

CHAPTER II CONCEPTS AND THEORIES

The topic of this thesis is “FREEDOM OF INFORMATION LAW IN ASEAN: A LESSON FROM THAILAND FOR INDONESIA, using the following concepts and theories for analysis:

1. Freedom of Information
2. Freedom of expression
3. Access to information
4. Bureaucratic secrecy
5. Democratization and communication
6. FOI laws – overseas experiences

2.1 Freedom of Information

“*Information*” has various connotations and is frequently used according to the intention and objectives of individual user. The *Oxford English Dictionary*, the earliest historical record of the word information in English, defines it as: “the act of informing, or giving form or shape to the mind, as in education, instruction, or training.”

Information in terms of the freedom of information concept could be described as an interesting message, no matter if it is true, false, or just merely comments regarding events which have taken place, just took place, or will take place; it is being transmitted to one or more receivers, or disseminated to the public.

The message is the core to the communication process between a sender and a receiver, and from a sender to the public. If the message is missing or misunderstood, the communication could be distorted.

Information has become valuable and meaningful to the present world. As Sheila S. Coronel wrote in the introduction of her book, *Access to information in Southeast Asia*, “Today, the notion that information can chip away at the heart of power is an unsettling one, especially in

Southeast Asia where, despite significant strides in openness and democracy and advances in technology, power relations remain congealed.¹

Information is also used to classify social status, as remarked by Associate Professor Kanjana Kaewthep, National Outstanding Researcher 2005, ‘Accessibility to information is a criterion to divide social status into one with information, and one without. The conflict between these two classes turns into political issues. The frequent incidents in Thailand are the decisions on various public utility projects such as dams, sky trains, and expressways. Both government agencies and contractors have all the information to proceed with, but the affected public will acquire little or none.’²

The idea of freedom of information or right to know is the fundamental right of the public to access information in a democratic society, as stated by former Attorney General Ramsey Clark:

“People should know the details of governmental administration, if that government is really of the people, by the people and for the people. In such a case, there will be nothing to doom the democracy.”³

Section 56 of the Constitution of the Kingdom of Thailand B.E. 2550, also states that “A person shall have the right to know and have access to public data or information in the possession of Government agencies, State agencies, State enterprises, or local governments, unless disclosure of such data or information may jeopardize the security of the State, public safety, or the interests of other persons which shall be protected or purport to be personal data, as provided by law.”⁴

Associate Professor Witayakorn Chianggul, a democratic advocate, has offered this comment on the Constitution of Thailand: “The constitution is always beautifully but vaguely drafted that people have rights and freedom in all matters, but in fact, there is no chance. An article on the people’s rights is usually ended with ‘as stated in the law’ without a time frame to pass the progressive supplemented law. There is no penalty on what will take place if government

¹ Sheila S. Coronel. *The Right to Know : ACCESS TO INFORMATION IN SOUTHEAST ASIA*. Manila: PCIJ and Seapa. 2001.

² Kanjana Kaewthep. *Media analysis: Technique and concept*. Bangkok. 2541.

³ Chaiwat Wongwattanasam. *Freedom of Information*. 3 vols. Bangkok : Nitisart, 2521.

⁴ Constitution of the Kingdom of Thailand B.E. 2550 (2007)

disregards it. There is no real neutral independent agency to take legal action on behalf of the people; for example, the Constitutional Court is distorted by politicians to serve their purposes; and some traditional high-ranking government officials do not have an interest in human rights.⁵

A right to access information is one of the core elements of democracy. The expansion of education and socio-economic information for the public will enable people to be aware of their rights and negotiating power. Well informed people, in other words, will not be taken advantage of by politicians, social elites, or capitalists.

In Thailand, the idea of right to access the information, especially news reports on governmental activities, was introduced in 1844 by Dan Beach Bradley, a missionary. He relied on the idea of the “rights to know” to publish a bi-weekly newspaper, *Bangkok Reader*. It was a failure then mainly due to the distrust of the Thai royal family who was not yet familiar with western ideas introduced by foreigners. Access to governmental information for newsmen was thus blocked. Government officials, in particular, were not cooperating in giving out any information, fearing that the damaging consequences would be brought to themselves and their colleagues.

During the reign of King Vajiravudh (Rama VI), the concept of right to know was brought back, and this made his reign a golden period for newspapers.

