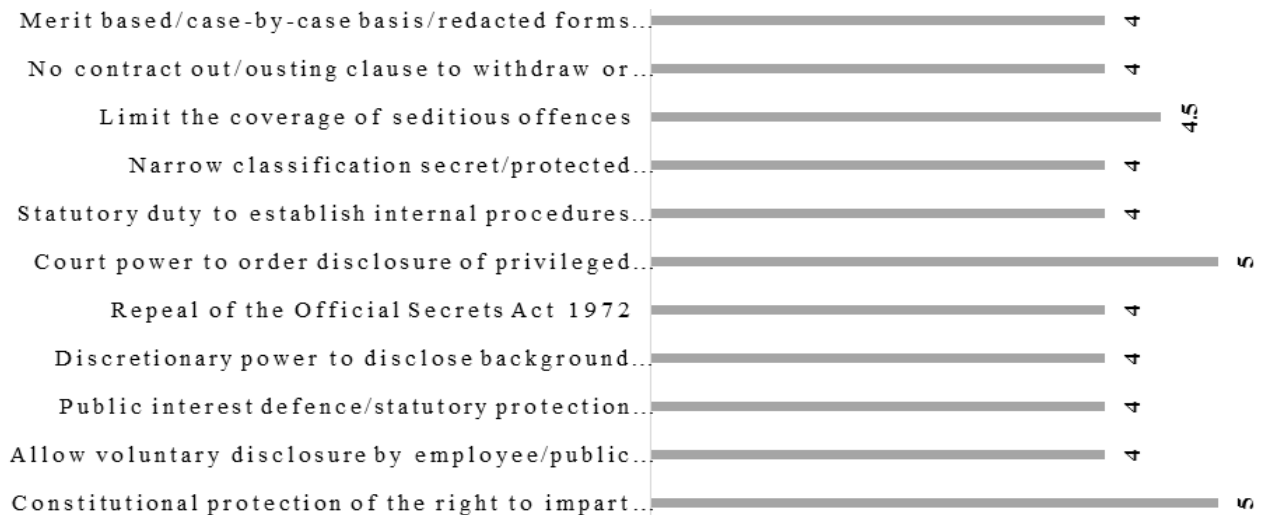


Figure-5. Total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the civil society to enable, protect and promote the right to impart PSI.

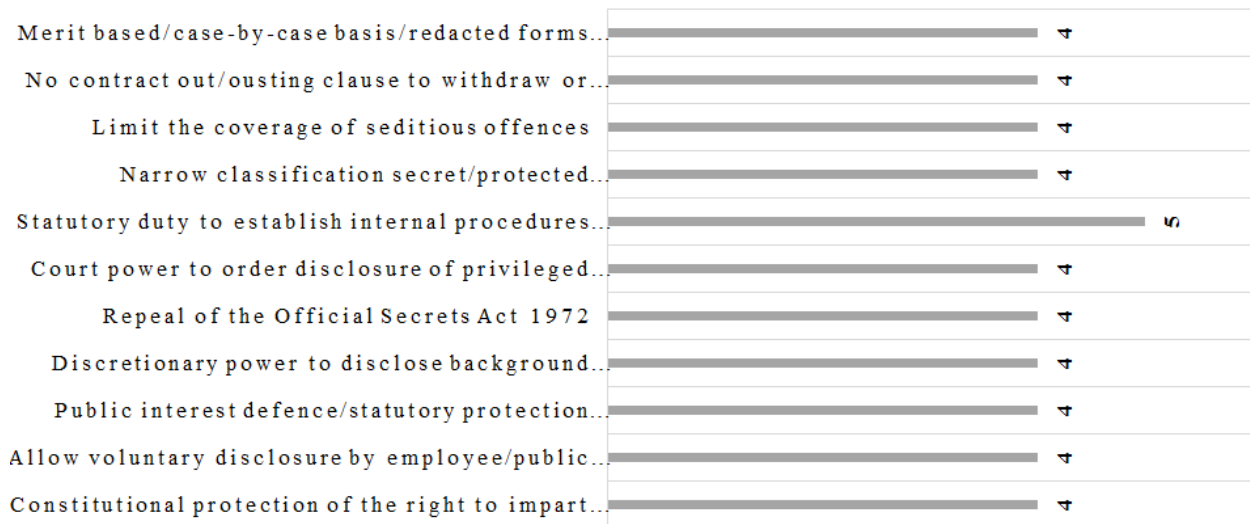


Figure-6. Total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the academia to enable, protect and promote the right to impart PSI.

