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(IJLGC)**www.ijlgc.com**A CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION
IN MALAYSIA?**Joshua Wu Kai-Ming^{1*}

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This work is licensed under [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/)**Abstract:**

At the time of writing, for all intents and purposes, Malaysia does not expressly and incontrovertibly acknowledge the right of access to information. This article seeks to argue that Malaysia should recognise such a right. This article explores how such a right would be consistent with international human rights standards, regional human rights standards, Malaysia's Cabinet policy decision on 11th July 2018, and the Federal Government's current freedom of information practices. This article also examines how the Judiciary has in the past indicated its openness to the existence and/or applicability of such a right within Malaysian jurisprudence. This article lastly looks into how the right of access to information can become a constitutional right in Malaysia by way of judicial recognition and/or constitutional amendment.

Keywords:

Federal Constitution, Right of Access to Information, Judicial Recognition, Constitutional Amendment

Introduction

For the purposes of this article, the right of access to information includes "the right to receive information"¹ as well as the right to seek information.²

¹ *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (FC), at paragraph 13

² Article 19 of the Universal Declaration of Human Rights

As it stands, Malaysia has not explicitly and unambiguously acknowledged the right of access to information as being applicable.

There is no Federal law (read: Act of Parliament) in Malaysia providing for and/or facilitating the exercise of the right of access to information. This situation persists despite periodic calls by various quarters for a Freedom of Information Act³ (or an equivalent Act) which would promote the right of access to information on a Federal level.

As for state law, two states in Malaysia have enactments facilitating the right of access to information. Selangor has the Freedom of Information (State of Selangor) Enactment 2011⁴ while Penang has the Penang Freedom of Information Enactment 2010.⁵

The preamble to both enactments expressly mention that one of their purposes is to provide for the right of access to information:

Freedom of Information (State of Selangor) Enactment 2011	Penang Freedom of Information Enactment 2010
<p>“Enactment to enhance disclosure of information for the public interest, to provide to every individual a reasonable right of access to information made by every department of the State Government and to promote transparency and accountability for each department in the State Government.”⁶ (Emphasis mine)</p>	<p>“An Enactment to provide for disclosure of information for public interest and right to access to information made by every department of the State Government and any other matters connected therewith.”⁷ (Emphasis mine)</p>

It is trite law that a preamble is “useful or may be used as a guide to the legislative intention of any statute. It is often of great assistance in construing a statute. The preamble is a key to open the minds of the makers of the Act of Parliament. The preamble indicates the mischiefs which

³ See e.g. Lee, Stephanie (2022, August 14). Time for Freedom of Information Act to be implemented to deter power abuse, says Sabah Law Society. *The Star*. Retrieved from <https://www.thestar.com.my/news/nation/2022/08/14/time-for-freedom-of-information-act-to-be-implemented-to-deter-power-abuse-says-sabah-law-society>; see also How P. L. (2023, May 1). Kit Siang: Time for M'sia to transition from 'official secrets country' to 'freedom of information nation.' *Borneo Post Online*. Retrieved from <https://www.theborneopost.com/2023/05/01/kit-siang-time-for-msia-to-transition-from-official-secrets-country-to-freedom-of-information-nation/>.

⁴ Freedom of Information (State of Selangor) Enactment 2011. (2011). Retrieved from https://www.mbpj.gov.my/sites/default/files/enakmen_kebebasan_maklumat_negeri_selangor_2011.pdf#page=21.

⁵ Penang Freedom of Information Enactment 2010. (2012). Retrieved from <https://www.penang.gov.my/images/pdf/Warta%20Enakmen.pdf#page=20>.

⁶ Freedom of Information (State of Selangor) Enactment 2011. (2011). Retrieved from https://www.mbpj.gov.my/sites/default/files/enakmen_kebebasan_maklumat_negeri_selangor_2011.pdf#page=23.

