From Literalism to Liberalism: Judicial Interpretation of Freedom of Information in Malaysia and Way Forward

Daripada Literalisme kepada Liberalisme: Tafsiran Kehakiman Mengenai Hak Kebebasan Maklumat di Malaysia dan Langkah ke Hadapan

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Received: 26 September 2024; **Revised**: 15 February 2025 **Accepted:** 06 May 2025; **Published:** 16 May 2025

To cite this article (APA): Ikhsan, M. I., Ku Yusof, K. M. A. A., Kamaruddin, S., Salleh, R. @ M.., Herman, H. @ R.., & James Matah, L. (2025). From Literalism to Liberalism: Judicial Interpretation of Freedom of Information in Malaysia. *Perspektif Jurnal Sains Sosial Dan Kemanusiaan*, *17*(1), 152-165. https://doi.org/10.37134/perspektif.vol17.1.10.2025

To link to this article: https://doi.org/10.37134/perspektif.vol17.1.10.2025

Abstract

The essence of a democratic society is closely tied to freedom of information. However, in the Malaysian context, no specific statute explicitly grants this right to the public. While the Constitution's Article 10(1) ensures the right to freedom of speech and expression, it does not explicitly cover the right to information despite international recognition. This article aims to delve into judicial interpretations to determine whether freedom of information is constitutionally protected in Malaysia. It explores two conflicting approaches to constitutional interpretation, namely the literal and liberal methods, which yield contrasting outcomes. This study employs a doctrinal approach in analysing relevant written law, court judgements and previous literature on freedom of information. The analysis concludes that there has been a noticeable shift in the judiciary towards a more receptive stance on liberal interpretation in recent years. Nevertheless, enacting a federal statute explicitly addressing freedom of information is deemed the most effective course of action to safeguard this right in Malaysia and remove the ambiguities of judicial interpretation.

Keywords: freedom of information; Federal Constitution; judicial interpretation; literal and liberal interpretation; judicial activism

Abstrak

Ciri masyarakat demokrasi berkait rapat dengan konsep kebebasan maklumat. Walau bagaimanapun, dalam konteks Malaysia, pada masa ini tiada undang-undang khusus yang secara jelas memberikan hak ini kepada orang ramai. Walaupun Perkara 10(1) Perlembagaan memastikan hak kebebasan bersuara dan berekspresi, ia tidak secara khusus meliputi hak untuk mendapatkan maklumat walaupun hak tersebut telah diiktiraf di peringkat antarabangsa. Artikel ini bertujuan untuk menyelidiki tafsiran kehakiman untuk menentukan sama ada kebebasan maklumat dilindungi oleh perlembagaan di Malaysia. Ia meneroka dua pendekatan yang bercanggah terhadap tafsiran perlembagaan, iaitu kaedah literal dan liberal yang menghasilkan hasil yang berbeza. Kajian ini menggunakan kaedah doktrinal dalam menganalisis undang-undang bertulis, keputusan mahkamah dan sorotan kajian terdahulu tentang kebebasan maklumat. Analisis tersebut menyimpulkan bahawa terdapat peralihan yang ketara dalam badan kehakiman ke arah sikap yang lebih terbuka terhadap tafsiran liberal sejak beberapa tahun

kebelakangan ini. Namun begitu, penggubalan undang-undang persekutuan yang khusus menangani kebebasan maklumat dianggap sebagai tindakan paling berkesan untuk melindungi hak ini di Malaysia dan menghilangkan kekeliruan tentang tafsiran kehakiman.

Kata kunci: *hak kebebasan maklumat; Perlembagaan Persekutuan; tafsiran kehakiman; tafsiran literal dan liberal; aktivisme kehakiman*

INTRODUCTION

The concept of freedom of information (FOI) includes the public's entitlement to seek information from the government and the government's responsibility to disclose information (Mitee, 2017; Paterson, 2004) regularly. Article 19 of the Universal Declaration of Human Rights (UDHR) articulates the right to information as an extension of the freedom of opinion and expression. It allows individuals to actively seek, receive and share information and ideas through any media without geographical restrictions (Howie, 2018). Additionally, the International Covenant on Civil and Political Rights 1966 acknowledges freedom of information in Article 19 with the understanding that this right is not absolute. Certain essential limitations are permissible, such as safeguarding the rights or reputations of others, national security, public order *(ordre public)*, public health or morality. It is emphasised that these restrictions should be narrowly applied to prioritise the broad exercise of the right (O'Flaherty, 2012). Other international instruments also recognise the right to information as a foundational freedom, including Article 23 of the ASEAN Human Rights Declaration and Article 22, paragraph (c) of the Cairo Declaration on Human Rights in Islam. This illustrates the widespread acceptance of freedom of information as a democratic standard, transcending diverse socio-political contexts in countries globally (Ikhsan & Matah, 2022).

