

TRACKING MINISTERIAL EXPENDITURE: A QUEST FOR THE 'GOLDEN FLEECE'? *

This is the second Position Paper published under the Ministerial Expenditure Monitoring project of Transparency International Sri Lanka. The analysis and comments are based on the findings of the project to date on the legal and financial implications involved in maintaining a large cabinet in Sri Lanka within the current socio-political and legal context.

INTRODUCTION

The main objective of the Ministerial Expenditure Monitoring (MEM) project is to ascertain data relating to maintaining a large Cabinet within Sri Lanka and assess its impact on governance with a view to creating a public demand towards good governance. While the focus was on ministers as opposed to ministries, the project particularly aimed at ascertaining information as regards the procedure involved in allocation of funds, legal provisions and mechanisms that are in place to monitor the expenditure, the loopholes in the existing system etc, given the obvious link between the use of public money and need to ensure accountability in this respect. The project attempted to achieve its objectives through the employment of various research techniques such as literature and internet surveys, personal interviews etc. While considerable progress was achieved during the project's four-month life span, obtaining officially documented information about ministerial expenditure in the present Cabinet posed a formidable barrier throughout the period of the survey. Therefore, this paper seeks to analyse the link between access to information and ensuring a system of transparent and accountable governance in the current politico-legal system in Sri Lanka through the lens of the MEM project.

* As per Greeek mythology, Jason quested for the golden fleece as part of an arduous journey to regain his throne.

¹ E.g. Official Secrets Act No.32 of 1955, Sri Lanka Press Council Law No.5 of 1973, Prevention of Terrorism Act No.48 of 1979 etc

We acknowledge the team of researchers headed by

Ms. Lakmini Seneviratne
(LL.M (Harvard), L.L.B.(Hons) (Colombo),
Attorney-at-Law)

Consultant to the
programme for the
invaluable work done in this
regard.

Table of Contents

1. **Introduction**
2. **Rationale**
*RIGHT TO INFORMATION AS PART OF
DEMOCRATIC PROCESS*
3. **Experience of the MEM
project**
4. **Attempts to Recognize a
Right to Information
under Sri Lankan Law**
5. **Attempts to Recognize
cont.....**
6. **Future Directions**

RATIONALE:

RIGHT TO INFORMATION AS PART OF DEMOCRATIC PROCESS

Neither the Constitution of Sri Lanka nor an Act of Parliament has recognized a right to information as being available to the Sri Lankan public. Although the Supreme Court of Sri Lanka has read in the existence of an implied right to information within the freedom of thought and expression recognized as fundamental rights within the Constitution, the absence of an express right to information has been a serious lacuna in the law. Not to mention the impact of legislation enacted over the years that has sought to restrict more than facilitate access to information held by the public sector of Sri Lanka, often in the guise of national security.¹ Several instances have been recorded within the fundamental rights jurisprudence in the country where the said legal loophole has caused maladministration and mismanagement of public resources resulting in significant practical difficulties and overall injustice to the public. Of course, these are but a few instances where selected members of society were strong enough or fortunate enough to withstand the rigours of court procedure and champion their cause for accountability in governance, *albeit* without an express right to information. The rarity of such incidents not only belittles any public demand for accountability but also serves to sustain the culture of impunity for those who occupy positions of authority governance.

Lack of access to public information is a problem in itself for obvious reasons. In this project for instance, lack of information means that the concept of democracy and the democratic process is undermined. The concept of democracy suggests that elected representatives must exercise power in trust for the People and be held accountable by citizens. But when no information or minimal information is available as to the details of how the representatives are exercising their powers and authority, the citizens are unable to hold the representatives accountable. The democratic process is thereby stifled. According to article 3 and 4 of the Sri Lankan Constitution, sovereignty is vested with the People. Justice Mark Fernando points out that the Constitution does not *vest* the People with sovereignty. Rather the Constitution recognises a *pre-existing* fact.² This argument further strengthens the position that elected Ministers are merely *representatives of the People* who must at all times be accountable to the sovereign authority of the People. Therefore when the concept of democracy and the democratic process is being undermined, the logical conclusion that can be drawn is that the representatives of the People are not honouring the ideology of the Sri Lankan Constitution. They do *not* consider the People to be sovereign and they do not consider themselves to be owing any accountability towards the people. This is why information as to how representatives use public resources and funds allocated to them cannot be accessed by the Public.