⁷ Penang Freedom of Information Enactment 2010. (2012). Retrieved from <https://www.penang.gov.my/images/pdf/Warta%20Enakmen.pdf#page=24>.

the legislation intends to redress (*Bennion on Statutory Interpretation* at p 732; *LCC v Bermondsey Bioscope Co Ltd* [1911] 1 KB 445 at p 451).⁸

From the preamble to the Freedom of Information (State of Selangor) Enactment 2011 and the Penang Freedom of Information Enactment 2010, it is evident that the Selangor State Legislature and Penang State Legislature acknowledge the right of access to information.

Constitutionally, the right of access to information is not expressly provided for under the Federal Constitution. However, as will be explored below, this is not necessarily a hindrance for the right of access to information to be recognised as a constitutional right.

Why Have A Right Of Access To Information?

Consistent With International Human Rights Standards

A right of access to information would be consistent with international human rights standards.

Article 19 of the Universal Declaration of Human Rights (“UDHR”) provides the following:

“Everyone has the right to freedom of opinion and expression; **this right includes freedom** to hold opinions without interference and **to seek, receive and impart information** and ideas through any media and regardless of frontiers.” (Emphasis mine)

The Malaysian courts have, in the past, referred to and/or applied the UDHR.⁹

In *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507 and *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145, two cases involving the freedom of expression, the Court of Appeal made reference to Article 19 of the UDHR.¹⁰

Lee Swee Seng JC (now JCA) in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2014] 2 SHLR 1, was of the view that “the Universal Declaration of Human Rights (‘UDHR’) is already part of the corpus of our law” by virtue of the Human Rights Commission of Malaysia Act 1999.¹¹ His Lordship elaborated further on this and said:

“It would not be incorrect to say that **we have given the principles of the UDHR a statutory status and a primal place in our legal landscape. The UDHR is part and parcel of our jurisprudence as the international norms in the UDHR are binding on all member countries unless they are inconsistent with the member countries'**

⁸ *Malaysia Airlines Bhd (according to Malaysia Airline System Berhad (Administration) Act 2015) v Tan Wei Hong (a child suing through his guardian ad litem and next friend, Chuang Yin E) & Ors* [2017] 2 MLJ 507 (CA), at paragraph 11

⁹ See e.g. *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368 (HC), at paragraph 18; *Suzana bt Md Aris v DSP Ishak bin Hussain* [2011] 1 MLJ 107 (HC), at paragraph 27

¹⁰ *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507 (CA), at paragraph 55; *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145 (CA), at paragraph 88

¹¹ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2014] 2 SHLR 1 (HC), at paragraph 85

constitutions. Indeed there is the persuasive argument that the principles enunciated in the UDHR have attained the status of international customary law.”¹² (Emphasis mine)

Granted, the Federal Court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 took the opposite view - namely that the UDHR was “not legally binding on the Malaysian courts. The use of the words regard shall be had' in s 4(4) of the Human Rights Commission of Malaysia Act can only mean an invitation to look at the 1948 Declaration if one was disposed to do so and to consider the principles stated therein and be persuaded by them if need be. Beyond that, one was not obliged or compelled to adhere to the 1948 Declaration.”¹³

Article 19(2) of the International Covenant on Civil and Political Rights (“**ICCPR**”) mirrors Article 19 of the UDHR:

“Everyone shall have the right to freedom of expression; this **right** shall include **freedom to seek, receive and impart information** and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹⁴ (Emphasis mine)

Admittedly, Malaysia is not a signatory to the ICCPR nor has it ratified the ICCPR. Consequently, the ICCPR’s provisions are not legally binding.

Notwithstanding this, the Federal Court in *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 MLJ 398 considered the provisions of the ICCPR as “no less significant as universal principles”.¹⁵

However, it is worth noting that the majority of the Federal Court in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 took a contrary view:

“Malaysia was not party to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The fact that the Executive had chosen not to sign, accede to or ratify them clearly suggested that **those international principles ought not to be considered applicable in the Malaysian legal context.**”¹⁶ (Emphasis mine)

Consistent With Regional Human Rights Standards

With regard to regional human rights instruments, as a member of the Association of Southeast Asian Nations (“**ASEAN**”), Malaysia adopted the ASEAN Human Rights Declaration (“**AHDR**”) in 2012.

