

USE OF THE RIGHT TO INFORMATION IN BATTLING FOR ENVIRONMENTAL JUSTICE IN SRI LANKA

K.M. Chetana Rukshani Karunatilaka*

INTRODUCTION

Right to information¹ is a basic human right in democratic societies. It allows the natural and incorporated citizens of a country to freely access governmental information. There are number of international human rights instruments that identify the RTI. The Universal Declaration of Human Rights provides *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*² Further, the Article 19(2) of the International Covenant on Civil & Political Rights also identifies the RTI as an integral part of freedom of expression. Based on these international instruments the contemporary approach taken towards RTI ensures good governance, transparency and accountability of the government bodies and officers.

RTI is a pre-requisite of litigating environmental rights and access to environmental justice. Lack of proper information flow would result in the concept of environmental justice becoming an utter failure. The simple meaning that can be attributed to the term ‘environmental justice’ is equitable distribution of environmental benefits and costs. When it comes to environmental benefits, every person is entitled to live in a healthy environment. Further, in case if equal environmental rights or benefits are denied, such party should have open access to justice. For the purpose of effectively implementing equal environmental benefits and access to environmental justice, accurate and proper information flow has become an essential element.

RIGHT TO INFORMATION IN SRI LANKA

Constitution of the Democratic Socialist Republic of Sri Lanka 1978 contains fundamental rights in its Chapter III. The RTI was not initially identified or guaranteed under the Sri Lankan Constitution. Due to the traditional approach taken towards governmental activities, all the information was kept in a confidential manner. Citizens of the country were denied of certain governmental information based on several grounds.

However, the higher Courts of Sri Lanka had taken the preliminary step in protecting the citizen’s RTI through judicial activism. In the case of *Visualingam and Others v. Liyanage*³, Wanasundara J. mentioned that *“it is man's right as the recipient of information to look to as many sources- of information as he likes; and it is equally the duty of the Press which provides the information to seek it from as many sources as possible. If, however, the sources*

* Lecturer @ Department of Law, University of Peradeniya, Sri Lanka

¹ Hereinafter referred as RTI

² Article 19, UDHR 1948

³ 2 Sri LR 311(1983) at 322

of information become concentrated in one, or restricted to a few bodies, then the formation of ideas is limited. It is in such circumstances only proper that the sources of information available to the public should be enlarged rather than restricted; therefore there can be no justification for interference with the freedom of the press". Even though this case was not related to an environmental issue, the Judgment is marked as the first case that the Court attempted to secure the citizen's RTI.

Access to environmental information was recently questioned in *Environmental Foundation Ltd v. Urban Development Authority of Sri Lanka and Others*⁴, The issue in this case was whether a non-profit making organization, duly incorporated under the Companies Act in Sri Lanka, can seek to obtain information related to a natural heritage of the country. Urban Development Authority has refused a request to access information made by the Company and therefore, the Petitioner sought relief under Article 12(1) and Article 14(1) of the fundamental rights chapter of the Constitution. Justice Sarath N. Silva inter alia held, *"Although the right to information is not specifically guaranteed under the Constitution as a fundamental right, the freedom of speech and expression including publication guaranteed by Article 14(1) a, to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in public domain. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attaches to the affairs of state and official communications."*

This case is set to be the landmark judgment that changed the history of access to environmental information. Soon after the delivery of this judgment, the legislature realized the paramount interest of identifying RTI as a statutory right in Sri Lanka. 19th Amendment to the Sri Lankan Constitution which was brought in 2015 contained a separate Section to include RTI in to the Fundamental Rights Chapter. Section 02 of the 19th Amendment introduced the new Article 14(A) to the Constitution, ensuring the explicit protection of the Citizen's RTI. Article 14A reads as follows,

- 1) 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", Art 14A, (1978)

⁴ 1 Sri LR 123 (2009) at 129-130

A RTI bill was submitted to the Parliament on the 24th of March 2016 and was certified as a law on the 04th of August 2016. Though there are some notable differences, Sri Lankan RTI Act is mostly based on the Indian RTI Act No. 22 of 2005. Since the Constitution guarantees the RTI in Article 14A related to administrative and executive actions, there was a need to foster a culture of transparency and accountability in other public authorities too. This Act promotes a social context in which the citizens of Sri Lanka would be able to participate in public life through combating corruption and promoting accountability and good governance.

Under this legal backdrop, it is a timely requirement to study whether the new law on RTI promotes the environmental justice? The focal objective of this research study is to evaluate the use of newly enacted RTI laws as a mechanism in battling for environmental justice. The study will also involve in a comparative analysis of the use of RTI in establishing environmental justice in the South African context. Hypothesis for the research suggests that the RTI law in Sri Lanka is well equipped to fight for environmental justice, provided if necessary practical knowledge and awareness is in place.

