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ACCESS TO INFORMATION, PEOPLES' PARTICIPATION AND SOCIAL JUSTICE IN SRI LANKA

LAW & SOCIETY TRUST

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Editor's Note ... ...

Extracts of a 2007 Sri Lanka Report of the TAI (The Access Initiative) National Coalition of Sri Lanka comprising the Public Interest Law Foundation, the Centre for Environmental Justice, the Green Movement of Sri Lanka and the Law & Society Trust are contained in this issue of the *Review*.

The Report is exceedingly useful for its comprehensive assessment of the government's performance and progress on multiple aspects of access to information, public participation and access to justice at the national level in relation to environmental governance.

These are questions that are in the forefront of public debate today in Sri Lanka. One good example in this regard is the Southern Transport Development Project (STDP). As has been documented before court in the petitions filed by persons compelled to seek redress after they had been evicted from their homes without adequate information, without adequate notice and without guarantees of adequate compensation, the manner in which the mega highway in Sri Lanka was proceeded with, was problematic in many respects.

A recent phenomenon in this respect is the collapse of bridges on the Southern expressway with investigative reports carried out by the media therein finding that there was a deliberate obstruction of information in relation to important aspects of the construction of the expressway. Questions relating to Access to Justice have been paramount.

In one notable case related to the STDP project, the Supreme Court in fact awarded relief to a group of petitioners on the basis that they had not been given adequate notice and information that their lands were going to be acquired and that they were to be evicted (*Heather Mundy* v. *Central Environmental Authority and others*, SC Appeal 58/2003, SC Minutes of 20.01.2004).

Principles relating to access to information and public participation in the context of development projects are well established in international law. In the context of people seeking to protect their homes, the European Court of Human Rights has held that "the importance of public access to the conclusions of... studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question" (*Taskin* v. *Turkey*, 2004 ECHR, para.119).

This approach is reflected in Principle 10 of the UN Declaration on Environment and Development 1992 which states that:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

This Principle has been subsequently reaffirmed by the *Aarhus Convention* ("Convention on access to information, public participation in decision-making and access to justice in environmental matters", ECE/CEP/43) adopted on 25 June 1998 by the United Nations Economic Commission for Europe and entered into force on 30 October 2001.

This instrument seeks to promote public participation in decision-making concerning issues with an environmental impact. In particular, provision is made for encouraging public participation from the beginning of the procedure for a proposed development, "when all options are open and effective public participation can take place". Due account is to be taken of the outcome of the public participation in reaching the final decision, which must also be made public.

In relation to large-scale development projects which threaten both the environment and people's individual homes and property, such as the construction of an expressway, these Principles place each country under an obligation to consult with all those affected, provide them with relevant information and give them an opportunity to make representations at a public hearing. This is in line with increasing acknowledgement of the right of individuals to be entitled to active, free and meaningful participation in development projects.

The Right to Information is the core aspect of these entitlements. The TAI National Coalition Report published in this issue looks at statute specific legal provisions relating to access to information and comments on the lacunae occasioned by the absence of a general access to information law.

Relevantly it may be observed in this regard, that though the Supreme Court has interpreted a right to information into the Constitution, this judicial application has had limited practical validity. It is not every citizen or person hampered by the absence of information who has sufficient resources to move court. Judicial strictures passed on branches of government which pose deliberate obstacles to the obtaining of legitimate information undeniably has had very little effect on the obduracy of government in this regard.

In advocacy aimed at the enactment of a Right to Information law for Sri Lanka in line with parallel developments across South Asia, this Report should provide valuable analysis as to the specific context in which such a law is urgently needed.

Kishali Pinto-Jayawardena

ACCESS TO ENVIRONMENTAL INFORMATION, PUBLIC PARTICIPATION AND ACCESS TO JUSTICE – SRI LANKA REPORT*

The Access Initiative (TAI) formed in 2002 is a coalition of civil society groups across the world working together to promote national-level implementation of commitments to access to information, public participation and access to justice (the three access principles). One of the main objectives of the TAI community is to ensure that citizens are given a meaningful voice in decisions and actions that affect their lives, health and community. TAI networks and coalitions aims at achieving this by working with governments. Today, TAI has partners from over 40 countries and is the largest network in the world working on peoples' right to information and decision making in relation natural resources and the environment.

TAI was created within the context of the Rio Declaration of 1992, where 178 governments agreed and committed to Principal 10 which recognized the three "access principles" mentioned above. The three access principles aimed at achieving "transparent, equitable and accountable decision making" that make up the framework for good environmental governance. In 1998 the United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, known as the "Aarhus Convention" was signed, which came into force in 2001. A further commitment to PP10 was made by over one hundred participating countries at the World Summit on Sustainable Development (WSSD) in 2002 through the Plan of Action.

In Sri Lanka the programme was initiated in 2005 with the support of the World Resources Institute (WRI), Washington DC (which is the secretariat for TAI). The first Sri Lanka assessment was carried out in 2006/7 by the Sri Lanka National NGO Coalition and this report contains the analysis and findings of this study. The main objective of the Sri Lanka study was to assess the government's performance and progress on access to information, public participation and access to justice at the national level in relation to environment. The analysis and findings identify the main weaknesses and strengths of the law and its practice is intended to provide the basis for reforms in environmental governance in these three areas.

The assessment was carried out by using the TAI methodology which has been developed and tested over a long period of time The methodology is based on looking at the actual status (and future) of the three fundamental access principles enshrined within Principal 10. Capacity building is also built into the assessment as it is an intrinsic part of the access principals. Hence, the assessment consists of four main subjects namely, Access to Information (A2I), Public Participation (PP), Access to Justice (A2J) and Capacity Building (CB). These four subjects are examined by looking at the existing law and its practice (in reality) including capacity building.