Currently, Malaysia lacks dedicated federal legislation addressing freedom of information. However, in late 2023, the Minister in the Prime Minister's Department (Law and Institutional Reform) revealed that a proposed Bill is in progress. The Legal Affairs Division actively examines various aspects, including parameters, implementation challenges, and potential conflicts with existing legislation that may hinder information freedom. The aim is to introduce a comprehensive Act tailored to Malaysia's context. Additionally, this initiative will involve amending the Official Secrets Act 1972 (OSA) to complement the evolving freedom of information framework (Tan, 2023). The Prime Minister further informed that the Special Cabinet Committee on National Governance has preliminarily endorsed introducing a Freedom of Information Act. This move is seen as a step toward fostering good governance and transparency in Malaysia (Bernama, 2023). Early opposition to enacting freedom of information laws can be attributed to several factors. These include concerns about the financial expenses and administrative challenges that such a law would impose on the government in setting up systems, formulating policies, the difficulty in streamlining data stored by different government agencies and establishing an overseeing organisation for its implementation (Stearman, 2012; Ng, 2015). Additionally, there is a recognition of the time-consuming nature of the process, especially the necessity to amend the Official Secrets Act 1972 before implementing a freedom of information framework (Osman, 2023).

This article aims to thoroughly investigate the judicial interpretation of freedom of information in Malaysia. It aims to understand the divergent judicial perspectives regarding this right and its constitutional foundation. This article discusses the international acceptance of freedom of information as a fundamental liberty through numerous international and regional conventions, the conflicting judicial stances in Malaysia with respect to freedom of information and the positive judicial activism in recent years in acknowledging freedom of information as a cornerstone of free speech and a democratic system.

METHODOLOGY

This study employs a doctrinal approach in exploring the judicial interpretation of freedom of information in Malaysia. This study analyses reported cases from online databases such as Lexis Advance Malaysia, CLJ Prime and LawNet. This research also explores written laws such as the Federal Constitution, the Official Secrets Act 1972 and the Whistleblower Protection Act 2010, and international conventions such as the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 as the primary sources of data. Secondary data sources are obtained from scholarly articles, conference papers, reports, theses and books relevant to this study. Analysis of primary and secondary data sources is necessary to understand the legal issues involved, the application of related theories and legal principles, critical discussion of the legal issues, and the social impact of the law on society (Pradeep, 2019).

LITERATURE REVIEW

Various research highlights the importance of FOI in a democratic society because access to information is critical in promoting accountability and transparency and exposing corruption and mismanagement (Mendel, 2003; Vadlamannati & Cooray, 2017; Zuffova, 2020). In Malaysia, the issue of FOI has been a subject of ongoing debate, with concerns over restrictive legal regimes on information access and the lack of national law on FOI. Ikhsan (2014) addresses the issue of the absence of federal law on freedom of information in Malaysia and the current legal framework, which still favours secrecy over transparency. The author also highlights various laws restricting access to information, such as the Official Secrets Act 1972 (OSA), Printing Presses and Publications Act 1984, Sedition Act 1948, Communications and Multimedia Act 1998 and the Penal Code. However, the paper does not discuss cases or judicial interpretation of information access and official secrets in Malaysia. Daud & Zulhuda (2018) discuss FOI and open data in Malaysia, comparing them with other jurisdictions. It emphasises the need for FOI laws at the federal level to prepare Malaysia for the Fourth Industrial Revolution (4IR). While the article provides a comprehensive review of the development of FOI and open data since the 1960s and a comparative analysis of FOI laws in the US, UK, Thailand and India, the article does not delve into the issue of judicial perspectives on FOI. The comparative analysis only covers the statutory aspects of the FOI systems in those jurisdictions. Ikhsan & Matah (2022), in another paper, succinctly highlight the judicial departure from strict interpretation to prismatic interpretation of the Constitution, the advantages of FOI laws and the possible challenges in implementing such law in Malaysia; there is no comparative analysis of the implementation of the law and judicial interpretation in other jurisdictions, such as India or the United Kingdom.

In Hadi et al. (2024), the authors discuss the intersection of international legal frameworks promoting freedom of information (FOI) and the restrictions imposed by Malaysia's national laws. It critically analyses Malaysia's compliance with international standards, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), while highlighting the limitations imposed by domestic legislation. While the paper mentions the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 in expanding the scope of free speech and expression, cross reference with later cases is not provided. Yusof & Nordin (2021) analyse the right to freedom of expression in Malaysia, its alignment with international human rights standards and the challenges faced in implementing effective freedom of information laws. In discussing judicial interpretation, the authors highlight that on top of the absence of a specific provision on FOI in the Constitution and the broad application of the OSA, the Malaysian judiciary has been reluctant to interpret the Constitution in a way that would expand the right to freedom of information, as seen in various court cases. Nawang et al. (2018) also highlight the literal judicial construction of fundamental liberties in cases such as *Mohd Ezam v Ketua Polis Negara* [2002] 4 CLJ 309, *Merdeka University Berhad v. Government of Malaysia [1981] 2 MLJ 356* which precludes the expansion of international covenants to local laws, unless there are adopted via local statutes. The article also briefly mentions the case of *Sivarasa Rasiah,* which contains a paragraph acknowledging the right to receive

and impart information under Article 10(1) of the Constitution. However, the article does not go further into the development of FOI's interpretation post-*Sivarasa Rasiah.*

