



Note on the Sri Lankan draft Constitutional Proposal on the Right to Information

April 2015

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This Note¹ contains the Centre for Law and Democracy's (CLD) comments on those parts of the Bill entitled "An Act to amend the Constitution of the Democratic Socialist Republic of Sri Lanka" – "19th Amendment to the Constitution" which are concerned with the right to information (proposed guarantee).² The comments in this Note are based on the version of the proposed guarantee which was published online by the *Colombo Telegraph*, which includes the amendments proposed by the Attorney General.³ This version of the proposed guarantee is attached as an Annex to this Note.

The Centre for Law and Democracy very much welcomes the fact that the Government of Sri Lanka is proposing to provide for a constitutional guarantee for the right to information, and that it is in the process of preparing a law to give effect to this right. This right is recognised under international law as part of the wider right to freedom of expression, which includes the rights to 'seek' and 'receive', as well as to 'impart',

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² The Bill was placed on the Order Paper of Parliament on 24 March 2015.

³ See <https://www.colombotelegraph.com/wp-content/uploads/2015/03/Amendments-proposed-to-the-19th-Amendment-to-the-Constitution-Bill-26.03.2015-Clean-copy-2.pdf>. The Bill was also considered by the Supreme Court of the Democratic Socialist Republic of Sri Lanka in S. D. No. 04-19/2015 on 1, 2 and 6 April 2015 (decision available at: <https://www.colombotelegraph.com/wp-content/uploads/2015/04/SC-SD-4-to-19-of-2015.pdf>).

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information and ideas.⁴ Over 100 countries around the world, including all of Sri Lanka's neighbours, have adopted right to information laws.⁵

At the same time, our analysis suggests that the proposed guarantee fails to conform to international standards in various ways. This Note sets out CLD's analysis of the proposed guarantee based on international standards relating to the right to information, with the aim of helping local stakeholders ensure that the final constitutional provision provides as robust a grounding as possible for this important democratic right.

Restrictions

One problematical area of the proposed guarantee is the envisaged regime of restrictions on the right to information. The test for validity of a restriction – namely that it be 'prescribed by law' and be 'necessary in a democratic society' – is robust and fully in line with international standards.

It is in the area of the list of grounds which would justify a restriction on or exception to the right of information – i.e. the interests which would justify secrecy – that the proposed guarantee is problematical. The Attorney General is proposing to add two additional grounds, namely "contempt of court" and "Parliamentary privilege". As to the first, the proposed guarantee already protects the "prevention of disorder or crime" and "the authority and impartiality of the judiciary", so that adding contempt of court is entirely unnecessary. Furthermore, the scope of contempt of court has historically been problematical in Sri Lanka and it could thus potentially be abused to limit unduly the right to information.

Parliamentary privilege is aimed generally at protecting freedom of expression within Parliament and giving Parliament the power to regulate the proper conduct of its own affairs. There is no need to 'protect' these privileges and powers through secrecy and it is unclear how secrecy would in any way improve or bolster these privileges. To the extent that Parliament or Members of Parliament may need to protect any of the information they hold, this would already be covered by other exceptions. It may be noted that better practice in this area, including from many other countries in the Commonwealth, is not to include exceptions along these lines in right to information laws.

A number of the other grounds for restrictions are also problematical in the context of the right to information. It may be noted that the right to information is not analogous in this regard to the right to freedom of expression. Exceptions to the latter need to cover the full

⁴ See, for example, paragraph 18 of General Comment No. 34 of the UN Human Rights Committee, adopted 12 September 2011, CCPR/C/GC/34, which states: "Article 19, paragraph 2 [of the International Covenant on Civil and Political Rights] embraces a right of access to information held by public bodies." Available at: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁵ See www.RTI-Rating.org. Bangladesh, India, the Maldives, Nepal and Pakistan have all adopted RTI laws.

range of harmful abuses for which individuals may attempt to use their expressive rights. This includes such expressive forms as child pornography, lies about other people (defamatory statements) and hate speech. This is not in any way analogous to the right to information, where exceptions only need to cover instances where the disclosure of information held by public authorities would cause harm to a legitimate interest. One would hardly expect a public authority to hold child pornography and even if it did, for example, hold defamatory material, exposing this fact in public would serve a higher public good (including so that the person to whom the defamation related could clear his or her good name).