In the early years of the Twentieth Century, King Vajiravudh, himself a prolific writer, used several pen names to write newspaper articles commenting on issues of the day.⁶

However, after the Revolution in 1932, public rights to know were neglected until 1990. The government of the time led by General Chatchai Choonhavan made an attempt to draft a law on the governmental information, but unfortunately the government was toppled by a coup in 1992. The Black May Incident of that year nevertheless brought with it the Official Information Act, which was passed in 1997 and which has been in force for 12 years up to the present.

For Indonesia, Zola V. Maddison wrote about the history of public information in this country in his book, *Information's Role in Emerging Democratic Societies: the Case of Indonesia*.

⁵ Witayakom Chianggul. **Political Reform up to the information and people** [Online]. 2007. Available from: <http://witayakomclub.wordpress.com/2007/06/26/thaipolitical/> [retrieved January 24, 2009]

⁶ Kavi Chongkittavom. *Media and Access to Information in Thailand*. World Bank: Washington DC. 2001

Indonesia's relationship with information has historically been linked to a ruling political power determining the output of information as a means of maintaining political hegemony. We can trace the first major output of information arriving on the islands through the colonial Dutch newspapers that emerged in the 1850's. Indonesian, Javanese and Chinese language papers soon followed and Dutch colonists were quick to recognize the potential of indigenous language newspapers for spreading nationalist ideologies that conflicted with their own.

In response, a series of laws and regulations were created to control the dissemination of information. The most restrictive of these were the *Haatzaai Artikelen* (Sowing of Hatred Articles) followed by the 1931 Press Act. Both could be used to silence anyone perceived of "disturbing public order or spreading hatred or dissent against the government."

After establishing independence in 1945, Indonesia experienced a series of short-lived governments resulting in a brief respite from such tight control of the press. However, the new and popularly exercised freedom quickly came to a close with the installation of Indonesia's first president, Sukarno. Faced with civil unrest, Sukarno declared martial law and, within a year, had carried out over 125 acts of suppression against the press, including interrogations of journalists, detentions, and newspapers closures. Sukarno's "Guided Democracy" borrowed themes from his colonial predecessors; most notably that the suppression of a free press was necessary to create social stability. Before ceding power to Suharto in 1967, Sukarno signed a revised Press Act into law. Chapter 9, Article 20.1a required that editors obtain an SIT (*Surat Izin Terbit* or Permit to Print) from the Ministry of Information's military security authority any time the state was 'in transition'.⁷

Following the demise of Sukarno's rule, Indonesia entered the era of Suharto's "New Order". During this era, the government took control of information design and distribution. All news reports and information were presented only to promote Suharto's political ideologies. When he was ousted in 1998, the people's rights and freedom to access information have increased. At

⁷ Zola V. Maddison. *Information's Role in Emerging Democratic Societies: the Case of Indonesia* [Online]. Available: from <http://libr.org/isc/issues/ISC25/articles/INFORMATION%20ROLE%20IN%20EMERGING%20DEMOCRATIC%20SOCIETIES.pdf> [retrieved January 24, 2009]

present, Indonesia has experienced the highest growth rate of press freedom in Southeast Asia since the passage of the Openness of Public Information Act in April, 2008.

2.2 Freedom of expression

Freedom of expression and freedom of speech are generally viewed as very similar. However, the freedom of speech is related to speaking while the freedom of expression covers any act of seeking, receiving and imparting information or ideas, regardless of the medium used.

Freedom of expression is a foundation of democratic rights and freedoms. UNESCO promotes freedom of expression as a basic human right because it is essential for a democratic system to work and for political participation by the people. Citizens cannot efficiently exercise their right to vote or be involved in public affairs if they do not have free access to information and ideas and are not able to express their views freely.

Thus everybody, and especially the media, must have the freedom of expression – that is, to hold opinions without interference. The Zimbabwean Constitution, for instance, most clearly defines the significance of freedom of expression.

The Zimbabwean Constitution describes freedom of expression at some length in its Article 20. In the case of *In Re Munhumeso* in 1992, the Zimbabwean Supreme Court cast freedom of expression as a "vitaly important right" that lies "at the foundation of a democratic society" and is a "basic condition for the progress of society and the development of persons." According to the Court, freedom of expression serves four broad purposes: (1) it helps an individual to obtain self-fulfillment; (2) it assists in the discovery of truth; (3) it strengthens the capacity of an individual to participate in decision making; and (4) it provides a mechanism for establishing a reasonable balance between stability and social change.⁸

⁸ Christopher W. Dell. **Freedom of expression and economic prosperity**. [Online].2008. Available from: <http://www.newzimbabwe.com/pages/powell43.14096.html> [retrieved January 24, 2009]

Freedom of expression sometimes leads to conflict and argument, especially in so far as political stability and national security are concerned. However, if the exercise of freedom of expression does not take place in real life, any legal provision guaranteeing it is simply a dead letter.

