

Right to Access to Information, is an Avenue for Strengthening the Sovereignty of People in Sri Lanka?

CS Kodikara

Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka
chamara.kodikara@yahoo.com

Abstract— *As per the constitution of Sri Lanka, sovereignty which includes powers of government, franchise and fundamental rights, is in the people and is inalienable. Further it elaborates the way in which the sovereignty exercised. People's powers of government are handed over to the elected representatives, to exercise in a certain manner in limited period of time. Further the preamble of the constitution embodies this idea of Social Contract between the people and their representatives. So people should have the knowledge over the implementation of their sovereign rights. In that context, "access to public information" is an essential fact for the empowerment of people. On the other hand transparent government is a long standing demand of general public and several attempts were made to enact a separate law for certifying the access of some governmental information (eg-assets and liabilities of elected and appointed dignitaries). Present government gives its priority not only for such act but also to make "right to access to information" as a new fundamental right. This paper particularly focus on the issue of "right to access information as fundamental right" and generally on the proposed information bill with its historical evolution. Comparative study with South African, Indian and USA jurisdictions would results better evaluation over the domestic attempt. In the special determination of the Supreme Court and in the Parliamentary debate, pertaining to the 19th amendment bill to the Constitution, this issue was heavily contested since its ambiguity and broadness. The constitutional guarantee on the right to information may adversely affect to the national security, peace and order. Though the limitations over such right are vague (eg- privacy) and sometimes unnecessarily diminishing its scope (eg-contempt to court). All such issues ultimately affect to the people's sovereignty. The objective of this research is to critically analyse whether the current approach of the government is sufficient to certifying the right to access public information to the people and determine how it affects to the people's sovereignty. Interviews with the legal experts may contribute as primary sources while acts, judgements and prior research works would be contribute as secondary sources. It is concluded with the recommendations for the better implementation of right to access of information*

Keywords— *Right to access, Information, Sovereignty*

I. INTRODUCTION

Access to information has been recognized as a human right since as far back as 1946. In that year, in the inaugural sessions of the United Nations, the General

Assembly adopted Resolution No. 59(1) which recognized freedom of information as a fundamental human right and as "the touchstone of all the freedoms to which the United Nations is consecrated". Article 19 of the International Covenant of Civil and Political Rights, as well as the Article 19 of the Universal Declaration of Human Rights recognize the right to seek, impart and receive information as a part of the fundamental right to freedom of speech and expression.

A number of countries have introduced such legislation in recent years and this has helped to bring about a change in political culture, the mindset and attitudes of politicians and bureaucrats and also has empowered the people in their quest for more participation, accountability and responsiveness. After several unsuccessful attempts in recent history, present government with the leadership of President Maitripala Sirisena, amended the constitution *inter alia* to give effect "Right to access to information" as a fundamental right. Actually they promised to enact specific law (via normal act) for certifying such right in their election manifesto.

The view of the author pertaining to the constitutional guarantee for "right to information" without proper procedure and substantive legal instruments, is derogate the merit of historical attempt in Sri Lankan political arena and will create many ambiguities and conflict of laws.

The 2nd part of this paper in this regard and provide justifications of "right to information" as an avenue for strengthen the people's sovereignty in general. 3rd Part of this paper deals with the legislative and judicial efforts made by the people to establish the legal recognition over their inherent right as the true owners of sovereignty. Part 4 brings a critical analysis of the "right to information" under 19th amendment to the constitution and with prevailing limitations. This paper

concludes with the recommendations derived with the comparative analysis in 5th part for the better implementation of “Right to access to information” as an avenue for strengthen the people’s sovereignty in Sri Lanka.