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* Reprinted in this Issue are extracts from the *2007 Sri Lanka Report* of the TAI (The Access Initiative) National Coalition of Sri Lanka, comprising the Public Interest Law Foundation, the Centre for Environmental Justice, the Green Movement of Sri Lanka and the Law & Society Trust. Assistance in making available the Report in this regard by the Public Interest Law Foundation is kindly acknowledged.

The Constitution

Sri Lanka's Constitution was evaluated on the basis of the extent to which it guarantees the following six rights: a clean and safe environment; right to information; right to public participation in administrative decision-making; access to justice; freedom of expression; and right to freedom of association.

While the Constitution does not contain any specific right to a clean and safe environment, it casts on the State a duty to "protect, preserve and improve the environment for the benefit of the community", and likewise casts a duty on the citizen "to protect nature and conserve its riches". The latter provision has been used as the justification for public interest litigation on this subject.

Creative interpretation of the right to equality before the law and the equal protection of the law have been successfully invoked by persons wrongfully denied the benefit of environmental protection or environmental information that other persons similarly placed would be legally entitled to, such as an EIA process.

Other constitutional rights that have been invoked in environment-related cases include the right to pursue one's chosen occupation, and the right to choose one's place of residence, which have been mostly invoked where traditional livelihoods such as rice farming, or basic needs such as access to clean water, have been threatened.

There is no specific right to 'information' in the Constitution, but the right to freedom of speech and expression under Article 14(1)(a) has been judicially interpreted to include the right to information, though of course this means that a party has to go to court to enforce it. The right to public participation is not constitutionally guaranteed, although the Constitution guarantees freedom of association and assembly.

Constitutional guarantees on access to justice are strong, inclusive of equal protection and non-discrimination provisions, the presumption of innocence, the right to be represented by an Attorney, and the right to access the courts including a direct application to the Supreme Court in the case of infringement of fundamental rights.

Right to Information

Turning now to the rest of the country's laws, Sri Lanka does not have a framework law supporting access to official information. Some environmental laws such as the Coast Conservation Act (CCA) and the National Environmental Act (NEA) are comparatively strong on disclosure requirements, while others such as the National Water Supply and Drainage Board Act contain none at all.

The CCA is the only law to provide for disclosure of information and public participation at the planning stage, namely preparation of the Coastal Zone Management Plan. It was also the first law to introduce the environmental impact assessment process (EIA) to Sri Lanka.

Under the NEA, information disclosure and public participation were originally mandatory under the approval process for all 'prescribed projects' but in 2000 these rights were removed in respect of projects which are deemed by the project approving agency to require only an Initial Environmental Examination (IEE), thereby restricting their operation to projects where the approving agency has determined that an Environmental Impact Assessment (EIA) is necessary. As there are no statutory guidelines as to which type of projects should require EIA and which ones may be passed with IEE, this allows the public to be shut out from commenting on projects that could have considerable environmental impact.

Meanwhile, the Official Secrets Act (rarely invoked) and the Establishments Code that governs the public service, have a strongly negative effect on disclosure of information by public officers.

Judge made law has also played a part in assisting information disclosure, as when, in 2005, the Supreme Court introduced the principle that where a public authority itself has put a matter into the public domain (e.g., by public advertisement) it cannot refuse requests for further information on that matter.

Case studies revealed some interesting specifics; e.g., that a pro-active approach towards information dissemination was more visible in respect of emergency situations than in the other case types that were studied.

With regard to information from regular monitoring, there was a sharp contrast between the favourable attitude to disclosure adopted by the Central Environmental Authority under a project where information disclosure provisions were written into the project TOR by the funding agency, and the attitude of the National Water Supply and Drainage Board which had not been placed under any legal duty to disclose information.

While the National Environmental Act contains certain disclosure requirements with regard to "prescribed projects", access to facility-level information was limited and was directed more towards encouraging foreign investment than protecting the health of the surrounding population.

Court actions have proved to be a useful way of obtaining information, as in the *Galle Face Green* case and the *GM food labeling* case. However the filing of such cases depends on the interest shown by environmental organizations which have the funds and expertise to fight cases in the superior courts.

Outright non-compliance with disclosure and public participation requirements while a project is ongoing proved to be one of the most unsatisfactory areas, as illustrated by the

Southern Expressway (STDP) project. In this case environmental clearance had been obtained for the expressway along a certain route but one point that route was departed from, without holding an EIA for the benefit of the people who were to be affected by the deviation. Despite finding that this was contrary to law, the court was not inclined to halt the project but ordered monetary compensation for the affected persons.

Another negative area was the impact in Sri Lanka of environmentally sensitive project carried on outside Sri Lanka's territorial waters, as illustrated by the Sethusamudram Ship Channel project in neighbouring India. There was no environment-related law under which disclosure of information could be compelled, and the lack of a general access to information law was keenly felt.

The role of the media varied from case to case. The media took up the controversial issues such as Galle Face Green, Sethusamudram and genetically modified foods, and also helped disseminate information during flood emergencies in Ratnapura. On the other hand, there was reluctance to devote space to regular monitoring, and some media organizations demanded payment to carry such information.

A further issue that arises is whether access to environmental information should be treated as part of a general Access to Information Act or whether it requires a special Act on the lines of the Aarhus Convention.

Public Participation

Much of what has been said about access to information is equally applicable to public participation. The National Environmental Act as amended comes nearest to being a framework law in relation to public participation but the year 2000 amendment referred to above seriously restricted its operation by taking the IEE process out of the public domain. In a further negative development, it was found that a handbook on public participation published by the Central Environmental Authority was no longer in circulation, apparently because some of the steps mentioned therein are not being followed.