Overall, the literature on FOI in Malaysia significantly enhances our understanding of the legal framework governing information access and highlights the challenges posed by the archaic Official Secrets Act (OSA) 1972. However, it falls short in addressing the judicial interpretation of FOI, particularly the two conflicting approaches to interpreting this right. On one hand, some judicial interpretations align with a more liberal approach, viewing FOI as an extension of the right to freedom of speech and expression under Article 10 of the Federal Constitution. Conversely, a more conservative approach is often adopted, emphasising the limitations and exceptions to FOI, particularly in the context of national security and public order stipulated by the OSA 1972. This approach prioritises protecting classified information over the public's right to know, thereby maintaining a status quo that limits transparency. The existing literature does not delve deeply into these conflicting judicial interpretations, leaving a gap in understanding how courts balance the right to information with the need for confidentiality. Therefore, this study aims to offer a more detailed examination of landmark cases and judicial reasoning. It would provide valuable insights into the evolving jurisprudence on FOI in Malaysia and the potential for reconciling these divergent approaches.

FINDINGS

International Recognition of Freedom of Information as a Fundamental Right

International law and other global and regional legal systems uphold Freedom of Information (FOI) as a fundamental human right. The first international law acknowledging the freedom of information may be attributed to the Universal Declaration of Human Rights (UDHR). Under Article 19 of the Universal Declaration of Human Rights (UDHR) in 1948, freedom of expression and the right to seek, receive and impart information are the fundamental Freedom of Information (FOI) principles. While lacking legal enforceability, the Universal Declaration of Human Rights (UDHR) has influenced the development of other legally binding texts and national laws, outlining the core concepts of freedom of expression (Goldberg, 2014).

One international treaty that acknowledges the right to seek redress is the International Covenant of Civil and Political Rights 1966 (ICCPR). The ICCPR's Article 19(2) expands upon the UDHR by explicitly defining the right to freedom of expression, which encompasses the right to get the necessary information. By extending the legal force on its 173 state parties, the ICCPR is a highly significant international accord pertaining to the freedom of information (Carter, 2017).
Furthermore, the UN Human Rights Committee, which is in charge of supervising the enforcement of the ICCPR, has stated in General Comment No. 34 (2011) that Freedom of Information (FOI) is a fundamental element of the freedom of speech and should be protected in a way that allows persons to access information held by the government (Carter, 2017).

Significantly, the Sustainable Development Goals (SDGs) have also recognised the entitlement to freedom of information. The importance of Freedom of Information (FOI) is underscored in Goal 16 of the 2030 Agenda for Sustainable Development, as it seeks to guarantee democratic access to information and protect essential liberties. The importance of Freedom of Information (FOI) in consideration of development is underscored by its portrayal as essential for transparent and accountable organisations (Ghorbani & Akbari-Daryan, 2017).

At the regional level. The European Union has recognised the freedom of information among the major trendsetters worldwide. Within Article 10 of the European Convention on Human Rights (ECHR), freedom of expression includes the right to access and acquire information. With the rising issues, the European Court of Human Rights (ECtHR) has interpreted this article to include the right to access public information, especially in matters of public importance or government transparency (Worth, 2017).

The *Magyar Helsinki Bizottság v Hungary (2016) 18030/11* case has demonstrated the crucial nature of the rights to freedom of information as inherent human rights. Hence, the European Court of Human Rights (ECtHR) has ordered the government to provide relevant information to the general public, thus establishing Freedom of Information (FOI) as essential for democratic representation.

Conversely, International Organisations are taking steps to acknowledge the right to freedom of information. For example, this can be seen in the endeavours undertaken by UNESCO. UNESCO has actively advocated for Freedom of Information (FOI), asserting its connection to the progress of decentralised media, democratic administration, and sustainable development. In addition to analysing global trends in information accessibility, the institution provides technical assistance to countries in developing Freedom of Information (FOI) legislation. In commemoration of World Press Freedom Day on May 3, UNESCO advocates for recognising access to information as an essential human entitlement and a mechanism to guarantee public responsibility (Pohle, 2021).

Furthermore, a collaboration has been established between the World Bank and Open Government Partnership (OGP). The World Bank and the OGP have emphasised the importance of Freedom of Information (FOI) in advancing efficient governance and mitigating corruption. Both measures would facilitate the development and implementation of Freedom of Information (FOI) laws in countries and establish platforms for collaboration between civil society and governments in transparency-promoting initiatives (Sulejmani, 2014).

Literal Interpretation of Fundamental Liberties

The Malaysian Federal Constitution, which holds the highest legal authority, does not expressly provide for the right to information. Article 10(1) of the Constitution acknowledges the right to free speech and expression; however, it does not sufficiently encompass the broader domain of freedom of information. This dilemma presents two contrasting presumptions that warrant consideration. Firstly, it posits that freedom of information is inherently intertwined with free speech and expression principles. The argument follows that without adequate access to information, free speech and expression exercise becomes devoid of substantial meaning. Secondly, the absence of explicit reference to freedom of information within Article 10(1) raises questions about the provision's applicability regarding its extension to encompass the right to information (Ikhsan, 2014; Mia et al., 2021). These contrasting perspectives can be elucidated through the lens of two distinct approaches to constitutional interpretation: the literal constructivist approach and the prismatic approach applied to the interpretation of the supreme law.