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” - James Madison [1822]

II. GOVERNMENT: OF THE PEOPLE; BY THE PEOPLE; FOR THE PEOPLE

The right to information (RTI) is a multidimensional right which serves a range of individual and group interests and rests on various theoretical justifications. The democratic system of government is nourished by and is dependent on the public and free flow of information which focuses on the core issues that influence community and individual life. Therefore, many view the free flow of information as a ‘key’ to the operation of the entire democratic system. The ability of individuals, interest groups, and organizations to actively participate in political debates deciding issues on the public agenda, as well as the very possibility of placing issues on that agenda, is tightly linked to their ability to obtain relevant information.

The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, ‘trustees’ of that information for the Sri Lankan people. The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of Government exist, and who ultimately (through one kind of impost or another) fund the institutions of Government and the salaries of officials. Similar to the prohibition against a public agency’s arbitrary and inequitable distribution of financial and other material resources considered to be public property, which includes allocation of these resources for the agency’s exclusive benefit, public agencies are prohibited from preventing access to the information that they produced as public trustees.

Further RTI is worked as an instrument for certifying other constitutional guarantees. For instance in

Environmental Foundation Limited v Urban Development Authority of Sri Lanka and others (Galle Face Green Case) (S.C.F.R 47/2014), Sarath N. Silva, C.J. held that RTI would enable a person to effectively exercise the right to freedom of speech and expression contained in Article 14(1)(a) of the constitution. Conditions supporting the exercise of basic rights are therefore no less crucial than the rights themselves. When a public agency stores information touching upon an individual’s rights or duties, that person’s only weapon in the protection of his or her other basic rights, constitutional and non-constitutional alike, is the RTI: “Indeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend.” - Toby Mendel (*Freedom of Information: An Internationally Protected Human Right*)

A commonly held view is that constitutions should include mechanisms to enable the regulation and oversight of government agencies. This idea rationalizes the introduction of principles and institutions into a constitution such as protection of the rule of law, aimed at guaranteeing the continuation of the democratic rules of the game. Accepting the proposition that transparency is vital to administrative oversight, which likewise has constitutional dimensions, this value represents an additional justification of the RTI. It has long been accepted that freedom of information encourages the transparency that alleviates corruption. In a broader sense, transparency ensures proper practice on a daily basis. As per Justice Brandeis, freedom of information can be understood as the “best disinfectant” for public ills. The constitutionality of access to information in this sense does not relate to its nature as a right, but to its nature as an important component of governance in any democratic regime. As is well known, constitutions not only protect rights, but also determine the structure of government. They do so in a manner that aims to promote proper functioning of government and to limit the threats that stem from the power vested in government. Access to information is an important tool in such structures. The public administration is meant to serve the public, its citizens, and residents. The public’s right to oversee those who serve it resembles the right of beneficiaries to monitor their trustees. Beneficiaries have no need to uncover or even suspect corruption to justify their oversight. In the public sphere, such a review may indicate that officials have invested innocently, but unwisely, even while bearing the public good in their sights; they may nevertheless be required to pay the consequences. At other times, the same type of review may indicate that officials have not met expectations of efficiency and good judgment. In any case, as long as these trustees’ decisions were reached free of any

conflicts of interest, or on the basis of extraneous considerations—they were within the “range of reasonableness”—the judiciary will avoid intervening. The same does not apply with regard to the public trial conducted in their wake. The public is entitled to demand an account of its trustees’ actions and the execution of their judgment. It is also entitled to demand that its trustees act not only reasonably, but optimally. Maintaining such oversight requires that the public have access to information. Sweden was the first country in the world which legislate a freedom of information act and to provide constitutional protection for this right. Then Finland inherited the right from Sweden. Today, Sweden and Finland are considered the least-corrupt countries in the world. The corruption-free character of these countries has arguably fostered a culture of transparency. It is important to mention the considerable weight that these states attach to administrative transparency as well. Conversely, totalitarian and corrupt regimes exert immense efforts designed to conceal information.

