

A free press must have a free rein

In Malaysia, the debate is on whether the ISA, OSA and other such laws should be repealed. But Swedish experts tell **TAN CHOE CHOE** that their 232-year-old legislation guarantees the right of access to information and this has helped the media and the country

MENTION the arrest of *Sin Chew Daily* reporter Tan Hoon Cheng and one is likely to hear sighs of frustration and comments about bad politicking.

And it has been after more than a month since her arrest and subsequent release under the Internal Security Act, purportedly for her own safety.

National Union of Journalists president Norila Mohd Daud called it an act of "intimidation of journalists and the media industry".

While the media has often been looked on as the watchdog for good governance, transparency and accountability, in Malaysia the efficacy of this role is often hemmed in by various legislation.

Information Ministry secretary-general Datuk Kamaruddin Siaraf, in a recent two-day workshop on Freedom of Information jointly organised by Transparency International and the Swedish Embassy, says:

"There is no law that stops our journalists from playing their role. They can write on anything except those proscribed by the Sedition Act or the Defamation Act.

"Have the proof or evidence and you can have your scoop."

But this is not the case, rebuts R. Nadeswaran, *The Sun's* editor of special and investigative reporting.

There are many laws — like the Official Secrets Act, the Internal Security Act, the Printing and Publications Act, the Penal Code and the Multimedia Act — that regulate and impede the role of the media, he says.

"Taxpayers look to the media to ensure politicians, bureaucrats and contractors are held accountable," says Nadeswaran.

"But if some persist in hiding or censoring information which taxpayers have a right to see, then there will be politicians and civil servants who are free to engage in corruption because journalists won't be able to play their role as watchdogs effectively."

Retired civil servant Dr Pola Singh says the tradition of secrecy in Malaysia is well-entrenched.

"Almost any and every document that comes to an officer is now automatically stamped OSA (Official Secret Act). No one really stops to think if it should really be an OSA document or not."

This is in stark contrast to Sweden, where every citizen has access to public documents, a right guaranteed by their constitution since 1776.

Indeed, this is the world's oldest legislation that guarantees right of access to information, the Freedom of the Press Act.

This right is not just exclusive to members of the press, but to every citizen of the nation.

The underlying principle is spelt out in the premise of Chapter Two of the Act: "In order to encourage the free interchange of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents."

"That basically means that when a person turns to a state or municipal agency and asks to see a document, he has a right to get

it immediately, and at no cost," says Swedish journalist Anders R. Olsson.

If anyone is refused a document or only given a truncated version of it, he is entitled to get a written notification of the refusal, specifying the grounds for the refusal, and informed about his right to appeal, says Kjell Swanstrom, head of the Parliamentary Ombudsman's Office in Sweden.

An appeal can be made to an administrative Court of Appeal and ultimately to the Supreme Administrative Court.

The matter would be dealt with as speedily as possible as the courts are obliged to give priority to cases concerning the refusal of access to public documents.

The Act also stipulates that those who ask to be shown a public document are entitled to remain anonymous.

"It also lays down the right to freely influence the public and for example, make them aware of governmental mismanagement and red tape," says Swedish ambassador to Malaysia, Helena Sangeland.

"It also establishes the right to publish information without prior control."

Sangeland believes the Freedom of the Press Act, together with the Freedom of Expression Act, which allow access to information and the right to communicate findings to the public, are fundamental to Sweden's success in combating corruption.

"It's easier to hold politicians and governments accountable when information is available; when any gaps that exist between official and public knowledge are reduced.

"I think Sweden's successful ranking in Transparency International's Corruption Perception Index makes a good case for the benefits of



Helena Sangeland says the media has a critical role to play in the fight against corruption

information freedom."

Sweden has always topped the chart when it comes to transparency.

In 2007, it shared fourth spot with Singapore, after Denmark, Finland and New Zealand.

Sangeland says if she was privy to information of a government decision taken as a result of corruption, she has the right to tell the media.

"I can choose to be anonymous and the authorities will have no right to find out who leaked the information.

"The media, in turn, cannot be forced to reveal its sources. The whistleblowers enjoy tremendous protection."

The media has a critical role to play in the fight against corruption, says Sangeland, by scrutinising the public administration and bringing any malpractices to light.

The workshop's chief facilitator, Toby Mendel, in



Kamaruddin Siaraf says there is no law stopping journalists acting as society's watchdog

concluding the workshop, remarks that some participants feel that the Malaysian legal framework is "extremely hostile to freedom of expression".

"...these have allowed for subjective and arbitrary regulation of the freedom of information and is permitted by ouster clauses in relevant legislation which have the effect of precluding judiciary review," says human rights lawyer and National Human Rights Society president Malik Imtiaz.

This, he adds, puts executive decisions virtually beyond the reach of the law.

"The Official Secrets Act, in particular, is too secretive, failing to strike an appropriate balance between openness and protecting legitimate confidentiality interests.

"It also accords undue discretion to officials to classify information as secret, and this discretion is routinely exercised.

"There are very few provisions providing for access to information and no general Freedom of Information law."

Mendel, who also directs the law programme at Article 19, an international non-governmental organisation that focuses on freedom of expression and the right to information, says:

"Civil servants exercise a lot of power and act in ways that are not accountable to the public.

"This includes a significant problem of corruption, as well as refusals to respect the rules.

"Information is a prized product and it wields a lot of power in the hands of those who hold it and who can decide on the extent of its secrecy.

"Given the practices in Malaysia, one is often left wondering what the justifications are or were when public information are/were classified restricted, confidential or secret," says V. Gayathry from the Centre for Independent Journalism.

She cites as examples the "infamous secrecy" around the Air Pollution Index, which had to be declassified in 2005 before it could be made public; agreements involving the water deals and draft bills before they were presented in Parliament; and local council meetings.