² See in this regard, Fernando, M.D.H. '*Defeating the Dragon: weapons for Fighting Corruption*', White Paper, Sri Lanka Anti-Corruption Programme, ARD Inc., (2007)

Experience of the MEM project

Lack of access to relevant information and the unavailability of information as regards ministerial expenditure were the two main obstacles that this project was faced with. This finding is both a problem in itself and a symptom of a larger problem that is faced by the Sri Lankan community.

Officially documented information: Since the objective of the study was to assess the adverse impact of maintaining a mega Cabinet within the current socio-political and economic context in Sri Lanka, it was important that there be access to information as regards the legal entitlements of the current cabinet of ministers and the allocation of expenditure in that regard. However, despite the fact that this information was classified as being publicly accessible, an unduly prolonged time and efforts had to be spent on obtaining official documents regarding the same. For example, one of the basic documents that the project required was a statement of the official entitlements of the current Cabinet ministers in Sri Lanka. The research team explored all possible sources that are likely to provide information in this regard i.e. official websites of the Ministry of Finance and Planning and Department of Census and Statistics,³ personal interviews with officials of the Government Treasury, the Presidential Secretariat, current cabinet ministers, members of parliament etc, for over three months since the implementation of the project, all to no avail. While it should be noted at the outset that obtaining personal interviews with some of these officials were extremely difficult (also noting the fact that the initial months of the project corresponded with the release of the National Budget) most of them were only able to say that this *should* be publicly accessible information. Additionally, the lack of clarity in the opinions expressed by the interviewees as regards which institution is vested with the responsibility to determine the official entitlements of ministers resulted in a significant loss of time and energy. Finally, it is worth noting that the relevant government circular was obtained a few weeks before the official termination of the project through a source that had no official responsibility in that regard. The failure to have timely access to such information created a dilemma in that, although there was *prima facie* abuse of public resources as was documented in the media, unavailability of officially documented information in relation to ministerial expenditure prevented the possibility of substantiating any allegation of abuse or demand for accountability.

Secondary sources: When the public or vigilante groups encounter such hardships and hindrances in obtaining information to ensure accountability of public officials through personal efforts, they are forced to resort to other available means. As far as ministerial expenditure is concerned, there were two other options available:

- Process of questioning in Parliament by Members of Parliament
- Media reports

The findings of the MEM project in relation to both these methods were discouraging to say the least.

³ As at 18 February 2008

Questioning in Parliament: The reality as regards the questioning process in Parliament was exposed at least on one occasion previously by the MEM project. It was revealed that the inordinate delays in obtaining a response from the relevant minister as well as the evasive nature of the answers provided have rendered the process significantly ineffective as a monitoring mechanism. For example, the research found that although timely questions were raised in Parliament as regards the unusually large group that accompanied the Executive President in his official tour of China, it was more than four months after the questions were raised that a substantive response was provided in parliament in this respect.⁴ Needless to say, the validity of the response for raising public awareness and creating a demand for accountability in governance was significantly lost by that time.

*Governmental/Departmental information 'which may be of interest and value to the public' is released at the discretion of the Secretary to the Ministry or Head of Department. An officer who is not authorized is forbidden to communicate information s/he would have obtained in his/her official capacity. Official documents cannot be sent to the mass media without permission from the Secretary or Head. Any information so released is restricted to facts as opposed to opinions. However, no information may be released 'when its publication may embarrass the government as a whole or any government institution or officer'. Any doubts in this regard to be clarified by the Minister concerned.
(Establishment Code 1999, Volume II, Ch.47, S.6*

Media reporting: During the research it was revealed that a significant problem in investigative journalism today is the difficulty or inability to obtain official verification of data as regards abuse of power by public officials. According to established media ethics, journalists are obliged to verify the accuracy of reports through authorised sources prior to publication. For politically sensitive issues such as ministerial expenses, the verification must necessarily come from persons who occupy high positions of authority in the ministries. The inaccessibility of these officials for comment and the immunity granted by law on such information against public scrutiny⁵ significantly hamper the media in performing a meaningful role exposing the action/inactions of the ministers to the public. While the failure to provide a comprehensive analysis of the case at hand prevents the media from presenting a credible report to the public, it effectually diminishes the capacity of the media to ensure the accountability of public officials.

Eventually, the lack of transparency effectively leaves these representatives who were elected by the public with the constitutional responsibility to wield power in the public interest, unaccountable and free to perpetuate corrupt practices of governance. In other words, they are able to exercise power in violation of the public trust doctrine in order to continue in power by withholding information that should lawfully be in the public domain. Evidently, lack of access to and unavailability of information to the public as regards matters relating to governance has fostered a culture of unaccountability and self-aggrandizement among those who hold positions of authority in Sri Lanka including Ministers.