The justifications described above lead to the conclusion that constitutions adopted by democratic states should include targeted protections to guard the right to information. This conclusion flows from the fact that the right to information represents an essential ingredient in the proper functioning of substantive as well as procedural democracy, and that access to information is a necessary condition for the exercise of other human and civil rights. Taken alone or together, these justifications underscore the importance of the constitutional recognition of the right to information.

III. EVOLUTION OF DOMESTIC LEGAL REGIME OVER “RIGHT TO INFORMATION”

There has long been recognition of the need for legislation on the freedom of information in Sri Lanka. The Committee to advise on the Reform of Laws affecting Media Freedom and the Freedom of Expression in 1995, chaired by R.K.W. Goonesekere, recommended the enactment of a freedom of information of act and the inclusion of the right to information in the draft Constitutions which were being considered at the time. It recommended the following formulation “This includes the freedom to seek, receive and impart information and ideas, either orally, in writing, in print, in the form of art or through any other medium of one’s choice. With regard to a Freedom of Information Act, the Committee noted that such legislation should display clear commitment to the general principle of open government and adheres to the following; disclosure to be the rule rather than the exception, all individuals have an equal right of access to information, the burden of

justification for withholding information rests with the government, not the burden of justification for disclosure with the person requesting information, individuals improperly denied access to documents or other information have a right to seek relief in courts. The committee also recommended that the law should specifically list the types of information that may be withheld, indicating the duration of secrecy. Furthermore, legal provision must be made for enforcement of access, with provision for an appeal to an independent authority, including the courts, whose decision shall be binding. The law should make provisions for exempt categories, such as those required to protect individual privacy including medical records, trade secrets and confidential commercial information; law enforcement investigations, information obtained on the basis of confidentiality, and national security. It was also recommended that the legislation include a punitive provision whereby arbitrary or capricious denial of information could result in administrative penalties, including loss of salary, for government employees found in default.

Notwithstanding these recommendations, the Law Commission of Sri Lanka produced a conservative Access to Information Draft Bill in 1996. The Law Commission in its report which accompanied the draft Bill recognised the unsatisfactory status of the current legal regime. It stated that the current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access. This policy is no longer acceptable in view of the reasons adduced above. On the other hand, law reform which allowed for the principle that all information in hands of the government should be accessible to the public unless there is good reason to make it secret would also be inappropriate. The introduction of the Bill was not pursued.

In the years that followed various civil society groups engaged in serious discussions on alternative freedom of information legislation. During the period of cohabitation between then President Chandrika Kumaratunga and UNP government, a space emerged which civil society groups decided to exploit. The government indicated willingness to revive the initiative to introduce a Freedom of Information Act. Its initial draft was conservative. The Editors Guild, Free Media Movement and the Centre for Policy Alternatives presented an alternative draft which was more in keeping with international best practice. Thereafter a series of meetings were held under the chairmanship of the Prime Minister at after which a compromise third draft was agreed to. This draft was presented to and approved by the Cabinet of Ministers in February 2004. Unfortunately,

Parliament was dissolved soon afterwards as the cohabitation arrangement collapsed. Further progress on the enactment of this important piece of legislation was stalled.

The Bill was further revised in 2010 by then Justice and Legal Reforms Minister of the Peoples' Alliance government, Milinda Moragoda who attempted unsuccessfully to enact an RTI law. Later, then United National Party opposition parliamentarian Karu Jayasuriya also attempted to bring in an RTI law as a private member's Bill. This attempt was disallowed by the UPFA government in power in a move widely condemned at that time.

In despite of the fact that RTI was not specifically certified via the Constitution of the country or other law, judiciary played an active role by deriving such legal norm with existed provisions in per 19th amendment era for the sake of people's sovereign rights. While the right to information is not specifically referred to in the constitution, some judgments of the Supreme Court, which functions as a constitutional court, have held that the right to information is implicit in the freedom of speech and expression.

