

## **Displacing the 'Old' Culture of Secrecy; Looking Askance at a 'New' Government's Performance**

*Kishali Pinto-Jayawardena*

### **Introduction**

A common view held by many across the Commonwealth that Sri Lanka holds out a beacon of hope to the world in reversing the tide of authoritarianism underscores darker and more complex realities.

Even in those early days when elation prevailed after the surprise election defeat of former President Mahinda Rajapaksa in 2015, many of us instinctively knew that this was just the beginning of a long, hard road towards reversing systemic Rule of Law failures, much of which had predated Rajapaksa rule (2005-end 2014).

Two years later, the formidable challenges before us are very clear. During the previous decade, the abuse of power had been unprecedented, even when assessed against the country's turbulent post-independence history after British colonial fetters were shaken off in 1948. Ordinary law and order had deteriorated to abysmal depths. State, economic and military powers were concentrated in the office of the Executive President. Corruption on the part of a ruling family cabal was rampant and ugly. Shaky at its best, the scales of the State tilted dangerously towards raw, naked authoritarianism. Editors and journalists were assassinated, beaten up and threatened. A decades-long secessionist war fought by the LTTE in the Northern peninsula was brought to a bloody end in 2009 but even after, terror continued to stalk the land.

Yet the stage for this departure from the democratic path had been set quite a while ago. Prolonged ethnic conflict and more sporadic but equally violent clashes between the majority Sinhalese government and rebellious Sinhalese youth in the South had paved the way for emergency law to become the norm. Checks and balances once holding arbitrary executive discretion in check became weaker. Under the Kumaratunga Presidency, a Supreme Court headed by her handpicked Chief Justice in 1999 became politicized with severe adverse impact on a once revered institution. Attacks on critical journalists waxed and waned with criminal defamation law being used to stifle dissenters until a vigorous media-led campaign resulted in its repeal.

So to many, the excesses of the Rajapaksa Presidency was a natural – and logical – culmination of what had preceded. Regardless, a restive if not angry populace was ripe for change when, following a surprise announcement of a premature Presidential election, Rajapaksa's onetime Health Minister Maithripala Sirisena deserted his party leader and contested the elections with the support of Ranil Wickremesinghe, leader of the (then) opposition United National Party (UNP) after months of covert planning. It was an

explosive electoral challenge in the best traditions of excitable party politics, catching the imagination and hope of Sri Lankan citizens who voted for the imprudent challenger. But the 2015 reformist agenda of the Sirisena-Wickremesinghe coalition is now facing grave internal subversion by forces that were very much part of the earlier anti-democratic establishment.

### **Great Expectations; the Government's Reform Agenda**

One major thrust of reform concerned the restoration of the Rule of Law including the independence of the judiciary, the enactment of a Right to Information law and a Contempt of Court Act, the broad-basing of state-owned media among a host of other pending media law reforms. The other equally imperative focus was on state accountability for war time abuses premised on a consensus resolution on Sri Lanka adopted at the United Nations Human Rights Council.

However, progress has been faltering. Indeed, in some respects, there is regression. For example, the Government promised to repeal or reform the Prevention of Terrorism Act (PTA) under which journalists and activists had been routinely imprisoned. But now, a draft Counter-Terror Act (CTA), conceived in secret and running to more than fifty pages, has far more terrifying potential to restrict civil liberties than the PTA.

Where accountability is concerned, little of significance has happened apart from an Office of Missing Persons which remains yet inactivated. Similar dysfunction affects a Victim and Witness Protection Authority. In addition, hawkish elements within the Government are denying the right of immediate legal counsel to a suspect upon being arrested. Cases relating to the killings and beatings of journalists are yet pending.

Emblematic cases of gross human rights abuses against Tamil civilians under the previous regime suffer a similar fate. Absent sufficient pressure from civil society, the members of which have now been co-opted in great part into *ad hoc* task forces, punishing perpetrators through a radically reformed criminal justice system has been replaced by a spluttering Colombo-centered transitional justice process. This has been an early victim of the huge gap between what the Government promised and what it can actually deliver. Ambitious constitutional reform plans are similarly bedeviled. Corruption investigations into the near-bankrupting of the state coffers by the Rajapaksas have also stalled. Emboldened, the former President's supporters have become increasingly more vociferous.