Attempts to Recognise a Right to Information under Sri Lankan Law

Over the past few years several attempts were made to introduce legislation that will guarantee a right to information. Notably, a progressive draft law on the subject drafted with significant involvement of civil society which was approved by the Cabinet in 2003, was never passed by Parliament. The most recent piece of draft legislation presented by the Sri Lanka Law Commission which seems to lay dormant with the government since 2006, contains several progressive suggestions worth noting. According to this draft law, *every person shall have a right of access to official information which is in the possession, custody or control of a public authority.*⁶ The draft law stipulates that Information Officers (IOs) should be appointed in each public authority. These officers are mandated to respond to requests for information by the public and to provide any other assistance that the public requires in that regard.⁷ In order to ensure that the IOs act independently, the law vests this office with immunity from civil or criminal proceedings in granting access to information under this act.⁸

⁴ Issue was raised in Parliament on 23rd March 2007 and answered on 07th August 2007 (Hansard reports)

⁵ Establishment Code 1999, Volume II, Ch.47, S.6. Media reports have made reference to government circulars as recent as March 2008 (http://www.lakbimanews.lk/archivi/lakbimanews_08_03_16/news/laknew1.htm), requiring strict adherence to these protocols and procedures by public officials.

⁶ S. 2 of the draft Freedom of Information Bill

⁷ *Ibid.*, S. 22

⁸ *Ibid.*, S. 29

Bangladesh (Draft) Right to Information Ordinance 2008

Right to information includes the right to take notes, photocopies, certified copies, soft copies and obtain certified samples of 'information' which is defined very broadly to include documents (both hard and soft copies), diagrams, photographs and videos from a 'Public Authority' which includes any ministry or public or semi-public office and bodies administered with public finance
(Source: LST Review, Vol.18, Issue 243, Jan 2008)

Right to Information Act No 22 of 2005, India

Right to information includes the right to inspect, take notes, extracts or certified copies in electronic or printed form of information which is held by or under the control of any public authority which includes 'any body owned, controlled or substantially financed directly or indirectly by funds provided by the appropriate Government'. Every public authority shall *inter alia*

- Duly maintain all its records in a manner and form which facilitates the right to information including access.
- Publish and update every year information relating *inter alia* to the procedure followed in the decision making process, including channels of supervision and accountability; a statement of the categories of documents that are held by it or under its control; monthly remuneration received by each of its officers and employees; the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made; details in respect of the information, available to or held by it, reduced in an electronic form; the particulars of facilities available to citizens for obtaining information;
- Publish all relevant facts while formulating important policies or announcing the decisions which affect public;
- Provide reasons for its administrative or quasi-judicial decisions to affected persons.

(Source: <http://persmin.nic.in/rti/WebActRTI.htm>)

During the interviews conducted under the MEM project, several journalists revealed that the current law applicable to public officials under the Establishments Code is being used as a shield by public officials to withhold information relating to ministerial actions/inactions that should lawfully be in the public domain. Particularly relevant as regards the MEM

project is that the draft law imposes responsibility directly on Ministers to make information available to the public regarding the activities of his/her respective ministry.⁹

The role of the IOs will be critical in ensuring that the public have access to information from another respect. One significant obstacle that was faced in the MEM research was that there was uncertainty and confusion as to who should be approached for obtaining information. E.g. a considerable number of phone calls had to be made to the Government Treasury and the Presidential Secretariat to determine which one of these institutions was vested with the responsibility of deciding upon the official entitlements of Cabinet ministers. In view of the limited time period of the project and the seemingly unnecessary length of time and efforts spent on this single issue, the relevant document was ultimately obtained through an unofficial source. In this background, assigning a specific officer under the law mandated to liaise with the public therefore is a commendable and pragmatic step. Additionally, under the draft Bill every officer of a public authority has a duty to give, in writing, the reasons for his/her decisions where a person affected by such a decision makes an application requiring the disclosure of reasons.¹⁰ This is a laudable provision because it is only when the citizen knows the reasons for a particular decision that s/he can challenge such a decision.

The approach of the draft law in conferring a right to information on the public while providing for the necessary checks and balances in the exercise of power by authorities in facilitating such right,¹¹ indicates a conscious attempt to recognize a right to information under the law. Given the findings and experience of the MEM project, the need for this bill to be approved as law is self evident. The prevailing culture of impunity cannot be challenged without the support of a legal framework for such attempts. Enacting this as law seems to continue to get deferred on reasons of political expediency.