In the *Galle Face Green Case*, the Court held that denial of access to official information is a violation of Article 14(1)(a) of the Constitution, therefore suggesting that this article indirectly includes one's freedom of information. There is also strong judicial thinking that freedom of information is not a right *simpliciter* but an integral part of Article 10 relating to thought & conscience on the basis that information is the 'staple food for thought'. "The observations in *Stanley v. Georgia* suggest a better rationale that information is the staple food of thought, and that the right to information, *simpliciter*, is a corollary of the freedom of thought guaranteed by Article 10. Article 10 denies government the power to control men's minds, while Article 14(1) (a) excludes the power to curb their tongues. And that may explain and justify differences in regard to restrictions: e.g. that less restrictions are permissible in regard to possession of obscene material for private use than for distribution."

IV. AMBIT OF "RIGHT TO INFORMATION" IN 19TH AMENDMENT

Now, the art 14A (1) states that every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-

(a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;

(b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;

(c) any local authority; and

(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph."

With the amendments made to the original bill at the committee stage as per the directions of the Supreme Court made this provision more specific and meaning full. Honorable attorney general made those submissions to his Lordships concern. But the access to information in the possession of a private person is heavily argued even at the committee stage of the parliament since it relates to private persons. The category of the personality is not clear whether it is natural or legal. As per the views of the Hon. (Prof.) G.L. Peiris, though the restriction is with regard to the nature of the material, still gives the right of access to material in the possession of a private citizen. Even if it (information) comes within the ambit of central government, provincial councils or Urban council, is it the policy of Parliament to allow information in the hands of a private person to be divulged? That is a policy issue.

The Hon. M.A. Sumanthiran replied as if one goes through subparagraphs (a), (b) and (c) , it is not the information relating to "any other person"; not his private information, it is only in situations where "any other person" is in possession of information that is required from the State, a Ministry or a Government Department, a body established by law, a Ministry of a Province or a Department or statutory body or any local authority. This is only to make sure that those bodies do not say, "We do not have that information, so and-so has that information. It is only for that reason. This was gone into in full and that is why a particular formulation was agreed in the Supreme Court which is incorporated in the Determination. The whole desirability of bringing a private person into this was discussed. I do concede that there are concerns. But, as the Hon. Minister of Justice said, the whole thing was discussed and it was found that this information is restricted to an information that is in the possession of a Board or a Government Department or a local authority, not some of his private information. So, that is why the Court has permitted.

Art 14A (2) placed the restrictions on the right as declared and recognized by earlier. Restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence and for maintaining the authority and impartiality of the judiciary are the general restrictions.

In Joseph Perera alias Bruten Perera v. The Attorney General & others (1992) 1 SLR 199 at 230, it was held that the exercise of the basic freedom of expression cannot be made dependent upon the subjective whim of the Police, without offering any standard of guidance. Where power is entrusted to a State official to grant or withhold permit or licence in his uncontrolled discretion, the law ex facie impinges the fundamental rights under Article 12. The permission of the Police mandated by Regulation 28 is a form of prior restraint. It abridges the freedom of expression guaranteed by the Constitution. It gives the Police absolute discretionary power to control the right of citizens to exercise their right of expression. There is no rational or proximate nexus between the restriction imposed by Regulation 28 and national security/public order. It is unconstitutionally overbroad. It strikes at the foundation of the fundamental right of speech and expression by subjecting it to prior permission. Hence that Regulation is invalid and can not form the basis of an offence in law. Also in Victor Ivan & Others v. Hon. Sarath N. Silva & Others (2001) 1 SLR 309 at 325 and Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority & Others (2000) 1 SLR 314 at 375, pounced that a restriction, even if justified by compelling governmental interests, such as the interests of national security, must be so framed as not to limit the right protected by Article 14(1)(a) more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.

