

Reflections on Sri Lanka's RTI Act and RTI Regime, ed., Kishali Pinto-Jayawardena, RTI Commission of Sri Lanka, Feb. 2019., ISBN: 978-624-5092-03-1, Samayawardena Press.

A collection of essays, edited by Kishali Pinto-Jayawardena, Commissioner, Right to Information Commission of Sri Lanka, reflects on the “successes and challenges of an emerging information culture”, in “fostering a culture of transparency and accountability in the functioning of government”. The collection takes stock of the first two years of implementation of the right to information in Sri Lanka. As the Chairman notes, each article reflects upon a different aspect of RTI administration during this period, engaging the reader in the multi-faceted RTI process. Collectively, the essays provide an immensely absorbing journey into a story of the pioneering efforts in contributing to establishing the primacy of the citizen in their relations with the state. However, the key question is how well RTI is positioned to making accountable government a reality. Sri Lanka faces many challenges in the governance transformation that the right to information seeks to bring about.

Positioning Sri Lanka's RTI Act

While right to information constitutes a cornerstone of a functioning democracy, Sri Lanka's Right to Information Act came into effect recently, in February 2017. However, as noted in the foreword to the volume, the Sri Lankan RTI legislation is ranked 4th globally and 2nd in Asia, on the Global RTI Index of the Centre for Law and Democracy. The Global RTI Index, assess the strength of an RTI legal framework around six measures, namely, the right of access, scope of application, requesting procedures, exceptions and refusals, sanctions and protections, and promotional measures. Thus, in his essay on “Comparative Perspectives”, Toby Mendel, concludes that “overall, the legal framework for the right to information in Sri Lanka is among the best in the world”.

The essay finds that, the strong role of the RTI Commission, constitutes a key feature of the Sri Lankan RTI regime. It is assigned a broad mandate around the core function of hearing appeals, extending to a wide-ranging set of duties and functions as well as powers of enforcement for discharging them. It is described as a “a very impressive package of responsibilities and powers which places the Sri Lanka Commission among the most powerful in the world”. The essay goes on to note that its constitution as, “an independent oversight body is one of the key contributing factors to the success of an RTI law” and that “Sri Lanka has gone above and beyond in this respect”.

The RTI Regime and the Governance Context:

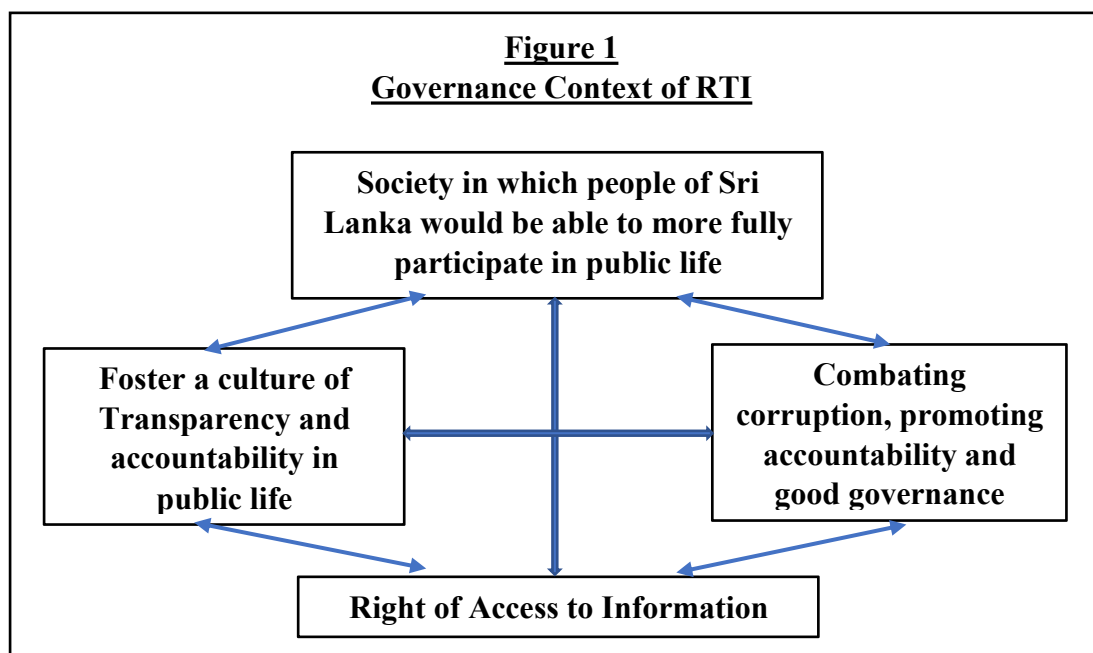
The test of the RTI law, is the operationalization of the ensuing “access to information system”, enabling citizens claim their right. The law defines access to information in terms of, the right of access to information, the exceptions to and refusal of such right, and when the request for information shall not be refused. The law assigns the responsibility for operationalization of the right to three institutional roles, comprising, the Ministers and Public Authorities, and their duties; the Right to Information Commission, its establishment, and the duties, functions and powers; and the Information Officers and Designated Officers, at the frontline of the access to information system. Importantly, the law vests the responsibility for the effective implementation of the provisions of the law, in the Ministry of the Minister assigned the subject of mass media. It extends to the making of regulations as