In light of the above, some of the grounds for restriction in the proposed guarantee are unnecessary, specifically “morals” and “the reputation or the rights of others”. The latter, in particular, is potentially extremely broad and could lead to widespread denials of access to information which were not justified. Furthermore, in practice, exceptions along these lines are not found in better practice right to information laws. On the other hand, it might be necessary to add in a more limited and precise ground for restrictions, namely legitimate commercial and economic interests.

Another ground is even more problematical, namely “preventing the disclosure of information received in confidence” (or, with the Attorney General’s proposed change, “communicated in confidence”). This would effectively grant any third party supplier of information a right of veto over whether or not that information could be made public, which is manifestly contrary to the public interest and an approach which has been rejected in not only better practice but almost all right to information laws. Instead of this highly problematical approach, providing for exceptions based on the narrow ground of maintaining good international relations (or relations with other States and inter-governmental organisations) is recommended.

Recommendations:

- The grounds of “contempt of court” and “Parliamentary privilege” should not be added to the constitutional guarantee of the right to information.
- The grounds of “morals”, the “reputation or the rights of others” and “preventing the disclosure of information received in confidence” should be removed from the guarantee.
- Consideration should be given to adding in two additional grounds, namely legitimate commercial and economic interests and maintaining good international relations.

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The proposed guarantee, with the suggested amendments of the Attorney General, starts with the following phrase: “Every citizen shall have the right of access to any information as provided for by law”. This is at best very unfortunate wording and at worst quite problematical. The reason for this is that this wording suggests that what the provision guarantees is whatever right of access happens to be provided for by law. This would not be a constitutional guarantee at all, but simply a reaffirmation of the rule of law. It is unclear what the phrase “as provided for by law” adds to the guarantee and the best solution would simply be to remove it and to revert to the original wording, namely: “Every citizen shall have the right of access to any information held by”.

Recommendation:

- The proposal to add the phrase “as provided for by law” to the proposed guarantee should be dropped.

Scope of the Guarantee

There are two ways in which the scope of the proposed guarantee is unduly limited. First, and most importantly, the proposed guarantee provides a detailed list of the bodies to which it applies, but this list is unduly limited compared to established international standards in this area. The proposed guarantee covers the State, ministries, government departments and bodies created by statute at the national or provincial level, local authorities and, to a limited extent, other persons. International standards additionally require that the right to information include all bodies which are owned, controlled or funded by public authorities, as well as private bodies which undertake public functions. In most countries, constitutional guarantees do not provide a detailed list of the bodies which are subject to the right, instead leaving this to be established by legislation. For example, Article 12 of the 2007 Constitution of Nepal (Interim) states simply:

Every citizen shall have the right to demand and obtain information from public bodies.

Second, it is restricted to citizens, defined so as to include bodies in which at least three quarters of the members are citizens. Under international law, the right to information applies to everyone, not just citizens. We understand that, in the Sri Lankan context, a decision has been made to limit the right to citizens and this is also largely the case across South Asia, where most right to information laws are similarly limited. However, this does not reflect better practice globally, with a majority of all right to information laws extending to cover everyone, including non-citizens. Arguments against extending such laws to non-citizens – whether based on considerations of cost or protection of national interests – simply do not bear scrutiny based on the very extensive experience of the many countries in which non-citizens may make requests.

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Recommendations:

- The scope of application of the right to information in terms of public authorities should be broad, in line with international standards. Consideration should be given, in this regard, simply to providing that the right applies to ‘public authorities’, leaving the substance of this to be set out in legislation and elaborated by the courts.
- Consideration should be given to extending the constitutional guarantee for the right to information to everyone instead of limited it to citizens.

Draft Constitutional Proposal on the Right to Information

14A.

(1) Every citizen shall have the right of access to any information as provided for by law 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 Province or any Department or statutory body established or created by a statute of a Provincial Council;
- (c) any local authority; and
- (d) any other person, being information that is required for the exercise or protection of the citizen's right of access to information in relation to a person or an institution referred to in sub-paragraph (a), (b) or (c) of this paragraph.

(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such 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, contempt of court, parliamentary privilege, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.