### **Exceptionally wide framing of RTI**

The one exception to this sad litany of non-performance is that on 23 June 2016, the Parliament unanimously passed the Right to Information (RTI) Act. This was a result of persistent advocacy for over one and a half decades by editors, lawyers, media activists

and civil society activists. A key pivot thereto was the 1998 Colombo Declaration on Media Freedom and Social Responsibility, which focused on RTI as a legislative imperative. Earlier, a Prime Ministerial committee had drafted the 2004 Freedom of Information (FOI) Bill which was approved by the Cabinet. However the premature dissolution of Parliament resulted in the 2004 Bill being discarded. Some unsuccessful revivals were attempted in later years, one such effort being notably by the present Speaker of Parliament Karu Jayasuriya then an opposition parliamentarian. But the Bill was re-activated as a template only in 2015 with the change of regime. Following sleepless days of hectic drafting and after public consultations, the revised version now named the Right to Information (RTI) Bill was approved by the Cabinet.

The Bill passed the test of legal challenge before the Supreme Court subject to certain modifications. To the surprise of those anticipating vigorous opposition on the floor of the House, it was passed with nary an opposing vote. As a member of both drafting committees in 2004 and 2015/2016, this was a rare day of rejoicing for me. Some months ago, a constitutional amendment had also enshrined the right of access to information. RTI was therefore backed by two supports; one, constitutional and the other statutory. That said, the fact that the constitutional restrictions (drafted differently to the statutory process) were somewhat broader in scope did give rise to unease. Nonetheless, there was much to be pleased about.

Since the Act and its Regulations with the Rules of the Commission on Fees and Appeals were operationalised on February 3<sup>rd</sup>, Sri Lanka has been ranked globally as having the third best RTI regime. No state agency is exempted from its reach unlike other information laws in the region.

The Act specifically prescribes that all information requests must be considered on the basis of maximum disclosure. Information Officers appointed to all Public Authorities are required to test that request against the public interest. So for example, if there is a denial of information, the Information Officer is duty bound to show that the harm caused by releasing the information is greater than the public interest.

Thereafter (in the case of a denial) the matter must go to the Designated Officer in that public authority as a first appeal. In both these instances the respective officers must state the reasons, the specific section relating to the exemption under which they're refusing the request and justify it as not falling within the public interest override. Finally, if that denial is upheld by the Designated Officer, then the information requester could appeal to the independent RTI Commission, which is the primary policy making and appellate body under the Act and finally to the courts.

In instances where Information Officers have not been appointed, the Act deems the head of that institution to be the relevant Information Officer. In those cases, if the information

sought is not forthcoming, the appeal can be filed directly to the RTI Commission due to operation of the doctrine of necessity. In all other instances, appeals can be made to the Commission only after the step of appeal to the Designated Officer is exhausted.

Moreover, where the relevant Public Authority has named an Information Officer but has failed to name a Designated Officer, a policy decision by the Government taken last year operates to the effect that the most senior official in that government department or office will function as the Designated Officer.

Strict time periods are laid down under the Act for the consideration of the information request and for the appeal. Delay attracts disciplinary consequences. The RTI Commission has been vested with prosecutorial powers in respect of taking offenders to court. The Commission consists of five members appointed by the President as recommended by the Constitutional Council chosen by nomination of specified bodies including the organizations of editors and publishers, the Bar Association of Sri Lanka and civil society groups. It has been in operation for just over two and a half months during which time, Rules were formulated on Fees and Appeals.

Departing from stricter precedent in the region, these Rules prescribe that an information application can be lodged at no cost. Moreover information provided through email is free, the first four pages of a print out or a photocopy is free and the first one hour of inspection of a document is free. Also the Rules state that information is granted free upon a successful appeal. Reimbursement to the requestor of information can be directed by the Commission if information is not given within the stipulated time.

The reach of the Act is meanwhile exceptionally wide. It applies to public authorities as defined to include constitutional and statutory entities, government departments and bodies, corporate bodies in which the government has a controlling interest, local and provincial authorities, courts, tribunals and institutions established to administer justice and private entities working under contract, agreement, licence or a partnership with the government (where their statutory or public service or function is concerned).