may be required in respect of matters that require to be prescribed or to give effect to the principles and provisions of the Act, as well as rules for matters specified in the Act.

The several RTI duties, functions, powers as well as roles and responsibilities must all work in cohesion to ensure that the right of access is in fact made available to citizens. The operationalization of the right to information is realized through a regulatory process set in motion by relevant rules and regulations in the public authorities actioned through the roles of Information Officers and Designated Officers. Oversight exercised by the RTI Commission would drive the process. The legal regime does not work in isolation. It is influenced through the activities of a range of stakeholders, including public service, citizens, civil society organizations and media. Thus, the operationalization of a right to information system involves institutionalizing a code of conduct linked to protections and sanctions in a mutually reinforcing manner.

The trajectory of a right to information system from disclosure, through accountability usage to governance and development outcomes is not linear and raises issues about the coherence of its constituent functional domains in achieving its fundamental purpose. A review on “Implementing Right to Information”, (Dokeniya, 2013) notes that while in developing countries RTI has been operationalized as “an intrinsic democratic right”, in developing countries RTI has also been cast as “a tool” for furthering governance and development objectives fundamental to enhancing citizen participation in public life. In fact, the Preamble to the RTI Act sets its purpose, in the context of Article 14A of the Constitution guaranteeing the right of access to information, as being, to give effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to fully participate in public life, by fostering a culture of transparency and accountability on the one hand, and combating corruption and promoting accountability and good governance on the other.

The ensuing governance context of RTI is set out in Figure 1.



Thus, the Preamble to the RTI Act positions right of access to information as a governance tool in promoting fullest democratic participation of citizens in public life. There is then, an external and an internal dimension to the operationalization of the right of access to information. On the external dimension are the several governance policy and programme measures promoting the democratic participation of citizens in public life. On the internal dimension are the several implementational roles and responsibilities set out in the RTI Act, noted above. Thus, the right of access to information functions and performs within the framework of the larger governance actions for bringing about democratic participation of citizens in public life. The operationalization of the right of access to information should therefore bring about cohesion in the working of the RTI implementational roles and responsibilities, and coherence in its engagement with the governance policy and programme measures for bringing about democratic participation of the citizens in public life.

Key Reflections:

The collection of essays published in the volume focuses primarily on the early operationalization of the right of access to information. While noting the achievements, the essays also raise fundamental issues about achieving the governance outcomes as provided for in the Preamble to the RTI Act. In the opening essay on “Reflections on Two Years of RTI in Sri Lanka”, Prashanthi Mahindaratne sets in perspective the nature and scope of the achievements and challenges of institutionalizing the right to access information. In particular, is the performance of the RTI Commission, both, in terms of the disposal of appeals and the qualitative nature of the decisions, and its recognition as a “fair arbiter”. The wide-ranging subject matter of appeals is seen to reflect, “a developing awareness amongst citizens of the value of RTI and on the evolving practice of exercising the right”. On the side of challenges, the writer observes the imperative of fullest stakeholder cooperation and a supporting government policy and strategy, in moving from a “status of official secrecy to a status of full transparency”. The test of RTI would then be the institutionalization of the disclosure role of public authorities.