Figure 5 and Figure 6 illustrate the total Median of 11 items measuring statutory measures deemed appropriate by the respondents from the civil society and academia to enable, protect and promote the right to impart PSI. Contrary to the respondents from the government agency and independent statutory body, the respondents from civil society and academia are found to be fully in agreement to all statutory measures to enable, protect and promote the right to information. The findings suggest that the respondents from the civil society and academia are more supportive to the statutory measures that are listed in the survey questionnaires, compared to the respondents from the government agency and statutory body.

6. PROPOSAL

This section proposes the statutory reform for the right to impart PSI in Malaysia. In formulating the reform, the research focuses on six areas of law that have been identified as impeding the right to impart PSI in Malaysia. The research posits that before a *sui generis* law on the right to PSI can be enacted in Malaysia, it is necessary to amend the existing laws that have been identified as impeding the right to impart PSI. The proposal for amendment includes adapting various statutory measures deemed appropriate to enable, protect and promote the right to impart PSI in Malaysia. The proposed statutory reform is discussed below.

6.1. Federal Constitution

The research proposes one area of reform involving the Federal Constitution by incorporating the right to information into the Federal Constitution similar to the Human Rights Act 1998 (UK) and Bill of Rights Act 1990 (NZ). To give effect to the proposal, Article 10, Federal Constitution should be amended based on:

- i) Art 14, Bill of Rights Act 1990 (NZ): constitutional right to seek, receive and impart information New Zealand Bill of Rights Act 1990.
- ii) Art 10(1), Human Rights Act 1998 (UK): everyone has the right to freedom of expression that include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

These two provisions will protect the right to impart PSI from any interference by public authority in any medium of communication.

6.2. Whistleblower Protection Act 2010 (Act 711)

The research proposes seven areas of statutory reform involving Act 711. The first proposal is to amend s 6(1) Act 711. To give effect to this proposal, a new section should be introduced based on s 10(1)(a) -(c), Public Disclosure Act 2000 (NZ). The new section will enable disclosure to be made to the public, if the person or appropriate authority to whom the disclosure was first made:

- i) Has decided not to investigate the matter.
- ii) Has decided to investigate the matter but has not made progress with the investigation within a reasonable time.
- iii) Has investigated the matter but has not taken any action in respect of the matter.

The second proposal is to introduce a new section based on s 16(a) & (b), Public Servants Disclosure Protection Act 2005 (Canada). This new section will enable disclosure direct to the public if:

- i) There is insufficient time to make the disclosure to the designated parties.
- ii) The subject-matter of the disclosure is an act or omission that constitutes a serious offence under the Act.
- iii) Constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

The third proposal is to amend the proviso to s 6(1), Act 711. This proposal is given effect by substituting the existing provision with an overriding provision:

“The statutory right and protection given under Act 711 shall prevail over other laws currently in force, provided the disclosure is made in the public’s interest.”

By amending the proviso, the right to impart PSI will be protected if the disclosure is made in the interest of the public.

The fourth proposal is to introduce a new section based on s 15(1), Security of Information Act 1985 (Canada). The new section enables the court to apply the public interest defence test i.e. the public interest in the disclosure outweighs the public interest in non-disclosure. This proposal will complement the proposed amendment made to the proviso to s 6(1), Act 711.

The fifth proposal is to introduce a new section based on s 15(4), SIA 1985. The new section will provide a list of factors to be considered by the judge in deciding whether the public interest in the disclosure outweighs the public interest in non-disclosure. These list of factors are:

- i) Whether the person had reasonable grounds to believe that the disclosure would be in the public’s interest;
- ii) The public interest intended to be served by the disclosure.
- iii) The extent of the harm or risk of harm created by the disclosure.
- iv) The existence of exigent circumstances justifying the disclosure.

This section will provide additional protection to the right of the member of the public to impart PSI as it takes into account the accused’s reasonable believe and good faith.