Despite the lack of a legal requirement, public participation has often been invited in the formulation of national policy, as illustrated by the case study on the draft National Policy on Bio Safety. With regard to development projects, the Colombo-Kandy Expressway proved to be a positive example with public hearings and a strong public response which secured some environmental and public health safeguards over and above those included in the original EIA Report.

On the other hand the *Eppawela Phosphate Mining* case indicated that the more powerful the developer (in this case a large multinational mining company) the more the government was likely to circumvent the law in order to carry out the project. Here the right to public participation was completely denied to the affected people, who however won back their rights and halted the project through a fundamental rights application in the Supreme Court.

The Galle Port Development study highlighted the difficulties that arise when a number of different agencies have regulatory powers over various aspects of a project, with different procedures and degrees of public participation.

The *Galle Face Green* case highlighted the lack of any mandatory procedure for public participation in the making of regulatory decisions that do not involve "prescribed projects" in terms of the National Environmental Act. However in this case effective court action by an NGO succeeded in preserving the Green in its traditional character. While the court invoked some very broad principles relating to the rights of the public, at a more technical level it also found that the agency that was attempting to lease out the Green had no legal power to do so. Similarly, procedural irregularities had to be invoked in order to halt environmentally damaging gem mining in the *Bogawanthalawa* case.

Access to Justice

The Constitution guarantees to every person the right to invoke the jurisdiction of a competent court in person or through an Attorney-at-Law. In addition there are a number of other quasi-judicial tribunals and commissions established by Acts of Parliament.

Even the lowest level of court, namely the Magistrate's Court has some powers over the environment by the use of the public nuisance provisions in the Code of Criminal Procedure. The *Kurunegala Quarry* case which formed part of the A2J study originated in the local Magistrate's Court although it eventually went up to the Supreme Court.

The higher courts serve both as appellate courts from decisions of the lower courts, as well as courts of first instance with regard to certain constitutional and administrative law remedies. For example the Provincial High Courts and the Court of Appeal based in Colombo have power to issue writs against wrongful administrative decisions of public agencies or a wrongful failure by such agencies to perform their public duties.

The Supreme Court (the highest court in the country) serves as a court of first instance for the hearing of fundamental rights applications, as well as the final appellate court in respect of all other types of claims. "Fundamental rights" are those expressly set out as such in the Constitution, and if there is an infringement of a fundamental right by a State agency, the aggrieved person has a right to petition the Supreme Court directly. Fundamental rights include the right to equality before the law and the right to freedom of speech and expression, which has, through judicial interpretation, been held to include right to information in several instances.

The environmental harm cases under review were of two kinds, namely:

(a) Cases where the damage is caused by a private party and the aggrieved persons have recourse to the court system in order to halt such activity, e.g., *Kurunegala Quarry* case; and

(b) Cases where the State agencies wrongfully fail to take preventive action against environmental damage by third parties, and the petitioners file action against the State agencies, e.g., *Horton Plains* case where the relevant agencies were apparently turning a blind eye to unlawful development activity within a forest reserve.

The *STDP* case already referred to above, was a test of access to justice in respect of a denial of information, but the Supreme Court, to where the case went in appeal, limited itself to ordering substantial costs to be paid to the aggrieved persons and did not stop the expressway project.

The *Kantale* case involved damage that was being caused to a major road, a part of which ran along the bund (bank) of the Kantale Tank (water reservoir). Load limitations which were applicable to the road in question were suddenly revised to accommodate heavy vehicles of a certain company. The case was filed by a public interest organization with the active participation of the affected people, and the State agencies cooperated in restoring the original load limit and agreeing to appoint a committee of experts to review what the new load limit should be.

It may be said that out of the three main aspects studied for this Report, Access to Justice is the area where Sri Lanka's laws are strongest. The only significant impediment appears to be the cost factor, which is not entirely mitigated by the assistance provided by State-funded and private legal aid schemes.

While many of the cases under review were settled by the State agencies concerned cooperating to enforce the law, those that were contested such as *Galle Face Green*, *Eppawala* and *Southern Transport Development* cases saw heavy awards in costs against the errant State agencies. It can therefore be said that the Courts generally consider the infringement of rights relating to environment to merit serious penalties.

However it may also be noted that many of the cases that were settled without a contest leave open the question of how effectively the terms of the final settlement can be monitored. It will be up to the petitioners to monitor and report to court if there is non-compliance.

Capacity Building

There would be little purpose in having laws on access to information, public participation and access to justice, if the public lacked the capacity to make use of such laws. Similarly, the relevant official agencies should have the capacity to respond in a manner that is prompt and meaningful.

The law indicators have revealed that while the law does not seek to hinder capacity building, it does not specifically require it at the official level, and it was left to the agencies concerned to determine their levels of staffing and staff training, subject to budgetary limits. It was also

found that constitutional provisions relating to the use of the national languages were not always adhered to.

A significant role was played by CSOs/NGOs in several of the cases under review. While tax benefits are not usually given to such organizations, there was no legal bar to a CSO finding its own sources of funding. The public interest status of such organizations was not challenged in any of the cases under review.

The Judges' Institute imparts training to the lower ranks of the judiciary, including grounding in environmental law. Such training is not considered necessary for members of the higher judiciary including Court of Appeal and Supreme Court as appointees to such posts are either very senior lawyers or legal academics, or persons promoted from the lower ranks of the judiciary where they have already had their training. The capacity of the judiciary to appreciate the nature of public interest claims in relation to the environment appears, on the whole, to be well-developed.

On the other hand, capacity building for the general citizenry appeared weak. It was found that civics had been downgraded as a subject in schools despite the fact that the Constitution places on all citizens a 'fundamental duty' to uphold and defend the Constitution and the law.