METHODOLOGY

This study has utilized both library and field research methodology. Library research was conducted using primary and secondary data resources. Under the primary legal resources, a number of Legislative enactments and case law were referred to whereas under the secondary legal resources, a collection of peer reviewed articles and internet resources were used. This library research was conducted utilizing the following line of literature:

- Identification of the significance of RTI in battling for environmental justice
- How the Sri Lankan Courts have identified the importance of ensuring environmental justice through RTI
- The provisions related to RTI in Sri Lanka, foreign jurisdictions and in international level
- Does the current law assist in establishing equal environmental benefits as well as equal access to justice?
- How other countries encourage environmental transparency
- What improvements can be suggested to the current law in Sri Lanka?

Field Research was conducted under the standard qualitative methodology and for the purpose of collecting data, 10 individual experts were consulted. Standard semi structured questionnaire was used for collecting data and opinions from the experts and the sample was selected as follows,

➔ Sample 10: Lawyers 4, Academicians 4, Environmentalists 2

ANALYSIS

The information possessed by the Government is of paramount interest in establishing environmental justice. Citizens of a country are unable to analyze whether they are given

equal benefits of the environment, if they do not have proper information. Quest for environmental justice is driven by available information. Public knowledge and awareness of the environmental injustice, would give them the opportunity to raise their voices against such violations. Therefore, proper and correct environmental information flow, would allow the present generation to protect their as well as the future generations environmental justice. As a preliminary access point to the study, researcher tried to evaluate the knowledge of the data contributors regarding the existence of the RTI as a fundamental right and a statutory right. All the experts who contributed to the data collection process had a general knowledge that RTI is now a constitutionally and statutorily recognized right. They also accepted the fact that RTI is one of the sources in obtaining government held information for evaluating whether the benefits of the natural environment are equally shared among the citizens of a country. Further they pointed out the full and frank disclosure of information as a prerequisite element in successfully litigating the environmental rights.

The outcome of the research suggested that the public RTI can be used as a weapon in battling for equal environmental benefits and access to justice, due to several reasons. One such reason identified by the Experts is the wide scope of definitions provided by the Act, allows covering a wide range of illicit activities, public authorities and undiscovered information related to environment. Firstly, people who are protected under the RTI law or who can seek access to environmental information through the provisions are wide. Article states that ‘citizen’ includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens, Art 14A(3) (2015) whereas the RTI Act provides that every citizen shall have a right of access to information in the possession, custody or control of a public authority, Section 3(1) (2016). This provision read together with Section 43 of the Act, guarantees the RTI of natural and legal citizens of the country. However this right is not available to non-citizens and non-legal entities. This position was established by the Supreme Court of Sri Lanka in *Environmental Foundation Ltd v. Urban Development Authority of Sri Lanka and Others*⁵, where Justice Sarath N. Silva clearly stated, “the word ‘persons’ as appearing in Article 12(1) should not be restricted to natural persons but extended to all entities having legal personality recognized by law”. He further upheld that he is of the view that even if the Article 14(1) refers to the term ‘citizen’, any distinction should not carry with it and it would enable a body corporate to vindicate an infringement.

Environmental matters are necessarily matters that come under the public domain. If there is a likelihood of causing a severe long-term wide spread environmental damage, such damage would cause a negative impact on the present and future of environmental justice. Therefore, the scope of information made available to the public is of utmost importance. According to the opinion of the Experts, the definition given to the term ‘information’ also can be a positive factor in ensuring environmental justice. This covers the right to access both information and records/documents that are in either physical (printed) or in electronic form as well as electronic media such as video tape, sound recordings etc, Section 43 (2016).

⁵ Supra note 3 at 131

Fundamental rights protectionism is guaranteed only against an action which comes under the administrative or executive head. Unlike the Constitution, the term 'public authorities' is also being given a broad definition under the RTI Act. A list of public authorities that comes under this purview is identified and the remarkable inclusions are public corporations, private educational institutions, Courts and other tribunals, Section 43 (2016).

As the experts identified, the most important provisions of RTI Act that can be used to protect environmental justice are Section 3 and 9. They argue that RTI Act can be used to ensure environmental justice in a right based approach as well as a responsibility based approach. According to them, Sec 03 of the RTI Act recognizes the every citizen's (natural or incorporated) right to access information. Experts are of the view that this provision enable the public to make an application to any identified public body for obtaining information about an ongoing or a proposed development activity or project that create a possible negative impact on equal benefits of natural environment. If one class of people is denied of clean air, pure drinking water or healthy environment due to a development activity, it is known as violation of environmental justice. They are deprived from the equal protection of law as well as the equal benefits of the environment.

If proper information is accessible to the public under Section 3 of the RTI Act, they can take action to prevent any discrimination on environmental justice beforehand. Public participation in environmental decision making process would be less effective, unless the access to environmental information is granted. Therefore, the experts are of the view that Section 3 enables the public to access environmental information for active involvement of establishing equal benefit of environment.