Perhaps the fundamental message about the right of access to information that comes through from the essays is the particular importance of the citizens’ right to know so as to be able to fully participate in public life. In her essay on “Right to Information as a Vital Premise of the Rule of Law”, Deepika Udagama, emphasises the particular importance of the right to know in terms of maximum disclosure of information held by public authorities, subject only to “rare exceptions”. While noting the position of the RTI Commission, that public interest is uppermost in deciding whether or not to release the requested information, the essay concludes on the note that the RTI law has played, “a life-changing role in the lives of people whilst promoting democratic governance, and acting as a tool to combat corruption”.

A critical challenge to right to know and maximum disclosure is examined by Susil Sirivardana in his essay on “The Culture of Secrecy in Sri Lanka’s Public Service”. He traces the culture of secrecy to fundamental negativities that have come to define the working of the public service. Thus, key fault lines making for secrecy are identified as “over-politicisation and bureaucratization” that have fettered and diminished the role of the citizen, and the subverting of a public administration based on “impersonal norms of good governance” by the “enthronement of mediocrity”. These negativities pose serious challenges in opening up Public Authorities, to a partnership with citizens in the conduct of public life.

Moving from the general setting to specifics, the reflections open up with the examination of media and RTI. The media reflection in the essay on “A Law for Journalists – not Churnalists”, by Sinha Ratnatunga, while placing on record, the media campaign for an RTI law, reiterates the role of the media as a key stakeholder of the right of access to information as well as the centrality of access to information for journalism, that is relevant to good governance and the national interest.

The essay on a “Critical Evaluation of Two Selected Orders of the Right to Information Commission of Sri Lanka” by Jayantha de Almeida Gunaratne, reflects on the jurisdiction conferred on the RTI Commission in the context of an entrenched culture of executive denial of right to information, especially when upholding national and or security interest. The author finds that the body of jurisprudence developed through the appeals give effect to the “liberal letter and the spirit of the Act”. On the basis of a review of two orders of the RTI Commission (Ceylon Bank Employees Union v. People’s Bank and Air Line Pilots Guild of Sri Lanka v. Sri Lankan Airlines), the essay concludes that, “the body of emerging and standard-setting jurisprudence” in the context of the RTI Act is of “paramount importance to the development of the RTI culture in Sri Lanka, in the fulfilment of its statutory role”.

In the essay on “RTI in the Realm of the Corporate and Banking Sectors”, Harsha Fernando reflects on the role and responsibility of corporate and banking sectors in RTI. The author examines the relationship of the corporate sector with right to information, in terms of the status as “citizens” enabling claim the right of access to information and, as “public authorities”, creating disclosure obligations. Notwithstanding legal considerations of “controlling interest” and “functional status” of corporate entities, the essay notes that the corporate sector performs a key role in the overall function of economic management, and hence, in ensuring good governance. Therefore, the RTI responsibility and accountability of the corporate sector should be operationalized as progressive steps towards ensuring citizen’s participation in public life.

The specific case of RTI in respect of marginalized and conflict-affected communities is examined by Ashwini Natesan and Aadil Nathani, in their essay on “The Acid Test of Using the Right to Know to Compel State Accountability”. The essay reviews eight orders of the RTI Commission on issues of national security, corruption and parliamentary privilege with a view to illustrating the potential for secondary level outcomes. First, is the issue of guidelines by the RTI Commission for the future RTI users and for Public Authorities, in the handling of right to information requests. Second, is the potential usage of information disclosed in the appeals in community work in former war-affected areas. Third, the motivational implications for Public Authorities, arising from satisfactory community level experiences not leading to appeals, though, it may also be due to the reluctance of local people to invoke the appeal process. The essay concludes noting that cooperation from Public Authorities, proactive engagement of citizens and increased contributions from Non-Governmental Organizations are essential for making right to information work.