Despite a corresponding constitutional duty 'to protect nature and conserve its riches' environmental education has been introduced into the school syllabus only recently. It was not possible to ascertain how widely these standards were maintained between the affluent schools and those in poorer areas.

The Legal Aid Law requires the establishment of a state-sponsored legal aid scheme but does not prescribe the extent to which persons should be aided, that being left to the Legal Aid Commission to work out within the limits of its budget, which however has been increasing in recent years.

In addition, the Bar Association of Sri Lanka and a number of NGOs run legal aid schemes. There are also a number of NGOs/CSOs which have shown a willingness to file public interest cases on behalf of persons whose environment is adversely affected.

In respect of capacity building within public institutions, an excess of governmental interference could be unhealthy, and the present policy of leaving each institution to determine its training requirements subject to its budget is not bad in principle, provided however that an overall adequate budget is provided. Public pressure, and even public interest litigation where required, also encourages institutions to build up their capacity in areas where they have fallen short. However it may also be argued that a uniform level of capacity building among official agencies will occur only when there is a uniform law governing access to information and right to public participation.

Recommendations

Therefore, in summary this Report will recommend:

- Bringing back information and public participation provisions that have been dropped from the National Environmental Act and strengthening the provisions that is already there;

- Introducing a pro-active approach to the dissemination of information to the poor and less educated sections of society;

- Harmonizing information disclosure and public participation laws and practices in all institutions dealing with the public;

- Establishing internal mechanisms for monitoring compliance and ensuring that the principles laid down by judicial decisions are incorporated into the practices and procedures of all relevant institutions; and

- Greater financial provision for legal aid in environment-related cases.

FINDINGS AND ANALYSIS OF LAW AND PRACTICE

Part II of this report presents the research and results of the law and practice indicators for the 18 case studies. The law indicators cover both constitutional and general law in terms of the three access principals. The practice indicators analyses the actual enforcement of the law on the ground in relation to the 18 case studies. Both the law and practice sections are presented and discussed under the three subject headings of A2I, PP and A2J. The Capacity Building (CB) indicators related to these areas and the law is presented immediately after.

The practice section further maintains the sub-topics listed in Part I of this report under the section on Methodology. The subtopics along with the relevant questions are given under each of the three subject areas including CB (i.e. A2I, PP, A2J and CB) in annexes D, E, F and G respectively for easy reference. This will provide the reader with a mechanism for quick reference to the questions that have been examined and reported upon in each of these subject areas.

Assessment of the Law

Constitutional Law Assessment

A nation's Constitution is its supreme law and the point of reference for all other laws. However, if a country adopts a new constitution sometime after attaining nationhood, it may choose to re-validate laws that were passed under the previous constitution or constitutions. Sri Lanka adopted this course of action when it promulgated its present Constitution in 1978.

The 1978 Constitution broke new ground in that it not only declared a set of "fundamental rights" but also allowed for anyone whose fundamental rights were infringed or about to be infringed, to petition the Supreme Court directly for redress. This was generally considered as a very positive measure. However, its effect was diluted in one respect, namely that Article 16(1) declared that all "written and unwritten law" passed before the Constitution would remain valid and operative notwithstanding any inconsistency with the fundamental rights chapter. As will be seen from the information gathered in the course of this project, this provision has had the effect of limiting access to environment-related information to some extent.

For the purpose of this project, the Constitution was evaluated on the basis of the extent to which it guarantees the following six rights:

- A clean and safe environment
- A right to information held at public bodies
- A right to direct public participation in government decision-making
- Access to justice
- A right to freedom of expression
- A right to freedom of association.

It was found that the Constitution does not contain any specific right to a clean and safe environment. The only specific mention of environment in the Constitution is in the chapter on "Directive Principles of State Policy and Fundamental Duties" which declares that "The State shall protect, preserve and improve the environment for the benefit of the community", and likewise casts a duty on the citizen "to protect nature and conserve its riches". These provisions are not legally enforceable although they have been invoked as an aid to interpretation and a justification for public interest litigation on environmental matters.

However several environmental issues have come before the superior courts which have given relief to the litigants through the creative interpretation of other "fundamental rights". The most significant of these is Article 12(1) which declares that "All persons are equal before the law and are entitled to the equal protection of the law". Thus if a person is wrongfully denied the benefit of any environmental protection or environmental information that other persons similarly placed would be legally entitled to (such as an EIA process), it becomes a fundamental rights issue and an aggrieved person is entitled to petition directly to the Supreme Court.

Other constitutional rights that have been invoked in environment-related cases include the right to pursue one's chosen occupation, and the right to chose one's place of residence. These rights have been mostly invoked where traditional livelihoods such as rice farming, or basic needs such as access to clean water, have been threatened as a result of industrial pollution.

There is no specific right to information, but the right to freedom of speech and expression under Article 14(1) (a) has been judicially interpreted to include the right to information. This means that a party usually has to go to court to enforce it. However some environmental laws have specifically conferred a right to certain types of information.

The right to public participation is not a constitutionally guaranteed concept and depends on the wording of other laws. Only two of the Acts of Parliament which were relevant to the cases under review were found to contain such provisions.

Constitutional guarantees on access to justice are strong, inclusive of equal protection and non-discrimination provisions, the presumption of innocence, the right to be represented by an Attorney, and the right to access the courts including a direct application to the Supreme Court in the case of infringement of fundamental rights. Freedom of expression and association are constitutionally guaranteed, but the Constitution itself permits these rights to be restricted by law on a number of grounds including national security, public order, public health or morality, or for the purpose of securing due recognition of the rights and freedoms of others, or of meeting "the just requirements of the general welfare of a democratic society".