In 14A(3) states, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens." The thrust of the submission of petitioners in special determination was that Paragraph 14A(1) enables even foreigners to receive benefits as they become the beneficiaries of the rights by virtue of the synthetic definition of a citizen given in the Bill as per the proposed paragraph 14A(3). It was also stressed on the fact that the proposed amendment enables a foreigner with the help of four other citizens of Sri Lanka living abroad or living in

Sri Lanka to access this information via setting up a hoaxed unincorporated body. Further it was the contention of the Counsel that when a fundamental right of this nature is conferred it amounts to a right as provided for by law and therefore it amounts to granting of a right conferred by paragraph 14A(1) against an individual and secondly, the said paragraph 14A(1) becomes a source of law by which that 'right of access' is granted to the accessory.

Counsel heavily laid stress on the following aspect also with regard to the paragraph 14A(2), that is, the defenses under 14A(2) are restricted by the inclusion of the phrase "prescribed by law", as there are no specific laws which have been enacted in relation to the right of privacy of an individual or reputation of others which are vague principles for which no defenses would be available for a Court to consider. The Court notes that the definition given to a "citizen" is identical to the definition given in the Constitution.

It has to be noted that restrictions that could be placed on the enjoyment of the fundamental right of access to information are not mandated to be reasonable ones. This gives the executive a large measure of discretion to determine the scope of the restrictions to be imposed on such right. Another serious drawback to the protection of fundamental rights is Article 16 of the Constitution. This Article makes all existing written law and unwritten law to be valid and operative notwithstanding any inconsistency with the provisions of the Chapter on Fundamental Rights. Hence all the fundamental rights, even those couched in absolute terms become illusory to any person vis-a-vis an existing law - whether written or unwritten - if that law was in existence at the time of the commencement of the Constitution.

Many of these existing laws and statutes contain provisions that are inconsistent with the chapter on fundamental rights including the right to information. Many of these statutes are designed to restrict access to information rather than to enable or facilitate it. Chief amongst these laws is the Official Secrets Act No 32 of 1955, which in its title states that it is "an Act to restrict access to official secrets and secret documents and to prevent unauthorized disclosure thereof". The Act, *inter alia*, prohibits entry into 'prohibited places' or places used for military purposes, and makes it an offence for any person entrusted with or in possession of such documents to seek, obtain, deliver or communicate any official secret or secret document. Under the Sri Lanka Press Council Law No 5 of 1973, it is an offence publish, or cause the publication, of official secrets and information which may 'adversely affect the economy' in any newspaper without prior Ministerial approval.

Furthermore, under the same Act, it is an offence to publish, or cause the publication, in any newspapers of any matter which purports to be a) proceedings of a meeting of the Cabinet of Ministers, b) internal ministerial documents and c) decisions of the Cabinet, unless approved by the Secretary to the Cabinet.

Other legislation which has a similar effect include the Profane Publication Act No 41 of 1958, the Public Performance Ordinance No 7 of 1912, the Obscene Publications Ordinance No 4 of 1927 and the Prevention of Terrorism Act No 48 of 1979. Furthermore, in recent years, because of 30 year war, the country has often been governed under a state of emergency. When a state of emergency is in force, the President is empowered to promulgate emergency regulations. Many of these regulations provide for censorship and restrictions on movement and information which have a serious bearing on the public's access to information. A trend in Sri Lanka is for such regulations often to be "overbroad" thereby preventing access to a wider range of information than may actually be warranted in the interests of national security.

Unlike the majority of countries which have a written constitution, Sri Lanka has no judicial review, but has in its place a limited system of pre-enactment review. Under this system, once a Bill is enacted by Parliament, the constitution expressly disallows any challenge to it on questions of constitutionality. Once a Bill is published in the Government Gazette, a citizen has a two week period during which s/he has to obtain a copy of the Bill, scrutinise it, obtain legal advice and if so desired prepare a comprehensive legal challenge before the Supreme Court. This has fostered a culture of secrecy in which draft legislation is kept secret and inaccessible until late in the process of law-making. Furthermore, it has also given rise to the practice in which controversial pieces of legislation are introduced to coincide with public holidays and court vacations in order to make the process of challenge more difficult. An example of such a practice is the introduction of the Media Authority Bill in April of 1997 close upon the traditional New Year holidays. Apart from undermining the supremacy of the Constitution and providing an incentive for governments to enact unconstitutional legislation, it also shuts people out of the process and promotes a culture of authority and secrecy rather than a culture of justification and transparency. Draft legislation is secret and inaccessible until it has been approved by the Cabinet of Ministers.