The sixth proposal is to repeal s 11(1) (d), Act 711. The section allows an agency to revoke the whistle-blower protection on the person who disclosed the information that involves questioning the merits of government policy. The section therefore discouraged member of the public from questioning the merits of government policy. By repealing this section, it will promote the right to impart PSI among the members of public who are critical of the policy of the government.

The final proposal for reform of Act 711 is to introduce a new section based on s 23(1) & (2), Public Disclosure Act 2000 (NZ). This section prohibits employers from inserting an ousting clause which requires their employees/contractors to waive their right to disclose information. This new section will promote the right to impart PSI among the employers especially in the public sector,

6.3. Official Secret Act 1972 (Act 88)

The research proposes six areas of statutory reform involving Act 88. The first proposal is to amend Act 88. The amendment which is based on s 4(1), Security Information Act 1985 (Canada) will narrow down the category of protected information. The amendment will protect the right to impart PSI as the Act will only cover wrongful communication by a person who has in his possession or control any secret official code word, password, sketch, plan, model, article, note, document or information relating to a prohibited place.

The second proposal is to introduce a new section incorporating the “Harm Test” similar to s 31(1), Freedom of Information Act 2000 (UK). The new section will also protect the right to impart PSI as this section imposes an evidential burden on the Prosecutor that the release or disclosure of an official secret is prejudicial to the specified interests of the State. This includes areas relating to defense, international relations, economy, crime prevention, commercial interests, and immigration.

The third proposal is to introduce a new section based on s 3(1)(a) –(n), SIA 1985. This new section will provide a list of actions that amount to a purpose that is prejudicial to the safety or interest of the State. Among those acts are:

- i) To advance a political, religious or ideological purpose, objective or cause or to benefit a foreign entity or terrorist group.
- ii) Adversely affects the economic stability, the financial system or financial market without reasonable economic or financial justification.
- iii) Impairs or threatens the capability of the armed forces/military service, or any part of it.
- iv) Impairs or threatens the ability of the Government or a Bank, to protect against, or respond to, economic or financial threats or instability.
- v) Impairs or threatens the capability of the Government to conduct diplomatic or consular relations, or conduct and manage international negotiations.
- vi) Develops or uses anything that is intended to or can cause death or serious bodily injury to a significant number of people by whatever means.

This proposed new section will protect the right to impart PSI as the accused can only be convicted if he/her action is listed under the section.

The fifth proposal is to introduce a new regulation of Act 88. The regulations is based on Para. 14, Part II of the UK Government Security Classifications 2014 (GSC). The new section will enable the right to impart PSI as it encourages open disclosure of PSI as follows:

- i) Information classified as “Official” is likely to be releasable unless it is subject to statutory exemptions.
- ii) Where appropriate, official non-sensitive information should be published for re-use.
- iii) All Official Information will be transferred to the National Archives as open records wherever possible, after 20 years and in accordance with the Public Records Act.
- iv) Assessment of Disclosure of ‘Secret’ information is on a case-by-case basis. Some information might be releasable in a securely redacted format.
- v) ‘Official Information’ is to be distinguished from ‘Official Sensitive’ information. Where appropriate, non-sensitive information should be published for reuse.

The sixth proposal is to introduce a statutory guidelines based on the New Zealand Guidelines for Protection of Official Information and the UK Government Security Classification System. These guidelines assist the Head of a Department in deciding whether or not to disclose unpublished official records relating to affairs of State. These guidelines also assist the Head of Department in identifying the circumstances where the public interest would suffer by disclosure of the official communication. By introducing the guidelines, it will enable the right to impart PSI among the Head of Department.

The final proposal is to introduce a new regulation of Act 88 based on Para 4.5, Government Security Classification System (NZ). The new regulation will limit the duration of the protective marking and set up review procedures. The new regulation will promote the right to impart PSI as the PSI can be released after certain period of time.

6.4. *Printing Presses and Publications Act 1984 (Act 301)*

The research proposes two areas of statutory reform involving Act 301. The first proposal is to amend s 7(1) of Act 301 by omitting the word “in his absolute discretion” and to insert a provision that allows a judicial review to challenge the Minister’s decision made under s 7(1) of Act 301. The amendment will protect the right to impart PSI as the Minister’s decision which is deemed improper or unreasonable can now be challenged in court and subject to judicial review.