Assessment of Law Supporting Access to Information

Legal Instruments Studied (Access to Information) *(in alphabetical order)*

- Establishments Code (1985, reprinted 2003)

- Evidence Ordinance (1896, last amended 1995)
- Food Act (1980)
- Greater Colombo Economic Commission Law (1978, amended 1992)
- National Environmental Act (1980, amended 1988, 2000)
- National Water Supply and Drainage Board Act (1974)
- Public Security Ordinance (1947, last amended 1978)
- Sri Lanka Constitution (1978, last amended 2001)
- Sri Lanka Disaster Management Act (2005)
- Urban Development Law (1978, amended 1982)

Subsidiary legislation

- National Environmental (Procedure for Approval of Projects) Regulations (1993)

Framework Law

Sri Lanka does not have a framework law supporting access to official information, although the constitutional right to freedom of speech and expression has been held to include a right to information in certain circumstances. Apart from this, the legal provisions relating to access to information are statute-specific and vary from one sector to another.

Some environmental laws such as the Coast Conservation Act (CCA) and the National Environmental Act (NEA) are comparatively strong on disclosure requirements. The CCA is the only law that makes disclosure of information and opportunity for public response compulsory at the planning stage, namely preparation of the Coastal Zone Management Plan. It was also the first law to introduce the environmental impact assessment process (EIA) to Sri Lanka.

Under the NEA, disclosure and public participation is optional at the scoping stage of a project, and becomes compulsory only at the project approval stage. This latter provision was considerably diluted in 2000 by removing the right to prior public notice and opportunity to comment in the case of projects which are deemed by the project approving agency to require only an Initial Environmental Examination (IEE). This has restricted the public disclosure and comment process to projects where the approving agency has determined that an Environmental Impact Assessment (EIA) is necessary.

Apart from these laws, a number of other agencies such as the Ceylon Electricity Board are statutorily required to make available to the public their Annual Reports, Accounts and Auditor-General's comments thereon.

However there are two framework laws that have a negative impact on disclosure of official information. One is the Official Secrets Act that is rarely invoked, although Emergency Regulations framed under the Public Security Ordinance may sometimes have a similar effect. The other is the Establishments Code that governs the public service. This Code prohibits the disclosure of official information by a public officer without the approval of his Ministry Secretary or Head of Department. Should an unauthorized disclosure occur, the Code requires the department concerned to hold an inquiry. These provisions of the Code are

a significant barrier to a more public-friendly approach to disclosure of information on the part of public officers.

The only law to mitigate the effects of these restrictive provisions is the Evidence Ordinance which contains a list of "public documents". These include documents forming the acts and records of the acts of official bodies, tribunals and public officers, as well as public records of private documents. There is room for debate as to whether the wording of the relevant section gives any member of the public a right to access any "public document", but there appears to be consensus that a person is entitled to access any such document that is reasonably necessary for the protection of his/her interests. Finally, in 2005, the Supreme Court introduced the principle that where a public authority itself has put a matter into the public domain (e.g. by public advertisement) it cannot refuse requests for further information on that matter.

Case Studies

Information in an Emergency:
Regular Flooding in Ratnapura

The National Council for Disaster Management is under a legal duty to ensure adequate publicity for the National Disaster Management Plan and Emergency Operation Plan, and to promote public awareness campaigns relating to disaster management. It was found that a Disaster Preparedness and Response Plan had been prepared for the Ratnapura District by the Emergency Operations Center which had been functioning since 2005. Even before that date other relevant institutions such as the Meteorology Department, Irrigation Department and District Secretary's Office Ratnapura had been in the practice of collecting and disseminating information relating to the frequent floods in Ratnapura District.

It could be said that a pro-active approach towards information dissemination was more visible in respect of this emergency situation than in the other case types that were studied. This included a recent decision to issue disaster warnings through Divisional Secretaries, Grama Niladharis (village level administrators) and the Police, in order to better reach the affected people, most of whom belong to the poorer sections of society.

However these measures are directed to savings lives and mitigating damage once a flood situation arises. The responsibility of disseminating information directed at preventing harmful activities that increase the risk of flooding appears to be the responsibility of other agencies which are not integrated into this process.

Information from Regular Monitoring:
Air Quality Monitoring System (AQMS) in Fort
Drinking Water Monitoring System in Ambatale

In both these cases there was no information disclosure requirement imposed by law, but in Case Study 1 certain disclosure requirements were imposed by the donor agency that funded the project. The Central Environmental Authority (CEA) which implemented the project

made information available to those who sought it, but did not make a pro-active effort to disseminate information to the sections of society most affected by air pollution.

In Case Study 2 the relevant agency was the National Water Supply and Drainage Board which was not subject to any information disclosure requirements under the Act of Parliament which established the Board, nor under any other Act. Researchers found that the Board responded to some requests for information, but declined to disclose water quality data.

Facility-level Information:
Pollution cased by the Factories in the Biyagama Export Processing Zone

While IEE and EIA disclosure requirements came into operation whenever a new factory was set up, facility level information at a more general level was limited. It was also found that there was more printed matter available in English (designed for investors) than in Sinhala or Tamil, the languages of the people.

The study focused on effluents released by the factories into a major river after being treated at a waste treatment plant within the Zone. Data from this plant is maintained internally but not disclosed to the public. However researchers found that opportunity was given to anyone affected by, or concerned about, industrial effluents discharged from factories within the Zone to make a complaint to the Zone authorities.