¹² *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2014] 2 SHLR 1 (HC), at paragraph 86

¹³ *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 (FC), at held 11

¹⁴ International Covenant on Civil and Political Rights. (1966). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

¹⁵ *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 MLJ 398 (FC), at paragraph 36

¹⁶ *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 (FC), at paragraph 158

By way of the ADHR, Malaysia (amongst other ASEAN countries, reaffirmed its commitment to the UDHR.¹⁷ Further, Article 23 of the ADHR which provides the following is *in pari materia* with Article 19 of the UDHR:

“Every person has the right to freedom of opinion and expression, **including freedom** to hold opinions without interference and **to seek, receive and impart information**, whether orally, in writing or through any other medium of that person’s choice.”¹⁸ (Emphasis mine)

A right of access to information would be consistent with Malaysia’s regional human rights commitments, particularly the ADHR.

The Judiciary Has Indicated Its Openness To The Existence And/Or Applicability Of The Right

Another reason for having a right of access to information is because the Judiciary has, at some point, indicated its openness to the existence and/or applicability of such a right within Malaysia’s jurisprudence vis-a-vis constitutional law. This will be expanded on below, with reference to the High Court’s decision in *Dato’ Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1)* [2005] 5 MLJ 489 (“**Penerbitan Sahabat**”) and the Federal Court’s decision in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (“**Sivarasa Rasiah**”).¹⁹

Consistent With Malaysia’s Cabinet Policy Decision

A right of access to information would also be consistent with Malaysia’s Cabinet policy decision on 11th July 2018 to introduce a Freedom of Information Act.²⁰ Pursuant to the Cabinet policy decision, the current Federal government comprising the Alliance of Hope (*Pakatan Harapan*) coalition and National Front (*Barisan Nasional*) coalition have taken steps towards the enactment of a Freedom of Information Act.²¹ The Cabinet policy decision and the steps taken subsequent to it are an implied recognition of the importance of a right of access to information in Malaysia.

Consistent With The Federal Government’s Current Freedom Of Information Practices

Although there is no Freedom of Information Act (or equivalent Act) in Malaysia, the Federal Government claims to practice freedom of information through its open data platform (data.gov.my)²² which was launched on 7th September 2020.²³

¹⁷ ASEAN Human Rights Declaration. (2012). Retrieved from <https://asean.org/asean-human-rights-declaration/>.

¹⁸ Ibid.

¹⁹ *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (FC), at paragraph 13

²⁰ Sesi Libat Urus Inisiatif Ke Arah Kebebasan Maklumat Bersama Agensi Penguatkuasaan, Keselamatan dan Pertahanan. (2023). Retrieved from

<https://www.bheuu.gov.my/pdf/Dasar/PEMBENTANGAN%20UPDATE%20FOI%20-%20SESI%20LIBAT%20URUS%20AGENSI%20PENGUATKUASAAN.pdf>.

²¹ Bunyan, J. (2023, February 23). Ramkarpal: Govt has consulted stakeholders to enact Freedom of Information Act, moots formation of info commission. *Malay Mail*. Retrieved from <https://www.malaymail.com/news/malaysia/2023/02/22/ramkarpal-govt-has-consulted-stakeholders-to-enact-freedom-of-information-act-moots-formation-of-info-commission/56171>.

²² Amalan Kebebasan Maklumat. Retrieved from <https://beta.data.gov.my/p/amalan-kebebasan-maklumat>.

²³ Public Sector Open Data Platform. Retrieved from <https://www.malaysia.gov.my/portal/content/30589>.

The Federal Government's current Freedom of Information practices are an implicit acknowledgement of the importance of a right of access to information in Malaysia.

How To Have A Constitutional Right Of Access To Information?

Judicial Recognition

One way to introduce a constitutional right of access to information would be by way of judicial recognition of the right. This can be achieved by way of a judicial expansion of the freedom of speech and expression found in Article 10(1)(a) of the Federal Constitution.

As conceded earlier, there is no right of access to information expressly provided for under the Federal Constitution. However, it is worth noting that the absence of an express right in the Federal Constitution does not mean such a right cannot exist and/or cannot be recognised as being a constitutional right within Malaysian jurisprudence.