Sec 9 of the RTI Act delivers the responsibility based approach to environmental justice. According to the provisions of the Section, a responsibility is casted up on Ministers to inform the public about any initiation of a project. A project for the purpose of this Section means a foreign funded project which exceeds hundred thousand US Dollars (US\$ 100,000) or a locally funded project which exceeds five hundred thousand rupees (Rs. 500,000), Section 9(3), (2016). Experts consider this as a very progressive provision where the liability casted up on the minister can be utilized in the mission for environmental justice. Since the Ministers have a statutory obligation to disclose regarding a proposed development activity, the public would be given a broad opportunity to evaluate the possible environmental effect and the impact on their lives, before actively participating in the assessment or decision making process.

Another important element of environmental justice is accessibility of remedies, in case if equal benefits are deprived. Therefore, one of the positive features of the RTI Act, in accessing environmental justice is the appeal opportunity. Three appeal opportunities are being identified by the Act, namely, appeal to the Designated Officer, appeal to the RTI Commission and finally appeal to the Court of Appeal. This wide range of appeal options expands the access to justice in case if the citizen's freedom of environmental information is violated. The experts are of the view that it clearly provides better access options to the administration of justice process in case of violation of equal environmental benefits.

Even though there are number of progressive points to be noted under the RTI law in Sri Lanka that assists environmental justice, existence of some drawbacks is inevitable. Every system in the world cannot be completely successful or 100% progressive, but some shortcomings are also coupled with that,

Some of the shortcomings identified by the experts are:

- Lack of public awareness of the use of RTI for environmental matters,
- Lack of training provided for the staff in public authorities,
- Costs involved in the appeal process

The two fold elements of environmental justice, namely equal environmental benefits and open access to justice in environmental matters are clearly incorporated in to the statutory framework in Sri Lanka. Constitutional RTI as well as the RTI Act No. 12 of 2016 play a vital role in balancing the environmental information flow for a better implementation of public benefit. The practical implementation of the environmental justice has become the major failure in the process.

Article 24 together with Article 32 of the South African Constitution, provide Constitutional protectionism for RTI, whereas the Promotion of Access to Information Act No. 02 of 2000 also supports right to environmental information. In the *Trustees for the time being of the Biowatch Trusts v. Registrar, Genetic Resources and Others*⁶, the question that the Court had to decide up on was related an environmental information denial. The Court decided mainly up on two regards, firstly, whether Biowatch can file this action since it is a public interest non-governmental organization, to which the Court answered affirmatively. Secondly, whether it can litigate not on its behalf but in the public interest, for which the Court again answered positively.

Therefore, it is clear that right to environmental information can be legitimized used the existing RTI law in a country. Further, judicial activism relating to open environmental information flow also would mark a paramount remark in the process of setting up environmental justice.

CONCLUSION & RECOMMENDATIONS

Since sufficient statutory regulations are in place for protecting environmental justice through RTI, lack of awareness of the general public needs to be properly addressed for the purpose of implementing the process. Persistently low level knowledge of the people regarding the RTI and how it can be used to access environmental information had become a major barrier. Therefore, the Right to Information Commission and other public authorities such as Central Environmental Authority can take the initiative steps to commence awareness programs all around the country. The public should be given proper education of their rights and enforcement of those rights.

⁶ ZACC 14, (2009)

Secondly, the Information Officers appointed for each public authority must be given a proper training regarding the RTI law. Most of the public officers are not people with a legal background, therefore interpreting the provisions of RTI law and deciding the scope of limitations available to RTI could be a hard task for them, unless a proper training is given. Further, a culture that fosters the open information flow, transparency, accountability and good governance must be promoted in public authorities. Human psychology of all the officers in public authorities should be altered to reduce seriously deficient administrative actions and to support open information flow mechanism.

When equal environmental benefits are denied, there are number of remedies provided by the Constitution as well as the RTI Act. However one of the disadvantages identified in these remedial processes is the high cost involvement. In case if environmental information are denied by a public authority, two fold remedies are available;

- Making a Fundamental Rights petition to the Supreme Court and
- Making an appeal under the RTI Act; where final appeal lies in the Court of Appeal.

However both the final remedial options available are considered to be high costly litigation process. Therefore, the members of the public are hesitating to go to the adjudication system, in case of violation of their environmental benefits.

A recent approach taken by the South African Constitutional Court can be taken as an example in this natured situation. In the Trustees for the time being of the *Biowatch Trusts v. Registrar, Genetic Resources and Others*, the costs attached had been recognized as the single most significant barrier to access to environmental justice.

The South African Constitutional Court held that it is the duty of the State to cover costs of environmental litigation, if the applicant becomes successful in a constitutional litigation. This decision is a positive approach that can be adopted by the Sri Lankan Courts, in helping the public for open access to environmental justice. If the state can implement a mechanism in overcoming the above mentioned drawbacks, the RTI law in Sri Lanka, can be effectively and efficiently used as a weapon in the process of battling for environmental justice in the country.