Information sought through court cases:
Galle Face case
Genetically Modified Organisms (GMO) case

In the first case study, the Urban Development Authority (UDA) denied a request for information by an environmental NGO regarding a proposal to convert a traditional public recreation area into a commercial leisure complex. The UDA had already advertised this project in the newspapers as a public friendly venture and the NGO had asked for the documentation relating to the project in order to determine the veracity of this claim. The case was filed under the fundamental rights chapter of the Constitution that guarantees freedom of speech and expression which has, by judicial interpretation, been held to include right to information in certain cases. The Court upheld the petitioner's request and, when the documentation was disclosed to court, proceeded to quash the agreement as being outside the powers of the UDA.

In the GMO case the petitioner made use of labeling requirements under the Food Act to require the disclosure of foods that contain genetically modified organisms. However while the required regulations have been gazetted, the implementing agency does not have the capacity for effective monitoring.

Non-compliance with disclosure requirements:
Southern Transport Development Project Case

In this case although EIA procedure had been followed in respect of the proposed construction of an expressway, it was not disclosed that the route of the expressway had subsequently been altered to affect the petitioners' houses. As a result of this nondisclosure the petitioners were deprived of their right to make representations to the project approving agency. The Court awarded compensation to the petitioners but declined to halt the project.

Impacts from projects outside national territory:
Sethsamudram Ship Channel Project (India)

The lack of a general access to information law was keenly felt in respect of the Sethusamudram Ship Channel project. As this project is taking place outside Sri Lanka's territorial waters the country's own national environmental laws do no apply and Sri Lankan agencies cannot conduct environmental impact assessments under which disclosure of information is mandatory. While the Ministry of Foreign Affairs has established a committee to monitor the project, officials declined to speak and referred researchers to the English language website maintained by the Ministry. However the persons most likely to be impacted by the project are Sinhala or Tamil speaking villagers from coastal hamlets.

Role of the media

The role of the media varied from case to case. The media took up the controversial issues such as Galle Face Green, Sethusamudram and genetically modified foods, and also helped disseminate information during flood emergencies in Ratnapura. On the other hand, there was reluctance to devote space to regular monitoring, and some media organizations demanded payment to carry such information.

Assessment of Law Supporting Public Participation

Legal Instruments Studied (Public Participation) *(in alphabetical order)*
- Antiquities Ordinance 1940 (last amended1998)
- Coast Conservation Act No.57 of 1981 (last amended 1988)
- Land Acquisition Act (1950, last amended 1979)
- National Environmental Act (1980, amended 1988, 2000)
- National Gem and Jewelry Authority Act No.50 of 1993
- Sri Lanka Constitution (1978)
- Urban Development Law (1978, amended 1982)

Subsidiary legislation
- National Environmental (Procedure for Approval of Projects) Regulations

Framework Law

The National Environmental Act as amended comes nearest to being a framework law in relation to public participation. It originally gave the right to public participation in the approval process of all "prescribed projects" gazetted under the said Act. However in 2000

the right of public participation was removed in respect of projects where the project approving agency determined that approval could be given after an Initial Environmental Examination (IEE). Hence today the right to see the project proposal beforehand and submit comments, as well as the possibility of granting a public hearing, are confined to projects where the project approving agency determines that an Environmental Impact Assessment (EIA) is required. As the project approving agency has a discretion whether to call for an IEE or an EIA, the year 2000 amendment has seriously eroded the public's right to participation in the project approval process.

Case Studies

Assessment of Participation in Policy Making: National Policy on Bio Safety

There is no legal requirement to provide information on the formulation of national policies, although the drafts of such policies are frequently published in the media by the relevant State agencies and public comments invited. The draft National Policy on Bio Safety was published in the print media and made available at the Ministry of Environment and Natural Resources, and the public were given four weeks to submit comments.

The Ministry maintained a bio-safety sub-unit with an information officer specially designated to assist the public, and also took a pro-active approach by conducting workshops in different parts of the country which the public could attend free of charge. However, despite this, researchers found that the general public did not have a clear understanding of bio-safety issues. The subject may have been too complex for the general public to relate to, especially in the limited time available.

Assessment of Participation in Project-level Decisions:

Under National Environmental Act, a Project Approving Agency "may take into consideration" the views of the public at the scoping stage of a project, i.e. when determining the terms of reference for an Initial Environmental Examination (IEE) or Environmental Impact Assessment (EIA) for a proposed project. However this is not compulsory. As there is no requirement to disclose project proposals at the scoping stage, the public have no way of pressuring the Approving Agency to hear their views unless they get to know of the project by unofficial means.

Under the National Environmental Act public notice becomes mandatory only at the start of the EIA process. However where acquisition of land is required, the Land Acquisition Act requires the giving of notice of the intention to acquire, followed by a survey and the determination of compensation. Under this latter Act, land can only be acquired for a "public purpose" the nature of which should be stated at the time of the acquisition.

The EIA process allows 30 days for the submission of public comments, after which one or more public hearings may be held at the discretion of the project approving agency.

The Central Environmental Authority originally published 3 booklets as guides to the project approval process, designed respectively for project approving agencies, project proponents and the general public. However researchers found that the book intended for the public was no longer in circulation, apparently because some of the steps mentioned therein are not being followed.

Kandy-Colombo Expressway

Three public hearings were held in respect of the Kandy Colombo Expressway.

The 30-day time period allowed by law for public comments on an EIA has been criticized as being too short. Members of the public affected by the Kandy Colombo Expressway complained of delays in obtaining copies of the EIA Report, which effectively reduced the time for submitting comments.

Nevertheless researchers found that a fairly strong public input had been provided and public participation had some influence in securing more environmental and public health safeguards than had been included in the original EIA Report.

Biolan Waste to Energy Project

This was a project entered into between the Western Provincial Council (a sub-national governing body) and a private company for the management of collected solid waste by recycling and dispatching it safely. Here too the EIA Report was made available to the public and a public hearing interest.