In a literal approach, strict constructionists advocate for interpreting the Constitution based on the original intent of its framers. They emphasise adhering to the provision's plain language, grammatical sense, and ordinary meaning, showing deference to the enactment's historical context (Faruqi, 2005). The landmark case in the Commonwealth in relation to literal interpretation is *AK Gopalan v. State of Madras* AIR 1950 SC 27. In this case, the Supreme Court of India adopted a narrow and literal construction of Article 21, holding that "personal liberty" solely pertains to safeguarding one's physical body from state harm. The court explicitly separated Article 19 and Article 21, highlighting that they have no inherent connection. Furthermore, it distinguished the American concept of "due process of law," emphasising fairness and reasonableness in procedure, from the Indian constitutional phrase "procedure established by law." According to the court, the latter focuses solely on the specified legislative procedure, indicating that courts can only intervene if the prescribed procedure is not followed. The term 'law' is stipulated to refer to laws created by the Legislature and cannot reasonably encompass the principles of natural justice. This is because procedures cannot be deemed 'enacted' by those principles (Ram, 2017).

In Malaysia, a positivist approach to constitutional interpretation is evident in the case of *Comptroller General of Inland Revenue v. NP* [1973] 1 MLJ 165. The defendant argued that the provisions outlined in section 82 of the Income Tax Ordinance,1947, mandating tax payment despite an ongoing appeal, are deemed invalid due to their inconsistency with Article 13(1) of the Federal

Constitution. Article 13(1) protects individual rights to property that shall not be deprived unless in accordance with the law. In rejecting the contention and interpreting the term "law", the court held that it refers specifically to legislated laws, and any reference to natural justice (not enacted by the legislative authority) is not applicable.

A similar approach was also taken in *Government of Malaysia v. Loh Wai Kong* [1979] 2 MLJ 33. Here, the respondent sought an order instructing the authority to provide him with a Malaysian passport. He argued that he had a fundamental right to international travel and that denying a passport infringed upon this right. The learned judge observed that the rejection or postponement of passport issuance effectively hindered the appellant from departing the country, constituting a breach of his personal liberty rights as outlined in Article 5(1) of the Federal Constitution. Hence, the appeal to the Federal Court and the respondent cross-appealed. Ultimately, the Federal Court held that "personal liberty" in Article 5 refers to the freedom associated with the individual's person or body. This article does not grant citizens an inherent right to leave the country. Instead, the government has the authority to prevent an individual from leaving, especially when there are pending criminal charges. Moreover, Article 5 does not give citizens the right to travel overseas.

In the case of *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, the appellant contested the lawfulness of his arrest and detention under the Restrictive Residence Enactment (FMS Cap 39), asserting that he was not brought before the Magistrate within 24 hours of the arrest. Concurrently, while the appeal was ongoing, Parliament retroactively amended the legislation, specifying that Article 5(4) of the Constitution would not apply to the arrest or detention of individuals under the existing legislation regarding restricted residence, with the amendment effective from the Merdeka Day. The Federal Court, in rejecting the appeal, emphasised that the assessment of whether the contested law was perceived as harsh or unjust is a policy matter designated for parliamentary deliberation and resolution. Therefore, it is inappropriate for judicial adjudication. The court asserted the principle of non-encroachment, emphasising that the judiciary should refrain from intruding into matters falling within the legislative domain.

Meanwhile, in *The Attorney General, Malaysia v. Chiow Thiam Guan* [1983] 1 MLJ 51, the plaintiff sought a declaration of the unconstitutionality of the compulsory death sentence specified in section 57(1) of the Internal Security Act 1960. The grounds for this challenge were that the provision was deemed unreasonable, oppressive, and a violation of the equality provision outlined in the Constitution. By dismissing the claim, the court ruled that if Parliament deems the death penalty essential, it is not the court's prerogative to assess the wisdom of such a law. Although the law might be stringent, the court's responsibility is to enforce the existing law without passing judgment on its merits.

The inclination also contributes to the judicial reluctance to exercise oversight over the executive and legislative decisions towards the separation of power. The case of *Mohd Yusof bin Mohamad v. Kerajaan Malaysia & Anor* [1995] 5 MLJ 286 exemplifies the court's reluctance to scrutinise the Executive, citing concerns about potential judicial overreach. In this instance, a police officer dismissed from the Royal Malaysian Police sought a judicial review to contest his removal from the force. The High Court, in rejecting the application, noted that it could not assess the rationality of the dismissal decision due to the absence of evidence supporting a prima facie case from the relevant disciplinary authority in court. Furthermore, the court highlighted that any interference by the judiciary in cases where the executive holds exclusive information and has taken decisive action could be construed as encroaching upon the executive branch's independence. Despite its role as a check and balance on other government branches, the judiciary, in this scenario, is refraining from intervening in the face of executive discretion.

In the case of *Teng Chang Khim (appealing as the speaker of Selangor State Legislative Assembly) v. Badrul Hisham bin Abdullah & Anor* [2017] 5 MLJ 567, the Federal Court underscored that activities within Parliament and State Legislative Assemblies are immune from judicial interference. The court asserted that it does not possess the jurisdiction to intervene in the internal affairs

or administration of Parliament or any State Legislative Assembly. This protection is grounded in the principle of the separation of powers among the executive, legislative and judicial branches of government.