Included in addition, are higher educational, private vocational or technical education institutions established, recognised or licenced under any written law or funded wholly or partly by the State and non-governmental organizations rendering a service to the public who are substantially funded by government, foreign government or international organizations.

### **Will the RTI Act be an Exception to a Discouraging Past?**

That said, Sri Lanka's experiences of reasonably good laws that have little practical impact are not reassuring. In 1994, the enactment of one of South Asia's best torture prevention laws, namely the Convention Against Torture (CAT Act), was a milestone. At

some points of deterrence, this law went beyond even the treaty norms established by the United Nations. It may have set a wonderful example for others to follow. But the converse occurred. Lacking requisite political will, its implementation was farcical. Indeed, the entire effort of various governments thereafter was to systematically cripple its functioning.

There is little doubt that the questioning of those in political power by virtue of the RTI will attract equally explosive reactions. Since the Act was operationalised on February 3<sup>rd</sup>, there has been vigorous use by citizens of both the ethnic majority and minorities. Family members of the disappeared in the North and the East and minority Tamil citizens who have been dispossessed from their land by the military have already filed more than a thousand information requests to the relevant Public Authorities.

For me personally, one of the proudest moments in those early days of RTI was when a group of fifteen mothers in the formerly war-torn East traipsed to police stations brandishing copies of the RTI Act and demanding answers from nonplussed policemen unable to read or understand copies of the Tamil language Act that they had. While utter confusion prevailed in the weeks that followed, reports are to the fact that slowly, investigations have commenced into some of those information requests even though, strictly speaking, the time periods have lapsed by now.

In the predominantly Sinhala speaking South, parents have filed requests in relation to their children not being admitted to school. Some have got answers even though the Ministry of Education which is the responsible Public Authority has been loath to appoint principals of schools as information officers due to reasons best known to that Ministry. The media has started using RTI in terms of investigative reporting. Some provincial politicians have released details of official and personal travel under RTI. The Commissioner of Elections has released financial records of political parties. The Moratuwa Municipal Council, distinguishing itself among municipalities, has proactively given information on its projects and promised to have a dedicated website on RTI.

For the past two months, the use of RTI has been quite diverse and vigorous. This is a positive factor even though I cannot comment on specific cases. Suffice it to be said that key Public Authorities have not yet appointed Information Officers. In some cases, this has been as a result of bureaucratic inefficiency. More worryingly, in other cases, it is due to subtle resistance to the Act. The stipulation in the Act that where an Information Officer has not been appointed, the Head or Chief Executive Officer automatically becomes the Information Officer has been used in some instances by informed citizens demanding their RTI. But the best practice would be the explicit naming of Information Officers to minimize confusion.

The Commission has been inundated with a considerable number of requests for advice from Information Officers requesting guidance in terms of responding to the flood of RTI requests coming to them on matters ranging from sensitive issues of land displacement in the North by the military to the illegal felling of trees and school admissions in the South. In terms of the law, the Commission cannot advise an Information Officer or a Designated Officer as to in what manner that officer exercises his or her discretion substantively. This is due to the fact that the matter, which may come up before the Commission in appeal, cannot be prejudged. The Commission therefore can only advise on a procedural issue connected to the grant of access to information. That said, the fact that people are using the RTI Act so vigorously in this manner is encouraging.

Certainly if the Act is implemented properly, Sri Lanka will move towards transparency in government and in the non-government sector along with the corporate and private sector that utilize public money. Will RTI be an exception to a discouraging pattern of practically ineffectual good laws in Sri Lanka? Will it radically transform the culture of secrecy that holds the political and public service establishment in an iron grip? Answering these questions require prophetic ability. But unlike other laws which depend on dysfunctional state institutions, RTI can be directly used by citizens to provoke, needle and demand accountability from government and non-government entities.

### **Challenges ahead – a new Counter-Terror law**

Unlike RTI, developments in regard to the replacement of the Prevention of Terrorism Act (PTA) have however, been far less happy. Though the Government promised to repeal or reform the PTA in order to make it more compatible with international protections of civil liberties, the converse has happened with a proposed new Counter-Terror Act (CTA).