Eppawela Phosphate Mining Case

This case involved a proposed large scale phosphate mining and chemical processing project that would have cut right across some of the most important agricultural land and water resources in the North-Central part of the country. The right to public participation was denied to the affected people as the Government attempted to circumvent the environmental laws of the country by retaining a foreign consultant to prepare an environmental report that made no provision for public comment or participation. The peoples' rights were won back by court action which halted the project and required a proper EIA process to be carried out.

This case attracted wide publicity, with the media and CSOs playing significant roles.

Galle Port Development Project

This case highlighted the difficulties that arise when a number of different agencies have regulatory powers over various aspects of a project. In this case the Coast Conservation Department, the Central Environmental Authority and the Department of Archaeology all had a regulatory stake in the project, but the first named agency clearly took the upper hand and

requests by the Department of Archaeology for an archaeological impact survey apparently went unheeded. (Galle Port is adjacent to the Dutch maritime Fort at Galle which is a World Heritage Site.).

Assessment of Participation in Regulatory Decisions

There is no mandatory procedure for public participation in the making of regulatory decisions that do not involve "prescribed projects" in terms of the National Environmental Act. However, persons who consider that their rights have been infringed may go to court.

Galle Face Case

In this case, which was also studied under the A2I section of this research project, the Urban Development Authority (UDA) sought to give over a popular open recreation area by the sea in the city of Colombo to a private entertainment company. Although each proposed construction (food courts, amusement arcades etc.) was not large enough to require environmental approval, the sum total of the developments would have significantly changed the character of the Green. What began as a case over right to information ended with the public interest organization that filed the case obtaining a judgment setting aside the entire transaction as being outside the powers of the UDA. The media and the NGO that filed the case played significant roles.

Although this case resulted in a successful outcome for the petitioner who had invoked the fundamental rights jurisdiction of the Supreme Court, it also demonstrated the lack of opportunities for public participation in environmentally significant decisions that do not fall within the definition of "prescribed projects". Court action appears to be the only option, but this might not be a satisfactory remedy for the poor and less educated in the country where legal aid schemes are far from comprehensive, as found in the parallel study on A2J.

Bogawanthalawa Gem Mining Case

In this case the regulatory authority (Gem and Jewellery Authority) took the view that the gem mining activities could be licensed by the Authority without any public participation. The petitioners were therefore obliged to have recourse to the court to argue, firstly, that even in terms of its own enabling Act of Parliament the Authority was obliged to obtain the concurrence of the Minister of Environment; and that in any event the scope of the activities in question required the conducting of an EIA under the National Environmental Act. The petitioners' case was supported by the lawyer appearing for the Ministry of Environment and the case was concluded within seven months. This could be regarded as a case where public pressure pushed the relevant government agencies to do their legal duty.

Assessment of Law Supporting Access to Justice

Legal Instruments Studied (Access to Justice)

- Constitution (1978, last amended 2001)

- Judicature Act (1978, last amended1989)
- Supreme Court Rules 1990
- Court of Appeal Rules 1990
- Code of Criminal Procedure Act No.15 of 1979, last amended 2005
- Civil Procedure Code 1977, last amended 2005.

Forum to hear the selected claim

Access to justice is guaranteed by the Constitution as well as a number of other Acts of Parliament. Every person is entitled to invoke the jurisdiction of a competent court in person or through an Attorney-at-Law. In addition there are a number of other quasijudicial tribunals and commissions established by Acts of Parliament.

The lowest level of court is the Magistrate's Court in which, amongst other actions, public nuisance cases may be filed by any member of the public. The Magistrate has power to abate a public nuisance or impose restrictions on the carrying out of a trade or other activity so that it does not constitute a public nuisance. The Kurunegala quarry case which formed part of A2J section of this study originated in the Magistrate's Court of Kurunegala under the public nuisance provisions of the Code of Criminal Procedure Act. In that case the Magistrate restricted the operations of a quarry which were causing damage to the houses of the petitioners.

The District Court is available for civil actions claiming declaration of title, damages or injunctions.

The District and Magistrate's Courts have the advantage that oral evidence can be led and witnesses cross-examined and therefore disputed questions of fact can be satisfactorily determined. The disadvantage is that there are two levels of appeal above these courts, and therefore it may take many years to reach finality on the matter in dispute.

The Provincial High Courts and the Court of Appeal exercise appellate powers over various lower courts and tribunals, and, in particular, the Provincial High Court serves as the first appellate forum for cases from the Magistrates Courts. However these courts also serve as courts of first instance for the purpose of writ applications challenging the acts and omissions of public authorities. These applications are decided on the basis of written documents and affidavits of the parties, and oral evidence is not generally permitted. Public interest litigation has been recognized and allowed in writ applications.

The Supreme Court (the highest court in the country) serves as a court of first instance for the hearing of fundamental rights applications, as well as the final appellate court in respect of all other types of claims. "Fundamental rights" are those expressly set out as such in the Constitution, and if there is an infringement of a fundamental right by a State agency, the aggrieved person has a right to petition the Supreme Court directly. Fundamental rights include the right to equality before the law and the right to freedom of speech and expression,

which has, through judicial interpretation, been held to include right to information in several instances.

As indicated in the foregoing paragraphs, there is a right of appeal or review from the decision of any court or tribunal other than the Supreme Court.

Environmental Harm Claim cases:

The environmental harm cases under review were of two kinds, namely:

(a) cases where the damage is caused by a private party and the aggrieved persons have recourse to the court system in order to halt such activity; and

(b) cases where the State agencies wrongfully fail to take preventive action against environmental damage by third parties, and the petitioners file action against the State agencies.