Prismatic Approach to Constitutional Interpretation

Adopting a broad and expansive interpretation of the Constitution traces its roots to the Commonwealth case of *The Minister of Home Affairs v. Fisher* [1980] AC 319. In this case, a Jamaican mother with four children born out of wedlock married a Bermudian in 1972. The family moved to Bermuda in 1975. In 1976, the Minister of Labour and Immigration ordered the children to leave Bermuda. The mother and her husband challenged this order, seeking a declaration that the children belonged to Bermuda. The Supreme Court rejected their request due to the children's illegitimacy. However, the Court of Appeal ruled that the children should be considered belonging to Bermuda under section 11(5)(d) of the Constitution. The Privy Council affirmed this decision, stating that constitutional interpretation should consider the instrument's character and origins and that "child" should not be narrowly defined. Thus, the children were deemed to belong to Bermuda.

The Singaporean case of *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 illustrates judicial activism in a liberal interpretation of the Constitution. In this Privy Council decision, the appellant appealed against his conviction for drug trafficking under section 3 of the Misuse of Drugs Act 1973 (Singapore). One of the appellant's contentions was that the rebuttable presumption of trafficking and the death penalty were unconstitutional. On constitutional interpretation, the Privy Council held that in a Constitution based on the Westminster model, especially in Articles aimed at guaranteeing fundamental liberties or rights to all individual citizens, the term "law" in expressions like "in accordance with law," "equality before the law," "protection of the law," and similar contexts, refers to a legal system that incorporates the essential principles of natural justice inherent in the common law of England that was in effect in Singapore when the Constitution commenced. The framers of the Constitution likely assumed that the "law" protecting citizens' fundamental liberties, as assured by the Constitution, would adhere to these fundamental rules. To suggest otherwise would distort the meaning of "law" as a safeguard for individual enjoyment of fundamental liberties (by Article 5) of Articles 9(1) and 12(1) would be little more than a farce.

The case of *Dato' Seri Ir. Hj Mohammad Nizar bin Jamaluddin v. Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285 in Malaysia shed light on the liberal perspective of constitutional interpretation. This legal dispute revolved around determining the rightful Menteri Besar of Perak after three members of the State Legislative Assembly had withdrawn their support for the incumbent Menteri Besar. Regarding constitutional interpretation, the Federal Court held that the Constitution, being the paramount law of a State or Federation, requires a unique approach to interpretation distinct from ordinary statutes. Malaysian courts generally lean towards the organic theory when interpreting the Constitution. This method underscores the importance of examining all provisions related to a specific subject collectively, rather than isolating and independently considering each provision, to interpret them in a manner that serves the overarching purpose of the Constitution. The organic approach involves considering current social conditions and interpreting the Constitution to address contemporary challenges.

A string of recent judgements is indicative of a more liberal approach to constitutional interpretation. The Federal Court in *PP v. Gan Boon Aun* [2017] 3 MLJ 12 held that the provision on fundamental liberties in the Constitution must be interpreted generously and liberally. The apex court further observed that literal interpretation does not apply to the Constitution. The Court cited the judgement of *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 where it was held that when interpreting a constitution, it is crucial to consider two key aspects. Firstly, judicial precedent's influence is less significant than its usual role in ordinary statutory interpretation. Secondly, because a constitution is a dynamic legal document, its provisions should be construed expansively rather than in a narrow and overly strict manner – with greater flexibility and generosity than typically applied to other statutes.

In *Mohd Alif Anas bin Md Noor (in his capacity as President, and on behalf of Gabungan Pelajar Melayu Semenanjung (GPMS)) & Ors v. Menteri Pendidikan Malaysia and another suit* [2022] 12 MLJ 455, the High Court underscored that it is well-established, especially in cases involving fundamental constitutional rights like the right to education in Article 12 under Part II of the Federal Constitution on Fundamental Liberties, that courts interpret relevant constitutional provisions generously. Employing a prismatic approach to constitutional construction, the court would interpret language in Article 152(1)(b) regarding vernacular schools to include using Chinese or Tamil to teach other subjects. In administering the Education Act 1996, including provisions on national-type schools, the government aims to preserve and promote the languages of the communities, a protection explicitly stated in Article 152(1)(b). This interpretation aligns with the principle that constitutional provisions should be understood in their historical context to discern the drafters' original intent.

Judicial View on Freedom of Information

The Court of Appeal addressed the matter of freedom of information as a human right in the case of *Minister of Energy, Water and Communication & Anor v. Malaysian Trade Union Congress & Ors* [2013] 1 MLJ 61. The respondents sought a declaration asserting the public's right to access two documents related to water concessions in Selangor: the concession agreement and the audit report justifying a 15% increase in water tariffs. The Minister declined to provide the documents, citing their classification as official secrets. The High Court granted the declaration, reasoning that the concession agreement served the public interest and posed no threat to national security.