⁹ *Ibid.*, S. 8 and 9

¹⁰ *Ibid.*, S. 3

¹¹ Other than the responsibility imposed on public officials and IOs, the draft law provides for the establishment of a Freedom of Information Commission which is expected *inter alia* to monitor the implementation of the provisions of the Act (S.13). While the Commission is granted significant powers in this regard, provision is also made to ensure its independence, transparency and accountability in exercising those powers [S. 11(1), 15(1) and 34]

Parallel to the drafting of the Right to Information Act, the Sri Lankan Supreme Court has recognised a right to information in at least three cases in the past. It is noteworthy how judicial recognition was granted in the form of an *implied* right to information couched within the freedom of thought as well as expression.¹² For example in the recent *Galle Face* case,¹³ where the Environmental Foundation Ltd challenged the UDA in court for withholding information as regards the lease of Galle Face Green promenade to a private entity, the court emphasized the interrelation between the freedom of expression and access to information without which the former will be hampered significantly. In juxtaposing this argument to the MEM project, it is clear how the absence of a right to access information as regards the exercise of power by the representatives of the Cabinet, effectively prevent the public from demanding accountability as regards their actions and/or inactions. This in effect sustains the circumstances that are conducive to the exercise of power aimed towards power preservation and self-aggrandizement rather than public good. In this light, judicial incorporation of the right to information in whatever form, endorses the argument that the accountability of representatives of the people to the people is a Constitutional imperative. It also suggests that the need for access to publicly held information is pressing enough for people to seek relief before the court *in spite* of the absence of an expressly applicable legal provision.

Attention should also be drawn to another line of cases decided by Sri Lankan courts relating to the right to inspect public documents which has considerable impact on the right to information. As per the Sri Lankan law relating to this matter,¹⁴ a person is not entitled to inspect and obtain a certified copy of any public document unless a right of inspection is expressly conferred through law. Consequently, certain documents which are *public in nature* by virtue of the fact that they affect the interests of the people despite non-recognition as public documents under the law e.g. government circulars setting out the official entitlements of Cabinet ministers (to be paid through public money), may not be available for the public to inspect nor obtain certified copies as of right without such an express guarantee. Given the obvious link between access to information and fighting corruption, the cumulative effect of this legal stance is to render transparency and accountability in governance a farfetched goal.

Future Directions

This paper attempts to demonstrate both the theoretical as well as practical significance of guaranteeing an express right to information in the Sri Lankan law as regards ensuring good governance, using the experience of the MEM project as an example of the adverse impact created by its absence. Express recognition of a right to information and to inspect and obtain certified copies of public documents will go long way towards reviving democratic process within Sri Lanka. While the law must necessarily be followed by effective law enforcement including progressive judicial interpretation of the law, an equally significant responsibility is cast upon the public as regards availing themselves of the legal provisions. While express recognition in the law permit and give opportunity to the people to revive the democratic process and to infuse transparency and accountability into issues of governance, it must be noted that law is only a tool. It can be effective only if the people will be willing to use it effectively. Therefore, recognition by law must necessarily be coupled with social mobilization in order to utilize access to information as a measure to curb misuse of power by public authorities in Sri Lanka. Because, accessibility of information to the public seeks to increase the level of transparency in governance, thereby decreasing the opportunity for corrupt practices and their continuance by those who wield power.

Therefore, while reiterating the necessity to guarantee a right to information expressly in the law, it is urged that the corresponding need to empower the public as regards making effective use of the law must be considered a matter of equal priority. TISL seeks to mobilize public opinion towards this objective by attempting to raise public awareness in the interim regarding the adverse impact of inaccessibility of information in ensuring accountability of public officials (in this context Ministers) to the people, through its research publications under the MEM project.

¹² *Environmental Foundation v UDA*, SC (FR) App. 47/2004, Supreme Court Minutes of 28th November 2005; *Fernando v Sri Lanka Broadcasting Corporation* [1983] 2 Sri L.R. 311 and *Heather Mundy v Central Environment Authority and Others* SC Appeal 58/03, Supreme Court Minutes 20th of January, 2004

¹³ *Environmental Foundation v UDA*, SC (FR) App. 47/2004, Supreme Court Minutes of 28th November 2005.

¹⁴ *Buddhadasa v Mahendiran*, 58 NLR, 8 cited in 'The Right to Inspect and to Obtain Certified Copies of Public Documents in Sri Lanka', Shantha Jayawardena, LST Review, Vol.13, Issue 179, September 2002, p.10