Professor Susan Dimock wrote in her article, *LAW AND LIBERTY*, there are four arguments for freedom of opinion and expression:

- 1) The opinion we suppress might, for all we know, be true; we are fallible.
- 2) Even if not wholly true, the suppressed opinion might contain part of the truth, and that truth can only come out through free discussion.
- 3) Even if we know the whole truth on a given subject, we must allow our belief to be challenged; otherwise it will come to be held as mere prejudice, or dead dogma; we will lose our understanding of its rational ground – that is, why it is right.
- 4) The meaning of truths will be lost or enfeebled unless challenged; they will not be properly held or appreciated or internalized.⁹

2.3 Access to information

Information is indeed a major part in our daily life. Humans need information to assist in making decisions. While the people in urban society receive vast information from a myriad of sources, those in the rural areas, though having greater access to information thanks to the spread of new technology, still remain more or less excluded from information sources at the disposal of the urban citizens. This proves to be a major part of the basis for social inequality.

The members of our society have a fundamental right of access to information. A basic right of citizens in a democratic society is access to information on matters which affect their lives. At times the interests of the individual have to be subordinated to the interests of the community in such matters as development of energy and mineral resources,

⁹ Susan Dimock. *LAW AND LIBERTY*. [Online]. 2007. Available from: www.arts.yorku.ca/phil/dimock/courses/phil2050/documents/LAWANDLIBERTY-lecturenotes.doc [retrieved January 14, 2009]

industry, town planning, transportation etc. Citizens have a right to be informed of the facts involved and to participate in the decision-making process, e.g. when activities such as massive alterations to the landscape and its use are proposed. The right to be informed, to be consulted, and to intervene is essential and fundamental to the democratic process.¹⁰

Former Prime Minister Anan Panyarachun once said that the right to access information and the duty to provide complete information are only the mechanical part of the matter: they are the methods as represented by the different forms of democratic government of achieving real rights. We are anxious to have administrations with quality and morality that will be in conjunction with public interest. However, the mechanics or systems to create good effective governance for such purpose are already not easy to create – not to mention those with such quality and morality.¹¹

2.4 Bureaucratic secrecy

The system to withhold information, not concerning the national security, to the public and press is the way to suppress freedom. In some countries, there are laws specifically to maintain bureaucratic secrecy. The purposes of these laws are to conceal what is considered necessary to be withheld from public scrutiny but in actual fact they serve to cover up bureaucratic wrongdoings or irregularities. Countries such as India, Pakistan, the United Kingdom, and the United States of America are cases in point.

Mr. Pokin Palakul, former Deputy Prime Minister, commented that in Thailand, 'government confidentiality' is the major obstacle for the public to gain civil information. Consequently, people do not know how to deal with government procedures and this paves the way for abuses of power and authority. Documents will not be made public unless there is an exemption or permission for their disclosure. Requests to see any documents or judgments through Thai government agencies can only be approved by the heads of such departments, not by the public right.¹²

¹⁰The Council of the Library and Information Association of New Zealand Aotearoa. [Online].2002. Available from: <http://www.lianza.org.nz/about/governance/statements/accesstoinfo.html> [retrieved January 14, 2009]

¹¹ Yip Punjan. Use of Official information Act B.E. 2540. Bangkok, 2543, pp. 57-58

¹² Pokin Palakul, Official Information Act B.E.2540: openness of government. Bangkok, 2540. Pp.19

In Indonesia, 32 years under the New Order regime gave rise to an imbalance in political power which is a far cry from democratic values. The governmental system was centralistic and monolithic, and all powers were in the hands of President Suharto. Overall it led to a closed non-participatory government. Public decision making processes remained a privilege of the ruling elite. When everything is centrally governed and confidential, there was widespread corruption, so much that Suharto was considered one of the world's most corrupt leaders.

“Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret...Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament – at least in so far as ignorance somehow agrees with the bureaucracy's interests.” Sir Humphrey Appleby from Yes Prime Minister said, “The Official Secrets Act is not there to protect secrets. It's there to protect officials.”¹³

2.5 Democratization and communication

The right to communicate is crucial to the development of democratic rule. It also covers the right to demonstrate, discuss, participate, inquire, narrate and access information. Without a two-way flow between participants in the process, democratization is not possible. Democratization can be defined as the process whereby the individual becomes an active partner and not a meager object of communication; and the variety of messages exchanged increases, together with the levels and quality of social representation or participation in communication.