Consequently, an appeal was filed with the Court of Appeal. In a majority decision of two to one, the court affirmed that the respondents lacked any fundamental or legal entitlement to access and disclose the concession agreement and audit report. It emphasised that, in Malaysia, the general public does not hold the right to obtain documents related to government department operations or those held by government Ministers or agencies. The court clarified that the Minister did not infringe upon the respondents' fundamental or legal rights in this context. Furthermore, the court highlighted the absence of a Malaysian law equivalent to the Australian Freedom of Information Act 1982, which, at the federal level, grants the public a legal right to obtain documents from government ministers, departments, and public authorities. Due to the nonexistence of such legislation, the Minister could not be compelled to comply with the information request from the respondents.

The dissenting opinion by the Honourable Mohd Hishamudin JCA in the mentioned case is noteworthy. His Lordship contended that the respondents, who were residents of Selangor and consumers of treated water from SYABAS, faced adverse consequences due to the Minister's refusal to reveal two documents. Considering SYABAS's monopoly in providing treated water in Selangor, the increase in water tariffs influenced by the concession agreement and audit report would have a detrimental impact on them. Despite the Minister asserting no obligation to disclose the documents due to their confidential nature publicly, the audit report did not fall under the protection of the Official Secrets Act 1972 (OSA) as there was no evidence of its prior classification as an official secret. The notion that a document automatically becomes an official secret when presented to the cabinet was deemed a misunderstanding. The appellant failed to substantiate the necessity of classifying the audit report as an official secret or its potential harm to national security. Additionally, as affected members of the public, the respondents held a legitimate expectation based on the Minister's public assurances, creating a duty to disclose under the principle of legitimate expectation.

In *Haris Fatillah bin Mohd Ibrahim v. Suruhanjaya Pilihan Raya Malaysia* [2017] 3 MLJ 543, the issue of freedom of information was also raised by the appellant. In this case, the appellant requested that the respondent provide information about the proposed delimitation of Parliamentary and State Constituencies. However, the respondent failed or neglected to furnish this information to the appellant. The High Court rejected the appellant's request, citing that the appellant lacked *locus standi* and granting the application would compel the respondent to undertake an action not obligated by the Constitution. Hence, the appeal to the Court of Appeal. In a unanimous decision, the Court of Appeal dismissed the appeal on several grounds. First, the appellant only identified himself as a registered voter in the

Petaling Jaya Selatan Parliamentary Constituency and Bukit Gasing State Constituency. The appellant did not assert any interference with his public right that also impacted his private right or claim any unique damage from such interference. The pleadings lacked any indication of a dispute or a well-defined issue between the appellant and the respondent, and there was no mention of the appellant's constitutional rights infringement.

Regarding the freedom of information, the court emphasised that Malaysia lacks a dedicated statute like India's Right to Information Act 2005, which extensively addresses the right to information. Additionally, Malaysia does not possess a provision akin to section 2(b) of the Canadian Charter of Rights and Freedoms, explicitly permitting access to information. The interpretation of the Constitution underscores that the Federal Constitution of Malaysia stands on its own merits, and it is ultimately the language of our Constitution that must be interpreted and applied. External principles from other constitutions cannot override this interpretation. Consequently, this judgement constitutes a clear rejection of the right to information in Malaysia.

The judgement of the Kota Kinabalu High Court in *Harris bin Mohd Salleh v. Chief Secretary, Government of Malaysia & Ors* [2023] 10 MLJ 520 suggests a shift in the judicial interpretation of the right to information. In this case, the applicant, a former Chief Minister (CM) of Sabah, requested a mandamus order to instruct the respondents to initiate the required actions for declassifying and/or disclosing the report from the Malaysian investigation into a plane crash that occurred on June 6, 1976, in Kota Kinabalu, Sabah. The crash resulted in the death of 11 individuals, including the then Sabah Chief Minister, Tun Fuad Stephens, and several members of his Cabinet (Double 6 incident). The judicial review application was founded on the contentions that the Federal Constitution's guarantee of the right to free speech and expression under Article 10(1)(a) inherently encompassed the right to receive information, and any State action violating the implied right to information and the right to free speech must meet the proportionality test. In reply, the respondents argued that the applicant lacked *locus standi* to initiate the judicial review proceedings, that the application was unreasonably delayed, and that the Minister's decision not to declassify the report was not unlawfully, irrationally, or procedurally improperly executed.

In granting the mandamus in favour of the applicant, the High Court held that the applicant possessed the *local standi* to submit the judicial review application, primarily due to being both a Sabahan and an elected State Assemblyman and member of the State Cabinet. He was not an officious bystander, lacking a legitimate interest in seeking the report's declassification. Given his direct involvement in the tragedy and persistent suspicions, the applicant's interest and reputation were acknowledged by the Federal Court, as evidenced by their ruling in his favour in a defamation lawsuit connected to the incident. On the issue of the right to information, the court held that the right to information was considered a natural extension of the right to free speech. The Federal Constitution aimed to create a society where citizens exercised their freedom of speech based on facts and reason rather than assumptions and conjecture, contributing to establishing an egalitarian society. In conjunction with this principle, Sabahans were entitled to be informed about the findings of the plane crash investigation. Although the court recognised the Minister's authority to classify and declassify information, it emphasised that this power should be exercised for legitimate reasons, not arbitrarily. According to this judicial ruling, a glimmer of hope emerges, indicating a shift in favour of the public's right to information, even without a specific law mandating such rights in Malaysia.