The Malaysian superior courts have long recognised that the Federal Constitution is a "living piece of legislation"²⁴ and "its provisions must be construed broadly and not in a pedantic way - with less rigidity and more generosity than other Acts."²⁵

It is also trite law that "it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution."²⁶

Article 5 of Federal Constitution, on right to life, has been expanded to include the right of access to justice,²⁷ right to receive a fair trial,²⁸ right to live in a reasonably healthy and pollution free environment,²⁹ the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members,³⁰ and the right to privacy.³¹

In *Penerbitan Sahabat*, a case which involved the freedom of speech and expression, Abdul Malik Ishak J (later JCA) held that the freedom of expression includes the right to information:

"Freedom of speech and expression must be read in the context of the right to information when dealing with the second article. According to *Halsbury's Laws of England* (4th Ed, Vol 8) at para 834, the phrase 'freedom of expression' would include

²⁴ Raja Azlan Shah Ag LP (as he then was) in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (FC), at p. 32

²⁵ Ibid.

²⁶ see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC), at paragraph 8

²⁷ *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (FC), at p. 334; see also *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 (FC), at p. 32

²⁸ *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC), at paragraphs 19 to 20

²⁹ *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1998] 3 MLJ 289 (FC), at p. 288

³⁰ Ibid.; see also *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC), at p. 225 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan And Another Appeal* [1996] 1 MLJ 481 (CA), at p. 510

³¹ *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (FC), at paragraph 15

both the right to receive and to express ideas and information and the secrecy of private communication."³² (Emphasis mine)

In *Sivarasa Rasiah*, the Federal Court mentioned in passing that the right to receive information can be derived from the freedom of speech and expression found in Article 10(1)(a) of the Federal Constitution:

"Article 10 contains certain express and, by interpretive implication, other specific freedoms. For example, the **freedom of speech and expression are expressly guaranteed by art 10(1)(a)**. The **right to be derived from the express protection is the right to receive information**, which is equally guaranteed."³³ (Emphasis mine)

However, in a more recent decision, the Court of Appeal in *Haris Fatillah B Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] MLJU 45 ("**Haris Fatillah**") refused to acknowledge the right of access to information as being applicable in Malaysian jurisprudence despite *Sivarasa Rasiah* having been brought to its attention.³⁴

The learned judges in *Haris Fatillah*, with all due respect, employed an overly simplistic and narrow approach to constitutional interpretation. They rejected the applicability of the right of access to information on the basis that Malaysia "do[es] not have specific statute ... which provides an elaborate and comprehensive matters on right to information"³⁵ nor does Malaysia "have similar freedom of opinion and expression ... which clearly permits an access to information."³⁶

The Court of Appeal in *Haris Fatillah*, unfortunately and respectfully, failed, and/or neglected to interpret the Federal Constitution in a manner consistent with the trite constitutional principles mentioned above.

The constitutionally regressive decision in *Haris Fatillah* has, regrettably, become binding precedent vis-a-vis the applicability of the right of access to information in Malaysia.

In the recent decision of *Tengku Faedzah bt Raja Fuad (diguamkan selaku Bendahari Persatuan Pengguna Islam Malaysia (PPIM) selaras dengan peruntukan Seksyen 9(c) Akta Pertubuhan 1966) & Ors v Kerajaan Malaysia & Ors* [2022] MLJU 1654 ("**Tengku Faedzah**"), the learned High Court judge followed *Haris Fatillah* and held that "Article 10(1)(a) of the FC does not impose [a] right to information."³⁷

³² *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1)* [2005] 5 MLJ 489 (HC), at paragraph 109

³³ *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (FC), at paragraph 13

³⁴ See *Haris Fatillah B Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] MLJU 45 (CA), at paragraphs 8(4) and 40

³⁵ *Haris Fatillah B Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] MLJU 45 (CA), at paragraph 44