The reflections on the Sri Lankan experience of right to information so far, concludes with an examination of proactive disclosure. The point of departure of the essay on “Proactive Disclosure on Information: The Unmet Obligation of Our Right to Information” by Wijayananda Jayaweera, is the centrality of proactive disclosure for a Public Authority’s own commitment to transparency and accountability. Building on the centrality of proactive

disclosure, the author states that the outcomes of openness, transparency and accountability expected from the enforcement of the RTI Act, justifies the case for a well-articulated government strategy to foster proactive disclosure. The proposal is made for recasting proactive disclosure requirements set out in Regulation No. 20, into a well-structured “Publication Scheme”, requiring senior managers to use it as a common template as a baseline for proactive disclosure.

Key Propositions:

The essays document forcefully the centrality of the RTI Act in bringing about citizens’ right to information and unequivocally, the leadership role played by the RTI Commission in driving implementation, overseeing public authorities, framing guidelines and regulations, responding to citizen appeals for disclosure, establishing jurisprudence, while creating an environment for compliance. While each of the essays reflect on the achievements and challenges of the specific feature of the regime, the focus on the regime relationships receives less attention. Thus, the political-economy context of the right to information system is left to be inferred. It is noteworthy, that while the legal frame of the regime has been demonstrably shown to be among the highest rated, there are significant gaps in its systemic operational context. These are issues of operationalization that require being addressed in a next phase of implementation. The reflections bring out several key operationalization propositional messages.

- a. That the fundamental challenge of establishing the right to information is the culture of secrecy in the public service that denies information to citizens.
- b. That Citizens’ right to know is fundamental to bringing about fullest participation in public life.
- c. That moving from a “status of official secrecy to a status of full transparency” requires both, reactive and proactive disclosure.
- d. That a status of full transparency requires institutionalization of disclosure as a way of day to day functioning of Public Authorities.
- e. That the corporate sector mainstream right to information as a constituent domain of public life.
- f. That a supportive government policy and strategy is necessary to sequence and prioritize right to information actions.
- g. That stakeholder engagement on the part of citizens, civil society, media and non-governmental organizations, is necessary for a right to information system to work effectively.