The second proposal is to amend s 8(2) of Act 301. The section declares as an offence any person who issues, circulates and distributes any prohibited publication. The proposed amendment to the section is to include a public interest defence based on s 15(1), Security of Information Act 1985 (Canada). The amendment which was earlier proposed as a new section in Act 711, will protect the right to impart PSI as it provides a statutory defence that the public interest in disclosure of the prohibited information outweighs the public interest in non-disclosure.

6.5. *Sedition Act 1948 (Act 15)*

The research proposed one statutory reform of Act 15. The proposed reform is by way of amending s 10(1), Act 15 on the court power to prohibit the issuing and circulation of prohibited publication. The amendment is made by substituting the word “shown to the satisfaction of the court” with the word “proven”, and omitting the phrases “be likely to” and “appears to”, to be read as follows:

Whenever on the application of the Public Prosecutor it is proven that the issue or circulation of a seditious publication is or if commenced or continued would lead to unlawful violence, or have the object of promoting feeling of hostility between different classes or races of the community, the court shall make an order prohibiting the issuing and circulation of that publication.

The proposed amendment will protect the right to impart PSI as the public prosecutor bears an evidential burden of proving their case under Act 15 in accordance to the specified criteria, before a judge could make an order prohibiting the issuing and circulation of the seditious publication.

6.6. *Evidence Act 1950 (Act 56)*

The research proposed four areas of statutory reform involving Act 56. The first proposal is to amend s 123 and s 124 of Act 56. The amendment to these sections is based on s 37(4.1) & (5), of the Evidence Act 1985 (Canada). The amendment will provide the court with a discretionary power to order disclosure of the information, if the public interest in disclosure outweighs in importance the specified public interest.

The second proposal is to introduce a new section based on s 69(2) (a)-(c), Evidence Act 2006 (NZ). The amendment will provide the judge with a discretionary power to order disclosure if the Judge considers that the public interest in the disclosure in the proceeding of the privileged communication or confidential information is outweighed by the public interest, including for maintaining activities that contribute to or rely on the free flow of information.

The amendment and the introduction of a new section as proposed above, will enable the right to impart PSI as the judge is vested with a broader discretionary power to order the disclosure of official communication and affairs of State during the court proceedings.

The third proposal is to introduce a new section based on s 21(2) (a) & (b), Access to Information Act 1985 (Canada). This new section will make it mandatory for the Head of Department of a government institution to

disclose any record that contains an account of, or a statement of reasons for a decision that he/she made in the exercise of a discretionary power or an adjudicative function that affects the rights of a member of public.

The final proposal is to introduce a new section based on s 35(2), Freedom of Information Act 2000 (UK). This new section makes it mandatory for the Government to disclose statistical or background information used by the Government to decide on a particular policy.

The new sections will enable the right to impart PSI as the Head of Department in the Government agencies is under obligation to disclose the information that is covered under the sections.

7. CONCLUSION

Overall, the research meets its objective to propose a statutory reform for the right to impart PSI in Malaysia. The statutory reform was adapted from the statutory measures contained in 11 statutes that enable, protect and promote the right to information from three Commonwealth countries. The proposed statutory reform should take place before the enactment of a *sui generis* law on the right to information, as the latter should not operate in silo and need to be harmonized with the existing laws.

The proposed reform is significant as it will encourage participatory democracy among the members of public. As the proposed statutory reform also involves removing legal impediments to the right to impart PSI, it will allow timely released of data and information deemed critical for public knowledge and discourse. By adapting various statutory measures enabling, protecting and promoting the right to information from the UK, Canada and New Zealand, the statutory reform can be regarded as feasible and viable to be implemented.

It is anticipated that the proposed statutory reform is beneficial not only to the member of public who will be vested for the right to impart PSI, but also to the Government. The statutory reform will enhance the public trust and confidence in the Government. This is due to the fact that by having in place statutory measures that enable, protect and promote the right to impart PSI, it will ensure Government transparency and good governance.

As the research is focused on statutory reform on the existing laws, the proposal does not include formulation of a new, specific or *sui generis* law on the right to information. Hence, future research should focus on developing a *sui generis* law for the right to information, whereby the right to impart PSI will become a part of the proposed law.