In the case of *Norhayati Mohd Ariffin v. Mohd Russaini Idrus & Anor* [2023] 9 CLJ 304, the High Court grappled with the implications of section 16A of the OSA 1972, which empowers a Minister or public officer to deny the disclosure of official documents, potentially conflicting with the public's right to information. Drawing from the precedent set in Haris Salleh, the Court noted that the "right to information exists as a corollary to the right to free speech," emphasising the Federal Constitution's aim to foster a society where citizens exercise their right to free speech based on facts and reason, not unfounded assumptions. While section 16A does not explicitly require the authority to provide reasons for refusing document production, the court stressed the importance of offering reasons to prevent any perception of afterthought or impropriety. The absence of reasons in the initial certificate, coupled with

the subsequent provision of reasons in affidavits, raises concerns of a potential afterthought. Additionally, despite the authority's power under section 16A, the court retains the authority for an objective evaluation to ascertain whether the given reasons align with legal foundations.

DISCUSSION

The Symbiotic Relationship Between Freedom of Information and Freedom of Speech

As pointed out above, the Malaysian judicial landscape is more inclined toward the liberal approach in interpreting freedom of speech and expression. This remarkable progress could provide a more inclusive basic human right protection to the citizens, which includes freedom of speech (FOS) as stipulated in Article 10(1) of the Federal Constitution. On that note, it is inevitable to put FOI under the spotlight as these two are mutually interdependent, especially the FOI, as it serves as one of the prerequisites of a holistic application of FOS. In Malaysia, this was displayed in the case of *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* (2021) 6 MLJ 477, where one of the issues arose is whether the Immigration Department have the right to restrict her freedom of movement by imposing a travel ban without any explanations. The need for reasons for the travel ban was invoked because, without an apparent reason for the justification behind the ban, it practically impairs Maria Chin's ability to challenge the administrative decision. Being an activist, this travel ban could affect her right to speak, engage in activism or even participate in international discourse. This shows the symbiotic relationship between FOI and FOS because it hinders one's right to exercise free speech without adequate access to information.

As regards to India, the judicial arm also recognised the relationship between FOI and FOS. In the case of *State of Uttar Pradesh v. Raj Narain* (1975) AIR 865, Raj Narain requested certain documents to prove that Prime Minister Indira Gandhi had committed electoral malpractices. The Supreme Court decided in favour of Raj Narain. The symbiotic association between FOI and FOS here can be seen where if the document (FOI) was not accessible, Raj Narain could not effectively express his concerns about the election malpractice committed by Indira Gandhi. The integrity of the election system and democratic process depends on information disclosure on electoral offences.

Following the same approach, the court in the United Kingdom, through the case of *R (Evans) v. Attorney General* [2015] UKSC 21, decided to disclose a letter written by Prince Charles. Evan, a journalist, requested the letter under the Freedom of Information Act 2000 and the Environmental Information Regulations. The information from the letter will be used to inform the public since it is related to the citizens in general. The disclosure of the letter (FOI) is needed for Evan to effectively inform the public of the letter's content (FOS). This denotes the mutual correlation between FOI and FOS. As the fourth estate and watchdog of the government, the press plays a crucial role in informing and imparting information to the public.

Similarly, in South Africa, the symbiotic relationship between FOI and FOS was highlighted in the case of *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service (SARS) and Others* [2023] ZACC 13. Here, a financial journalist requested access to the tax records of former President Jacob Zuma. The request was rejected by SARS, claiming that the President is entitled to confidentiality under the Promotion of Access to Information Act, 2000 and Tax Administration Act, 2011. The court held that both Acts were unconstitutional and ordered the production of the tax records. This case portrays the mutual relationship between FOI and FOS, where accessing the tax records (FOI) could allow the journalist to provide information that affects the public interest (FOS). Being a public officer, the President's tax and financial records are subject to public oversight, highlighting the interdependence of FOI and FOS.

Based on the analysis of judicial decisions from several jurisdictions which inclined toward applying a liberal approach in interpreting freedom of speech, there is an emphasis on more protection for public rights. It is high time for Malaysia to align itself with what is practised by its counterparts in

acknowledging the public rights to access information and to exercise their freedom of speech and expression. The availability of information in the public sphere (FOI) enables people to comment, criticise, and challenge government institutions (FOS).

Transparency vs. Secrecy: Reconciling the Competing Interests

In a democratic system, there is always tension between transparency and privacy (Harwood, 2016). Reconciling the competing interests between openness and official secrecy is daunting, especially for a country with a multi-faceted political and socio-economic background like Malaysia. On the one hand, the ability of citizens to access information withheld by the government is essential for an informed citizenry and enhances government accountability and responsibility (Harwood, 2016). Access to information serves as a critical tool for government oversight (Zuffova, 2023). To that end, the Malaysian government's commitment to transparency can be seen in its efforts to implement the Whistleblower Protection Act 2010, which protects and grants immunity to individuals who expose corrupt or illegal activities within the public sector (Che Abu Bakar & Mangsor, 2022). Furthermore, Malaysia has joined international initiatives like the Open Government Partnership (OGP), which aims to promote transparency in public institutions and foster citizen engagement in governance, where more than 200 data suppliers from 18 different clusters were established to routinely publish datasets on open government portals (Mustapa et al., 2019).