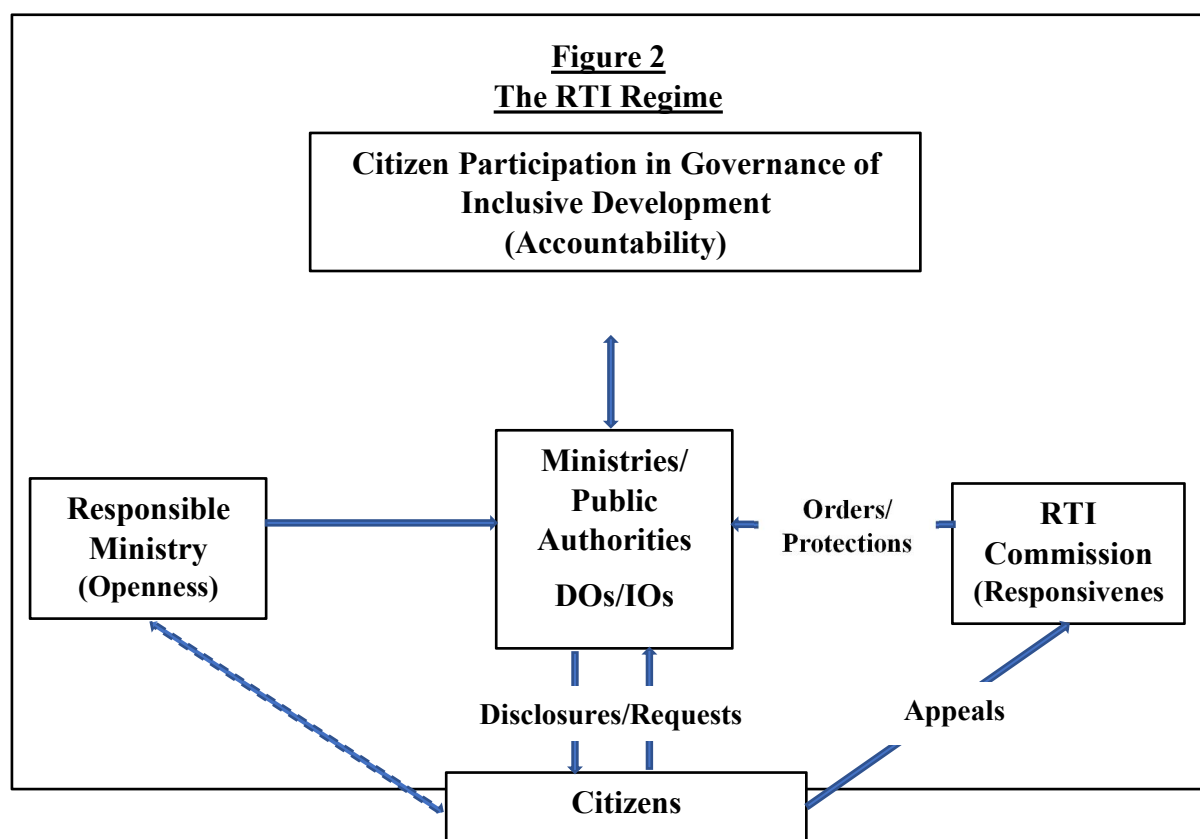
Above propositional messages, point to the “Reflections” as an exercise in critical learning in moving from the experience of the first two years of implementation to the next with a deeper understanding of the institutional context of the regime in which right to information is operationalized. The propositions pulled out from the essays, point to the critical challenges and opportunities in operationalization of right to information. Thus, the critical learning from the “Reflections” would be to move from reflections on specific features of the RTI Act and the Regime, to the holistic design of a system of actions for their resolution, based on a

coherent body of knowledge. As the propositions suggest, such body of knowledge is about the institutional context of implementation.

Institutional Context of Implementation

The central purpose of the collection of essays, as the title of the volume states, is to reflect on the status of implementation of RTI Act and the operation of the ensuing RTI regime at the end of two years. Each essay is a reflection upon the operational experience of a specific aspect of the “RTI administration”. Each such aspect constitutes a feature of the legal-institutional framework for right to information. These do not exist in isolation and if RTI is to perform as per the Preamble to the RTI Act, they must function cohesively in operationalizing right to information.

The legal-institutional framework of the RTI Regime is set out in Fig 2.



The RTI Act defines the duties, functions and powers of Ministries and Public Authorities, Information Officers, the RTI Commission and the Responsible Ministry. The Act sets out the procedures for requests, and disclosures that link citizens’ right to information with Public Authorities, appeals that links citizens with the RTI Commission, and orders and protections that link the RTI Commission with Public Authorities. The RTI Act provides for Ministerial responsibility for the RTI Commission. Accordingly, the RTI Commission is placed under the Ministry of Mass Media, for government budgetary purposes. This makes the RTI Commission a part of the executive branch of the government. This makes the RTI Commission a part of the executive branch of the government. The Act does not set out the links of the Ministry with Public Authorities and the Citizens. However, from an implementation perspective, what is important about the legal-institutional framework of

roles, structures and processes, as well as the duties, powers and functions, is that they constitute an institutional system that is bound by the primacy of transparency.

The legal-institutional framework functions around four interacting operational domains, (i) enabling conditions, (ii) demand and supply of information, (iii) institutional capacity, and (iv) oversight. (Trapnell and Lemieux, 2014). The operational domains are cross-cutting and establish a network of relationships and interacting clusters of capacity, spanning a range of actors, bringing them into vertical and horizontal collaboration. These have multi-level focus. Enabling conditions and oversight are largely focussed on the national level operationalization. Demand for information integrates local, provincial and national levels. Institutional capacity is focussed on specific clusters of operation.

- a. Enabling conditions, cover the legal regime, an engaged civil society, active legislative/executive leadership for policy prioritization.