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REFERENCES

- Ackerman, J.M. and I.E. Sandoval-Ballesteros, 2006. The global explosion of freedom of information laws. *Administrative Law Review*, 58(1): 109.
- Anuar, M.K., 2014. Defining democratic discourses: The mainstream Press. In K. B. T. Khoo & F. Loh (Eds.), *Democracy in Malaysia Discourses and Practices*. London: Routledge. pp: 138.
- Balakrishnan, B.N., 2016. Kenya and more commonwealth countries that have abolished their sedition laws. Available from <https://says.com/my/news/commonwealth-countries-that-have-abolished-the-sedition-act>.
- Banisar, D., 2006. Freedom of information and access to government record laws around the world. Available from http://www.freedominfo.org/documents/global_survey2006.pdf.
- Bartlett, G. and M. Everett, 2017. The official secrets acts and official secrecy. Available from <http://researchbriefings.files.parliament.uk/documents/CBP-7422/CBP-7422.pdf>.

- Centre for Media Pluralism and Media Freedom, 2016. Media pluralism monitor: Impediments to access to information in Europe (World Press Freedom Day 2016). Available from <http://journalism.cmpf.eui.eu/discussions/world-press-freedom-day-2016>.
- Daruwala, M., 2003. Open sesame: Looking for the right to information in the commonwealth. Available from http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/chogm_2003_report.pdf.
- Eusoff, N.S., 2018. Expedite freedom of information law creation, lawmakers told. The Edge. Available from <http://www.theedgemarkets.com/article/expedite-freedom-information-law-creation-lawmakers-told>.
- Haas, B., 2016. In Malaysia, almost everything is an 'official secret'. DW.Com.
- Ikhsan, M.I., 2014. Legal hurdles in freedom of information in Malaysia. Available from <http://dx.doi.org/10.2139/ssrn.2470291>.
- Johan, S., 2013. Goodbye to whistleblowers. The Star. Available from http://www.malaysianbar.org.my/members_opinions_and_comments/goodbye_to_whistleblowers.html.
- Liang, I.H., 2018. Freedom of information in Malaysia. UM Law Review. Available from <https://www.umlareview.com/lex-in-breve/freedom-of-information-in-malaysia3869206>.
- Lor, P.J. and J.J. Britz, 2007. Is a knowledge society possible without freedom of access to information? Journal of Information Science, 33(4): 387-397. Available at: <https://doi.org/10.1177/0165551506075327>.
- McGinness, J., 1990. Secrecy provisions in commonwealth legislation. Federal Law Review, 19(1): 49-89. Available at: <https://doi.org/10.1177/0067205x9001900103>.
- Mendel, T., 2008. Freedom of information: A comparative legal survey. Available from http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf.
- Mishra, A., 2013. Right to information empowerment or abuse. Available from <http://lawmantra.co.in/right-to-information-empowerment-or-abuse-2/>.
- Nasu, H., 2015. State secrets law and national security. International & Comparative Law Quarterly, 64(2): 365-404. Available at: <https://doi.org/10.1017/s0020589315000056>.
- Palmer, G., W. Young, H. Aikman and P.J. Burrows, 2007. Reforming the law of sedition. Wellington, Law Commission New Zealand, 17: 54.
- Peled, R. and Y. Rabin, 2011. The constitutional right to information. Columbia Human Rights Law Review, 42(2): 357.
- Sharma, J., S. Kanojia and S. Sachdeva, 2018. Comparison of whistle-blower protection mechanism of select countries. Indian Journal of Corporate Governance, 11(1): 45-68. Available at: <https://doi.org/10.1177/0974686218769198>.
- Steven, S.C.K., 2016. Revisiting Penang's freedom of information enactment (Part I) Malaysiakini. Available from <https://www.malaysiakini.com/news/353298>.
- Thiru, S., 2016. Misuse of the communications and multimedia act must end. Available from <https://www.malaysiakini.com/news/332239>.
- Transparency International, 2014. Classified information: A review of current legislation across 15 countries and EU. Available from <http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf>.
- Venkiteswaran, G., 2010. Freedom of information in Malaysia: Turning the secrecy regime into a more open one. Available from http://www.asef.org/images/stories/ccs4/ws%206_gayathry%20venkiteswaran%20malaysia.pdf.

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