In Sri Lanka a Members of Parliament does not have the freedom to vote according to his/her conscience. Members of Parliament are considered to be ambassadors of their parties in Parliament, rather than representatives of the people. The authority of a political

party which opposed to representative democracy may dilute the importance of the individual responsibility of a Member of Parliament as a legislator and advocate for the people. There is very little scope therefore for dissent in Parliament, for individual responsibility and accountability. The outcome of a vote on a piece of legislation is so predictable that the debate ceases to be a serious deliberation where an attempt is made to persuade members of the legislature on the merits and demerits of the draft legislation. The undermining of Parliament which consists of the elected representatives of the people acting on behalf of the people, as a deliberative assembly, has seriously hampered the people's right to know about important issues of public policy.

According to the proviso of newly replaced art 35 of the constitution, the immunity of the president shall not extend to the jurisdiction under art 126. So in the event of infringement or imminent infringement of right to access to information within the scope of art 14A, any citizen can institute fundamental rights petition against Attorney General in respect of anything done or omitted to be done by the President, in his official capacity. As per art 33A which newly included to the constitution, The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.". Further as per art 43(1) cabinet of ministers are collectively responsible and answerable to the parliament. Such constitutional provisions may increase the accessibility to public information.

One of the main causes for the culture of authority and secrecy that exists in the public service is the Establishments Code. Paragraph 6 of Chapter XLV11 deals with The Release of Official Information to the Press or the Public demonstrates the conservative approach of the Code to access to information. It states that a Secretary to a Ministry or Head of department may exercise discretion with respect to the release to the public of information that ' may be of interest and value to the public.' Paragraph 6 : 1 : 3 provides that, No information even when confined to statements of facts should be given where its publication may embarrass the Government as a whole or any Government Department or officer. In cases of doubt, the Minister concerned should be consulted. These provisions such as these help create a mindset or attitude among public servants which is not compatible with values of transparency and public accountability. A comprehensive revision of the Establishments Code is, therefore, urgently required.

Introducing reforms to strengthen parliamentary control over public finances is a key area of governance and accountability that requires capacity building. The constitutionally questionable practice in recent years of the Executive President holding the finance portfolio considerably undermined parliamentary control over public finances. Furthermore, the constitutional position of Members of Parliament vis-à-vis their parties and the electors described above, the absence of intra-party democracy and the erosion of traditions of deliberative democracy in the past two decades have contributed to the decline of Parliament as a watchdog mechanism in all areas including public finance. At a more specific level reforms to strengthen parliamentary control over public finance by making this aspect of the legislative function more visible, will be useful. The proceedings of various parliamentary oversight committees such as the Committee on Public Accounts (COPA) and the Committee on Public Enterprises (COPE) are held *in camera*, and are not open to the media or the public. There is, therefore, little public pressure on the committees to perform effectively.

V. FOR CERTIFY THE RIGHT TO ACCESS INFORMATION:
THE WAY FORWARD

Neither USA nor India provide direct constitutional guarantee over the RIT. Though, both countries have very strong culture of public information delivery and access. Both countries have very strong "Promotion of access to information acts while having separate laws for certifying the Right to privacy. South Africa initially provide the constitutional guarantee over RIT while placing mandatory provision as part and parcel of such right to enact separate law for the promotion of RIT. Right to privacy is a separate constitutional guarantee in there. Even though the establishment of constitutional

certification over RIT is welcomed by the public, the supportive act is essential to reach a meaningful end. Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of a good government.

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