An enabling environment is considered to be a necessary condition for the success of policy reforms. Thus, while Sri Lankan RTI Act is recognized as providing a strong legal framework, the essays do not point to a matching regulatory framework that brings together political and executive leadership, with active civil society engagement. While the essays suggest that RTI is making its presence felt in the provinces, it is not clear whether this is a reflection of the openness of the public service or engagement of civil society. What comes out clearly in the essays is that the enabling environment provides a more supportive “ecology of transparency” at the centre, than at the periphery, as evidenced by the number of appeals filed and the significant performance of the RTI Commission in hearing and making orders thereon. A supportive ecology of transparency at the periphery can promote requests and accelerate disclosure that can have a direct impact on community empowerment.

- b. Demand for information, is constituted by the quantity and quality of citizen access to information engagement with public authorities.

The demand for information underpins right to information systems and is driven by the citizens’ right to know. The approach to strengthening the demand-side of right to information, so far, has focussed on increasing public awareness. However, there is little focus on user groups in creating demand-side pressure for information. Indeed, user groups can bridge the divide between the demand and supply side of information, especially where marginalized communities are concerned, where inclusiveness of RTI can be in question. While, the demand for information is essentially user-driven based on awareness, from a social accountability perspective, such demand should be matched with institutional space for citizen engagement in public governance. Regulation 20 of the RTI Commission provides for pro-active disclosure with specification of information to be disclosed. When positioned within social accountability, such mandatory disclosures should be increasingly focussing on distribution and outcomes that would require localized data. Such, “targeted transparency” is necessary to promote fully citizen participation in public life.

- c. Institutional capacity, is primarily about the supply-side of information.

The supply-side is defined by rule-based and accessible government procedures that may open-up or constrain citizen engagement in accessing information. It is comprised of administrative systems, procedures and practices, that are grounded in

operational transparency, establishing the foundation for open government. Institutional capacity is approached through technical and human resource capacity, information management systems and archival practices. Moving beyond technology, institutional capacity entails a fundamental shift in orientation to principles and practices of managing public information. Institutional capacity, is as much about incentives for change from secrecy to transparency on the one hand and the openness of governance procedures and practices for citizen engagement accessing public information. Institutionalization of procedures and practices for disclosure is necessary to ensure that investment in archival infrastructure becomes productive. Adequate financial and human resources, and a well-designed system of rules and regulations providing incentives for behavioural change on the part of the public service become critical elements of capacity.

- d. Oversight, includes monitoring and enforcement capabilities, at the system level. Monitoring extends to oversight of implementation at all levels of the RTI system. Enforcement is about ensuring compliance with the RTI laws, and include conduct of appeals and application of sanctions, as well as issuing of rules and regulations. Oversight then involves the exercise of strategic leadership, on both monitoring and enforcement sides. It is noteworthy that while the duties and functions under Section 14(a) requires the RTI Commission, to “monitor the performance and ensure due compliance by public authorities of duties cast on them under this Act”, the powers vested in the Commission under Section 15 covers enforcement, making the Commission responsible for oversight. The specific role, in this regard, of the Ministry assigned with the subject of mass media under, Section 2 of the Act, “to ensure the effective implementation of the provisions of this Act”, is left to be determined de-facto. Thus, the relationship between the Ministry for Mass Media and the RTI Commission emerges as an area of implementation relations, where the nature and scope require institutionalization. In this regard, it is perhaps relevant to note that some RTI systems provide for independent oversight agencies, as well as “nodal agencies”, with a promotional role, both within the executive branch of government.