The right to communicate is a general norm based on ideals of participatory democracy. It asserts that all citizens must have a say, a communication right, in any and every governance process that affects them. It believes that a “right to hear and be heard, to inform and be informed,” and “to participate in public communication” should be the touchstone of communication policy.¹⁴

¹³ Bibek Debroy. **Officials' secret acts** [Online]. 2007. Available from: <http://www.indianexpress.com/news/Officials%92-secret-acts/225705/> [retrieved November 27, 2008]

¹⁴ CRIS. **Communication Rights in the Information Society: Democratization of Communication as Social Movement** [Online]. 2005. Available from: <http://dcc.syr.edu/ford/mim/CRIS-case-9-12-05.pdf> [retrieved November 27, 2008]

One of the most serious ideological issues in communication rights is its unrelenting lack of clarity about whether it is an individual right or a collective right.

“The UNESCO medium-term plan for 1984-89 is typical, defining the right to communicate as “a fundamental right of the individual and...a collective right, guaranteed to all communities and all nations.” There is very little analysis of the contradictions and ambiguities that such a combination creates.”¹⁵

It may be concluded that the right to communicate comprises information right, association right and right to privacy and cultural protection. However, rights without freedoms will not be of benefit to the development of democracy. People who exercise such rights should also be aware of their responsibility to society as well.

2.6 FOI laws – overseas experiences

Over 70 countries around the world have a law to guarantee the public right to receive any information from the government, and the oldest one was in Sweden.

Sweden is believed to be the first country in the world to adopt the information legislation in 1766. The enlightenment thinker and politician Anders Chydenius (1729-1803), from the Finnish city of Kokkola, played a crucial role in creating the new law. As Professor Juha Manninen describes in his article, the key achievements of the 1766 Act were the abolishment of political censorship and the gaining of public access to government documents.

Over recent decades, the legacy of Anders Chydenius has received more recognition globally. With the creation of the United Nations and international standards on human rights, the accessibility to information began to spread. Freedom of information is recognized in international law. Article 19 of both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights provides that every person shall have the right to seek and impart information. There is growing recognition that the right to seek information includes a right of freedom of information.

¹⁵ Hamelink, C. (1979). *The new international economic order and the new international information order*. Paris, UNESCO: Mauve Paper 34, International Commission for the Study of Communication Problems.

Over the past 40 years, there has been a dramatic increase in the number of countries that have adopted freedom of information laws. A milestone was the US Freedom of Information Act (FOIA) of 1966, and many countries started to follow the FOIA model on access to government documents. According to a global survey, some 70 countries have now adopted comprehensive Freedom of Information Acts. Fifty countries have legislation pending.¹⁶

The essence of the content and objectives of the information law already enacted or still pending in more than 100 countries in the world now can be set forth as follows:

- 1) To guarantee the public right to receive news and information of the government which have been made available for investigation, unless it is stated otherwise in the law
- 2) To ensure the transparency and responsibility of the government and government system to the public
- 3) To provide the opportunity for public to participate and inspect the governmental affairs
- 4) To protect some of the civil information needed for national security
- 5) To protect individual rights, especially private information created by government.¹⁷

Of the 70 countries, this thesis will focus on the experiences of those that are most relevant to the preparation of the Official Information Act of Thailand, namely, the United States of America, France, and the United Kingdom.

¹⁶ Juha Mustonen. **The World's First Freedom of Information Act** [Online].2006. Available from: <http://d.scribd.com/docs/19vc2xaj7ha443p0e9wq.pdf> [retrieved November 27, 2008]

¹⁷ Sasiporn Taikham. **A comparative study of information closure and information disclosure of the official information act, B.E. 2540**. Master's Thesis, Department of Mass Communication, Faculty of Communication Arts, Chulalongkorn University,2000. pp.48

2.6.1 Freedom of Information Act in the United States

In the United States, there is a law on information comprising the Freedom of Information Act (FOIA), United States Code Title 5 section 552 and Privacy Act of 1974 United States Code Title 5 Section 552. This law was promulgated on July 4, 1966 by President Lyndon Johnson.

The main objective of FOIA is to build the confidence of the public in receiving information and inspecting the administration, including any corrupt practices, and to ensure transparency which is vital in democratic society. The information from the government will clearly show how it works.