³⁶ *Ibid.*

³⁷ *Tengku Faedzah bt Raja Fuad (diguamkan selaku Bendahari Persatuan Pengguna Islam Malaysia (PPIM) selaras dengan peruntukan Seksyen 9(c) Akta Pertubuhan 1966) & Ors v Kerajaan Malaysia & Ors* [2022] MLJU 1654 (HC), at paragraphs 18 to 20

Haris Fatillah and Tengku Faedzah notwithstanding, the dictum in *Sivara* leaves room for a later Court to adopt the same and to crystallise it into binding precedent.³⁸

One major weakness of judicial recognition of a constitutional right of access to information is that a later panel of judges could derecognise the same, by departing from the decision of earlier courts (as seen in Haris Fatillah). This is not unique to the right of access to information as it has occurred in relation to other judicially recognised concepts such as the basic structure doctrine.³⁹

Constitutional Amendment

Another way to introduce a constitutional right of access to information would be by way of a constitutional amendment(s) to Article 10 of the Federal Constitution, pursuant to Article 159 of the Federal Constitution.

Amendments to the Federal Constitution, including to provisions relating to fundamental liberties (namely the articles in Part II of the Federal Constitution), are not unheard of. For example, Article 10(2)(a) to (c) of the Federal Constitution was amended in 1963 to insert the words “or any part thereof” after the words “the security of the Federation”.⁴⁰

Article 10(1)(a) of the Federal Constitution could be amended in the following manner, drawing from the phraseology found in Article 19 of the UDHR and Article 23 of the ADHR:

“(1) Subject to Clauses (2), (3) and (4) -

(a) every citizen has the right to freedom of speech and expression, **and this includes the right to seek, receive, and impart information;**”

[“Proposed Amendment 1”]

Alternatively, drawing yet again from the phraseology found in Article 19 of the UDHR and Article 23 of the ADHR, a new Article 10(1)(d) of the Federal Constitution could be introduced:

“(1) Subject to Clauses (2), (3) and (4) -

(c) all citizens have the right to form associations;

(d) every citizen has the right to seek, receive, and impart information”

³⁸ See e.g. *Kebing Wan & Anor v Lembaga Pembangunan Dan Lindungan Tanah & Ors* [2012] MLJU 1284 (HC), at paragraph 27, as per Wong Dak Wah J (later CJSS) and *Wong Choo Yong v Safety Insurance Co Ltd* [1971] 2 MLJ 260 (HC), at p. 263, per Ibrahim Manan J (later FJ); The Court of Appeal in *R v Barton and Booth* [2020] EWCA Crim 575 (CA), at paragraphs 102 and 104, considered itself bound by the Supreme Court’s dicta of Lord Hughes in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club)* [2017] UKSC 67 (SC) which proposed a different test from the test propounded in the Court of Appeal’s earlier decision in *R v Ghosh* [1982] QB 1053 (CA)

³⁹ Wu, J. K. M. (2021). The Rise and Fall of the Basic Structure Doctrine. *LegalFoxes Law Times*, II(III). Retrieved from https://www.foxeslawjournal.com/files/ugd/43c023_c0ef67a3189347de8ecf2df1a7cd49e8.pdf

⁴⁰ See Section 60(3) of the Federation of Malaya Act of Parliament No. 26 of 1963

[“Proposed Amendment 2”]

Proposed Amendment 2 would require a consequential amendment to other parts of Article 10 of the Federal Constitution. For example, the following amendment would have to be made if the same restrictions imposed on the freedom of speech and expression were imposed on the right of access to information:

“(2) Parliament may by law impose -

(a) on the rights conferred by paragraph (a) **and** (d) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;”

Proposed Amendment 1 would remove the need for Article 10(2)(a) of the Federal Constitution to be amended.

One of the downsides to the constitutional amendment route is that a two-third majority in Parliament would be required.⁴¹ At the moment, it is unclear whether the current members of Parliament consider the right of access to information to be of sufficient importance justifying the introduction and/or passing of a Constitution (Amendment) Bill.

In view of the foregoing, there are valid reasons which would justify Malaysia's recognition of the right of access to information. Such a recognition can come about by way of judicial recognition and/or constitutional amendment.

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⁴¹ Article 159(4) of the Federal Constitution