Thus, implementation of RTI is cross-cutting, both vertically and horizontally. A tracking system of the movement of the RTI process, from requests, through appeals to orders would provide information to map the system operations. Such mapping would allow understand the working of RTI across Public Authorities, at local, provincial and national levels, as well as the engagement of civil society organizations, media and non-government stakeholders, through the RTI process. Further, such mapping will allow understanding of the localized RTI operation across the country, in fact of local RTI systems. Such mapping requires a well-articulated right to information results framework

Reflecting on Reflections:

The preamble to the RTI Act sets out the framework of objectives for the RTI Act and for the Regime. It envisages citizens benefiting from accessing information. It requires transformative change in the roles of state and citizens, in state-citizen relations in governance. It involves networking with actors from government, civil society organizations, and independent bodies, where supportive action, if not, direct engagement is necessary. The

RTI is indeed a complex system. In fact, the foregoing issues related to implementation of the legal-institutional framework demonstrates the inherent complexity of the nature and scope of its operationalization. Therefore, the trajectory from the legal-institutional framework, to the objectives set out in the Preamble, is not linear. The “Reflections” do not posit a theory of change, in moving from the right of access to information to the higher-level results described in the Preamble. However, it is timely that the changes required for and arising from the operationalization of right to information are mapped, and the RTI operations tested, and aligned against such RTI results.

The Preamble to the RTI Act moves from a perspective of access to information as an inherent democratic right of citizens, to one that is instrumental in addressing challenges of governance and development, by opening up the functioning of the state to public scrutiny. Thereby, access to information becomes a pre-condition for achieving governance outcomes in terms of transparency, corruption and accountability. This would, in turn lead to development outcomes of fuller participation in public life that lead to inclusive service delivery and human development. The ensuing chain of results is set out in Figure 3.

Figure 3
Access to Information Results Chain

| Implementation Domains | System Outputs | Governance Outcomes | Development Outcomes |
|----------------------------------|--------------------------------|---|--|
| 1. Enabling Conditions | Stakeholder engagement | Transparency (Breakdown in culture of secrecy) | <ul style="list-style-type: none"> • Fuller participation in public life • Inclusive access to services • Reduced vulnerabilities |
| 2. Demand for Information | Responsiveness | Corruption (Reduced public service corruption) | |
| 3. Institutional Capacity | Systems, procedures, practices | Institutionalization (Compliance with RTI practices) | |
| 4. Oversight | Enforcement, Monitoring | Accountability (Follow-up actions; Increased results-based reporting) | |

From a governance perspective, right to information is about correcting information asymmetries between the state and the citizen. The RTI regime addresses the structural underpinnings of such asymmetry through answerability (i.e., explain through disclosure what they are doing) of the Public Authorities, and, enforcement (impose sanctions on violations of disclosure), through the RTI Commission. These are accountabilities that the Public Authorities are required to respond to in the RTI system, whether as demands or as oversights. While the emergent role of civil society as holders of right to information is making for more direct forms of accountability through disclosure, the right of access to information takes on an instrumental nature when positioned against the objective of accountable governance. Therefore, from a social accountability perspective, it is necessary to position right to know, as an intrinsic democratic right, within the larger framework of

governance and development outcomes, when reflecting on the achievements and challenges of right to information at the end of the first two years of implementation.

Thus, the Public Authorities play a central role in providing for right to information. It moves from receiving requests and providing information, whether reactive or proactive. It is only when an appeal is rejected by a Designated Officer that an aggrieved citizen appeals to the RTI Commission. While the RTI Commission has powers to impose sanctions on Public Authorities, as noted earlier, compliance on the part of the Public Authority is one of incentives to change practices of secrecy to practices of full transparency. It is reasonable to assume that such change will be more likely and effective if supported by a broader public sector reform process. Indeed, it would seem that this fundamental aspect of compliance is neglected, with the focus being on reporting, as per Section 10 of the RTI Act. If such reporting is to be meaningful, these should be grounded on an assessment of the demand-side situation of the right to information, and be results-based.

Thus, a stock-taking of the successes and challenges of an emerging information culture in the context of transforming state-citizen relations in the conduct of public life, must be positioned within the framework of objectives set out in the Preamble to the RTI Act. It is then imperative that the stock-taking of successes and challenges also take into account the institutional imperatives of the emergent information culture such that it would “promote a society in which the people of Sri Lanka would be able to more fully participate in public life”. The stock-taking, and in particular oversight monitoring of the RTI system, should then move on to addressing the transformation sought by the Preamble to the RTI Act.

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