"As long as the OSA is in place, anyone in the government who has been conferred powers under the Act can and will classify any information under any of the categories — restricted, confidential or secret — and for almost any reason that cannot be challenged in court," says Gayathry.

An amendment to the act in 1986, she says, also effectively removed judicial discretion in sentencing as those convicted under the law would be subject to a mandatory jail sentence.

"Even when information or wrongdoing is exposed, there is often very little official or even general public reaction, making it difficult to promote the idea of access to information as a powerful democratic right."

Gayathry says civil society groups have come up with a petition calling for the enactment of the freedom of information law to be based on the principle of maximum disclosure, with exceptions to the right of access spelt out "clearly and narrowly".

"Exceptions should be limited to protection of legitimate interests in the areas of law enforcement, privacy, national security, commercial and other relationships premised on confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes."

The petition also proposes that individuals be protected from any legal, administrative or employment-related sanctions for releasing in good faith information on wrongdoing.

Olsson says the citizen's right to speak is not enough.

"Without access to reliable and relevant information about their own society, their talk will have limited value; a democracy without well-informed citizens is not a healthy democracy."

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Pola Singh, retired civil servant



The truth should be shared

Swedish journalist Anders R. Olsson tells **TAN CHOE CHOE** how his country's tradition of freedom of information has made the Swedish media a more effective watchdog and, surprisingly, shaped a society that is actually more trusting of the government

Q: Are there instances when Swedish journalists are refused access to public documents?

A: When a journalist sees a civil servant and demands to see certain documents, he puts the civil servant in a difficult situation. The rules are pretty complex, and they don't always know exactly what kind of information they're allowed to hand out.

We have the Swedish Secrecy Act, which is a huge piece of legislation. It can be difficult for the civil servants to decide what's secret or not. Some prefer not to make any decision, putting the reporter off or try to refer him to someone else so it's out of their hands. This is one of the more common problems.

If the official refuses to disclose the information, he'd be obliged to put the refusal in writing; and to refer the issue to someone who might know more about the issue. In this way, the journalist had forced the official to find out the rules.

Q: Has any civil servant been penalised or jailed for giving information that he should not have?

A: He may be criticised or made uncomfortable but not jailed.

Q: With the right to freedom of information enshrined in the Swedish constitution, does it mean everyone is allowed access to every public document?

A: No. There's the Secrecy Act which, I think, has about 160 paragraphs explaining in detail what information is to be kept secret. But there's no connection between what's allowed to be printed and written as a journalist and what is secret.

If I get hold of a secret document, there's no crime in publishing it. Unless, of course, if I reveal military information or invade someone's privacy for which I can certainly be prosecuted.

But the fact that what I have is classified as secret information is no reason to stop me from publishing it. If some public servant makes the mistake of giving it to me, I'm not responsible; he may be. I won't have any problem handling or publishing the information in the document. I won't get prosecuted in any way.

Q: To a journalist, this is fabulous.

A: Yes. If someone breaks into a house and steals a document and hands it to me, the person doing the break-in is responsible for the crime. I can't be made responsible for the way the document landed on my lap.

Q: What exactly cannot be reported?

A: There is specific legislation on what cannot be published, like libel and military secrets and racist propaganda.

Q: What information should be made public?

A: Swedish law is a good one, that everything should be published unless and until it is shown it actually causes more harm if it's made public, or there's no strong reason to make it public.

Q: Malaysia has various legislation that govern or regulate the press. What about Sweden?

A: Just some advertising regulations.

Q: The list of exceptions in the freedom of information article in the Swedish constitution seems to be rather general.

A: In the constitution, seven different areas are mentioned as exceptions, including national defence, protection of privacy and environment safety. The seven areas cover just about everything. The specific areas of secrecy are dealt with in the Secrecy Act and any change in that would have to be made by the parliament.

Q: They sound like some of the arguments Malaysians have heard for having the Printing Presses and Publications Act, the Official Secrets Act, and other secrecy laws.

A: These areas just spell out the approved motive for secrecy but it doesn't mean that everything and anything pertaining to these areas are secret. The list of exceptions gives or allows parliament the power to decide what is secret on issues related to these areas.

Q: Has this freedom of information made journalists in Sweden an effective watchdog group?

A: I think so. It's very difficult for the government to conduct secret manoeuvres

of any kind. Of course, in an environment where everyone knows the rules, there will be some who know how to get around it. It's far more difficult when you have a freedom of information regime, which is the case in Sweden.

Q: How has this right to information shaped the thinking of Swedes in the last 200 years?

A: I think one of the effects is we actually trust the government more than most people.

In many countries, I think people have a sort of antagonistic relationship with the state. They feel the state takes their money and doesn't really do anything for them. Every five years, they have a chance to vote for a political party to do something for them. For the rest of the time, they want to be left alone.

If you have that attitude, it means you're not really interested in freedom of information, but more interested in staying away from the government. In Sweden, it's not considered impossible to have an influence on government policies, maybe not personally but through some organisation that you're part of.

I'm generalising. But if you compare Sweden to countries like Germany and Italy, there's a difference. We have a bit more confidence in the government and as a result of that or maybe the other way around, we are interested in freedom of information.

Q: What made your forefathers introduce the right to freedom of information into the constitution in 1766?

A: To put it very simply, there was then the political elite that was divided into two parties — the Hats and the Cats. The Hats were conservative and the Cats were considered more liberal. The Hats were often in power.

When the Hats were in power, the Cats weren't allowed to get information they wanted. So the Cats promised to have a right to access government documents if they came to power, and they did.

Q: It's a wonderful lack of foresight.

A: Yes. We kind of grew into it as more people began to read, get access to things and participate in society. To some extent, it's a piece of luck.