The purpose of FOIA is to initiate the idea to fully open up the state agencies and to close the legal gap that allows state agencies to refuse giving out information to public. The policy is set to open the information to all but withhold when necessary. The Congress sets 9 exemptions in the legislation to balance the public's right to know and the preservation of government secrets.¹⁸

Under the structure of FOIA, any records belonging to state agencies should be made available in any form to the public unless they are initially omitted. FOIA has 9 fundamental exemptions which will be considered by the authorized agency. If the inquirers are not satisfied, they can take it to a district court for clarity.¹⁹

The American press is not comfortable with FOIA because the state agencies normally refuse to disclose any information claiming that it was lost, not filed, or put it off till the information was invalid. On the other hand, the state employees or the businessmen think FOIA opens up so much that it is unfair to business operations.

¹⁸ Kent R. Middleton & Bill F. Chambertin. *The Law of Public Communication*, Second Edition, New York : Longman Publishing, 1991 c, pp.485-486

¹⁹ Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview*, (Washington,D.C.:U.S. department of Justice, September 1996 c), p.3-42.

Though the United States is under a truly democratic rule, there is National Security Act 1974 that allows the Central Intelligence Agency (CIA) to conceal the information which could lead to the disclosure of the sources.

On April 6 1982, President Reagan issued Executive Order 12356, which substantially increased the amount of information classified and withheld from public scrutiny. It increases agency discretion in imposing classification, allows for reclassification of previously released materials, and eliminates automatic declassification arrangement. By increasing the duration of official secrecy, the order lessens public access to agency records under the Freedom of Information Act.²⁰

2.6.2 The 1978 Law on Access to Administrative Documents in France

Although France is considered a developed country, a founder of European Union (EU) and United Nations (UN) and also a permanent member of United Nations Security Council, she has had the information legislation for only 31 years.

The 1978 Law on Access to Administrative Documents provides for a right to access by all persons to administrative documents held by public bodies. These documents include "files, reports, studies, records, minutes, statistics, orders, instructions, ministerial circulars, memoranda or replies containing an interpretation of positive law or a description of administrative procedures, recommendations, forecasts and decisions originating from the State, territorial authorities, public institutions or from public or private-law organizations managing a public service." They can be in any form. Documents handed over are subject to copyright rules and cannot be reproduced for commercial purposes. Public bodies must respond in one month.²¹

Meanwhile, the documents that would harm the secrecy of the proceedings of the government and proper authorities coming under the executive power and personal privacy are not available.

²⁰ Peter Herman, and Charles R, McClure. Public access to government information. New Jersey : Ablex Publishing Corporation, 2004. pp.33-34

²¹ David Banisar. **Freedom of Information and Access to Government Records Around the World** [Online]. 2006. Available from: <http://www.freedominfo.org/countries/france.htm> [retrieved November 14, 2008]

2.6.3 The Freedom of Information Act in the United Kingdom

United Kingdom is a constitutional monarchy upon which Thailand may be said to have modeled. Previously, there was Official Secrets Act 1991 in United Kingdom that prevented any governmental information from being released to the public. Any disclosure would be a crime, and Right to know by public was not accepted.

The House of Lords has given a lead in the right direction by sharply reversing its earlier doctrine that the government had an absolute legal right to withhold or suppress information needed as evidence in litigation. The abolition of this 'Crown privilege' is related elsewhere. Here we are concerned with the difficulties which British law puts in the way of the ordinary citizen trying to obtain or use information in government hands.²²

The Freedom of Information Act was adopted in November 2000; the Act gives any person a right of access to information held by a broad array of public authorities, which will number over 100,000 when it is in full effect. State authorities are required to respond within 20 working days.

It is possible to conclude that though the freedom of information acts in various countries have been introduced in different times, all have broadly similar goals of promoting good governance – that is, making the government more open, transparent, and accountable – by dismantling the bureaucratic culture of secrecy. In making the government more transparent and accountable to the public, this will result in the reduction or even eradication of corruption in government and its agencies and in their working efficiency.

Even members of the public will better understand how the government makes decisions, and, as more informed citizens, they will contribute more effectively to the democratization of the political process. All of these achievements will, in turn, help to raise the public's level of trust and confidence in government.

²² Bernard Schwartz. *Legal Control of Governments*. Oxford:Clarendon,1972c. ,P.81

All that has been mentioned should be of great benefit to the government and the nation, but, as we shall see, in reality the implementation of freedom of information law in many countries including Thailand still suffer from various shortcomings and obstacles ranging from government obstruction to bureaucratic inefficiency. Perhaps much more time is still required before the countries that have already introduced such a law will be able to reap full benefits from it.