The original version of the draft CTA (leaked' to the public last year with the drafting process being conducted in the utmost secrecy) contained vague and overbroad definitions of what constitutes terrorism and terrorism related offences. Familiar language in the old emergency laws echoed in the draft CTA's classification of 'terrorism related offences.' This prohibited 'words either spoken or intended to be read or by signs' etc which 'causes or intends to cause the commission of acts of violence between different communities or racial or religious groups. The prohibition was coupled with intent to cause harm to the 'unity, territorial integrity or sovereignty of Sri Lanka or the peaceful coexistence of the people.'

Journalists and dissenters had been imprisoned in the past precisely under these very same provisions in PTA despite these prohibitions being contrary to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Further, the inclusion of an offence of 'espionage' in regard to the gathering and providing of 'confidential information' relating to the listed offences was exceptionally chilling.

Restraining elements of necessity and proportionality were absent. And what constitutes 'confidential information' was vaguely defined, recalling of the unloved colonial-era Official Secrets Act. This boded ill for the new information culture touted as a clarion call of this Government through the RTI Act. The CTA would effectively override the RTI in those respects once enacted.

The draft CTA was subjected to vigorous criticism by this writer among others who were overcome by understandable consternation. Due to ongoing negotiations that the Government is conducting with the European Union (EU) in regarding to renewing a preferential trade facility that Sri Lanka had lost under Rajapaksa-rule, some of these overbroad and vague definitions have been removed in a brand new recent version of the CTA that is now being unofficially circulated.

But the revised version still infringes civil liberties in its conferment of wide powers on law enforcement officers to obtain information from service providers. A police officer not below the rank of Superintendent of Police is empowered to call for information from any telecommunications, digital or satellite providers again without adequate judicial oversight. This includes any information pertaining to services that may be provided or used to/by any person, information or data, documents or records that may be stored, archived or otherwise kept by such provider. Notably, it also includes uploading or downloading of data by such service provider.

Further the provision of immediate legal counsel to suspects arrested remains ambiguous. Earlier, the Government had repeatedly refused to allow this right, insisting that access to legal counsel be afforded only after the police interrogations take place. This was despite well documented reports showing that the incidence of torture of suspects in police custody which is an endemic problem in Sri Lanka takes place in the first few hours after arrest.

## **Conclusion**

Ambitious reform plans of Sri Lanka's coalition leadership have been slowly collapsing into disarray. True, citizens now live free from the threat of enforced disappearances and blatant misuse of power. Moreover, there is freedom of public debate which was once a luxury. Nonetheless, as has been repeatedly emphasized in my weekly column to *the Sunday Times*, Colombo, the coalition Government's incessant refrain that 'things are not bad as they once were', is no answer. Setting the bar of comparison based on the previous regime is akin to no standard at all.

And freedom of expression is of limited use when structures of state power remain impervious. In addition, increased criticism appears to be having a bitter impact. The Government has vowed to bring in a regulatory framework for print, electronic and online media. While media professionalism has deteriorated badly, mostly due to journalists

being bludgeoned literally and metaphorically in the past, government regulation is unquestionably not the solution to that problem. Cloaked in the deceptively misleading language of 'independent regulation' such innocuous experiments are often twisted to political advantage.

Some in the Government have asserted that RTI is a *quid pro quo*; in other words, as RTI has been 'given' to the media, it should 'submit' to the proposed regulatory scheme. This argument suffers from a fundamental misconception. RTI is not a privilege to be bestowed at the magnanimity of politicians. Rather it is a people's right (not limited to the media). Any suggestion of a *quid pro quo* is unfortunate.

In 2015, democratic change-makers were ordinary citizens from far flung corners of the land who reacted with powerful anger against state sponsored racism, chauvinism and corruption. But this critical constituency of reform is being eroded day by day. That is regrettable for Sri Lanka's people, for the Government which once promised much and most profoundly, for those working for genuine systemic change.

*The writer serves as a Commissioner on Sri Lanka's RTI Commission as the nominee of the organisations of editors and publishers. The views expressed are strictly in her personal capacity. This is an edited excerpt of a paper discussed at a panel session of an international conference on 'The Commonwealth and Challenges to Media Freedom' hosted by the Institute of Commonwealth Studies (ICwS) in London, April 4<sup>th</sup> 2017.*