On the other hand, while transparency in government is crucial for fostering accountability and public trust, it is equally important to recognise that certain areas necessitate confidentiality. Specifically, information pertaining to national security, international relations, economic stability, and overarching public interests must be safeguarded from public disclosure to prevent potential risks and adverse consequences (Hashim, 2020). This balance ensures that while the government remains open and accountable, it also retains the ability to protect sensitive information critical to the nation's well-being. However, the absence of clear guidelines for managing official secrets and conducting classification exercises presents a risk that documents not genuinely related to legitimate secrecy exceptions may be concealed from the public. This could be done to avoid embarrassment or to shield those in power from adverse political repercussions. For example, before the government changed in 2018, the 1 Malaysia Development Bhd. audit report. (1MDB) was classified as an official secret. It was only declassified following the fall of the ruling government. Although the 1MDB audit report was presented to the parliamentary Public Accounts Committee in April 2016, the former auditor-general sealed the documents under the OSA, preventing any debate in the Dewan Rakyat (Yunus, 2018).

The classification of the 1MDB audit report as an official secret under the Official Secrets Act (OSA) 1972 prevented public scrutiny and debate, allowing the scandal to escalate unchecked. This case highlights the dangers of excessive secrecy and the need for greater transparency in government operations. The remaining challenge lies in determining the boundaries of secrecy. It is essential to establish clear and narrow criteria for non-disclosure of information to prevent the misuse of secrecy for political or personal gain. This study submits that the areas where information can be withheld should be strictly limited, in line with Article 10(2)(c) of the Federal Constitution. This provision allows for restrictions on freedom of expression (and, by extension, FOI) only in relation to national security, public order, friendly relations with other countries, or morality. This study suggests that a total reform of the OSA 1972 is necessary to bring it in line with the FOI regime and the Whistleblower Protection Act 2010.

Judicial Activism and Its Tension with The Doctrine of Separation of Power

Judicial activism in Malaysia, characterised by proactive judicial decision-making that influences public policy, continues to be a complicated issue, especially regarding its conflict with the separation of powers. This is a highly controversial area of the judiciary where decisions strictly abide by precedential authority and decisions deal with more flexible intrusions into legislative authority. The main problem associated with the court in Malaysia is that the judges tend to favour conservatism rather than activism.

The Federal Constitution of Malaysia specifies separate functions for the executive, legislative, and judiciary, yet courts have progressively assumed a proactive role, especially in matters of constitutional interpretation and the safeguarding of human rights (Harding, 2012). Significant decisions like *Indira Gandhi v. Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545, which dealt with unilateral child conversions, illustrate the judiciary's function in clarifying constitutional issues while safeguarding individual rights (Thiru, 2021). In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* [2017] 5 CLJ *526*, the Federal Court reaffirmed judicial independence by invalidating legislative provisions that compromised its constitutional function, highlighting the significance of judicial review in upholding the rule of law.

Media coverage, including those from The Malay Mail and The Edge, underscores public responses to such verdicts, frequently perceiving judicial intervention as both a protector of individuals' rights and a catalyst for institutional conflict. Judicial intervention improves accountability and safeguards minority rights; however, critics contend it may lead to judicial overreach, exemplified by *Maria Chin Abdullah v. Ketua Pengarah Imigresen* [2021] MLJU 12 i, where the judiciary's involvement in travel restrictions raised apprehensions regarding encroachment on executive authority (The New Straits Times, 2021). This contradiction highlights the necessity for a balanced approach, wherein courts protect rights while preserving the separation of powers (Faruqi, 2019).

CONCLUSION

The significance of freedom of information in fostering an enlightened citizenry is a vital aspect of a democratic society. In the absence of sufficient access to information, the ideals of freedom of speech and expression become illusory. In the context of Malaysia, historical judicial decisions denote a preference for a literal approach in interpreting the Constitution, influenced by factors such as the doctrine of separation of powers, judicial non-interference, and the legal positivism concept of "the law as it is." Nevertheless, a shift towards a more liberal and expansive interpretation of the Constitution is evident in recent judgments, emphasising human rights protection, the court's duty to uphold fundamental liberties and principles of fairness and justice.

However, a lingering issue arises from conflicting interpretations regarding whether freedom of information is an inherent component of the Malaysian legal system. To resolve this legal ambiguity, it is strongly recommended to enact legislation explicitly recognising and safeguarding freedom of information. This legislative measure would provide clarity and a definitive framework for protecting this fundamental right. It is essential to note that establishing such legislation should also consider aligning the legal framework on official secrets with the new law to ensure a harmonious and coherent application of both legal provisions. This approach would contribute to a more robust and transparent legal landscape that upholds the principles of democracy and human rights.

ACKNOWLEDGEMENT

The authors declare that no financial support or funding was received from any organisation or institution in completing this study.

Conflict of interest: There is no conflict of interest regarding this study.

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