Kurunegala Quarrying Case

This case belonged to the first category referred to above. The case commenced as a public nuisance action under the Code of Criminal Procedure Act instituted by affected parties in the local Magistrate's Court. The petitioners got relief to the extent that the Magistrate restricted the working of the quarry that was causing the nuisance to three days of the week and only between certain hours. The respondents thereafter went up in appeal to the Provincial High Court of the North-Western Province sitting at Kurunegala, and thereafter by way of further appeal, to the Supreme Court where the case is still pending (2007). However the Magistrate's Court order remains in force unless and until it is set aside in appeal.

Protected Areas Management Project - Horton Plains National Park Case

This case belonged to the second category and took the form of a writ application filed in the Court of Appeal. Writ applications are available against public officers and administrative agencies which have committed an unlawful act or failed to perform a public duty. This case was filed because the relevant agencies were apparently turning a blind eye to unlawful development activity within a forest reserve. The case was disposed of speedily without a contest, as the relevant agencies agreed to take action to halt these unlawful activities.

Access to Information claim cases
Southern Transport Development Project Case

This case, which was also studied under A2I, concerned the building of an expressway. The case was filed by persons whose houses were going to be acquired due to the fact that the route of the expressway had been changed after the environmental impact assessment had been concluded. As their lands were not due to be affected under the routing that was originally published, they had not participated in the EIA process. No information was

furnished to them about the proposed change of route and they were accordingly deprived of an opportunity to voice their objections.

The case originated as a writ application in the Court of Appeal, which held against the petitioners. The petitioners appealed to the Supreme Court. The case was strenuously contested by the respondents at both levels of court hearings. The final decision in appeal resulted in the petitioners obtaining financial compensation for violation of their rights, although the Court declined to halt the project.

Public Participation claim cases:
Protection of the Kantale Bund case

This case involved damage that was being caused to a major road, a part of which ran along the bund (bank) of the Kantale Tank (water reservoir). There were a series of gazette notifications by which the original permitted load that could be transported along the said road had been raised, apparently to benefit two companies which were operating factories in the area and found it more economical to send their ultra heavyweight vehicles along the road over the bund than to take a longer route.

The petitioner was a public interest organization that had been requested by the persons of the area to take up their case. These persons had themselves been actively monitoring the activities of the heavy transport trucks. It was feared that the frequent passage of these vehicles would cause the bund to collapse, resulting in the inundation of the area. Once the case was filed, the State agencies cooperated in restoring the original load limit and agreeing to appoint a committee of experts to review what the new load limit should be. The local Police also cooperated by furnishing information on prosecutions they had launched against persons violating the load limit and also disclosing the technical problems they faced in bringing the prosecutions to a successful conclusion (lack of the necessary equipment, etc.). Thus the case was speedily resolved without going to argument.

Non-compliance claim cases:

The Galle Face Green case, discussed in the A2I section above, may also be considered as a non-compliance claim of a sort. Although there was no Access to Information Act under which the petitioner could make a statutory claim, the Supreme Court upheld the argument that since the respondent had put a certain matter into the public domain by way of a newspaper advertisement, the said party could not thereafter refuse a request for further information on the same matter made by a public interest organization which sought to test the veracity of the respondent's claim.

Assessment of Law Supporting Capacity Building

There would be little purpose in having laws on access to information, public participation and access to justice, if the public lacked the capacity to make use of such laws. Similarly, the

relevant official agencies should have the capacity to respond in a manner that is prompt and meaningful.

Assessment of laws supporting capacity building

The law indicators have revealed that while the law does not seek to hinder capacity building, it does not specifically require it at the official level. It was left to the agencies concerned to determine their levels of staffing and staff training, subject to budgetary limits. The degree of training given to staff with regard to public participation and environmental protection varied greatly between the institutions. The Central Environmental Authority predictably emerged as the best trained and most public / environment conscious, although even that agency had its lapses, most particularly the apparent abandonment of its handbook on public participation.

Researchers also found that information provided at facility level by relevant agencies in print and electronic form tended to be more in the English language that in the national languages and were designed for project proponents rather than for members of the public who were likely to be affected by the projects. Strict adherence to language requirements under the Constitution is therefore lacking.

Role of Community Service Organizations (CSOs)

CSOs may be formed in a variety of ways. The authority with whom an organization may be required to register will depend on the nature of the organization and the law under which it has been formed. Most tend to be either incorporated under the Companies Act or formed as unincorporated societies registered under the Voluntary Social Service Organizations (Registration and Supervision) Act. Others may be registered under the Societies Ordinance or the Trusts Ordinance. Tax benefits are given only to "charitable trusts" within the meaning of the Trusts Ordinance.

Researchers found that there was no legal bar to a CSO finding its own sources of funding. CSO representatives who were interviewed were of opinion that the relevant laws and regulations had been applied fairly to their respective organizations.

CSOs played significant roles in almost all of the cases under review. Most often they were either the sole petitioners, or petitioned along with members of the affected community. Researchers also found that CSOs played a significant part in the EIA process, as members of the general public often lacked the knowledge and resources to make a meaningful study of EIA reports. The public interest status of such organizations was not challenged in any of the cases under review.

Capacity building – Judicial agencies

There is a Judges Institute for the lower ranks of the judiciary (original court judges and magistrates) where environmental law is one of the subjects studied. Such training is not

considered necessary for members of the higher judiciary including Court of Appeal and Supreme Court as appointees to such posts are either very senior lawyers or legal academics, or persons promoted from the lower ranks of the judiciary where they have already had their training.

Capacity building – General Public

Two main areas of capacity building for the public in this regard are:

(1) Education in Civics and Environment

(2) Legal aid/education on legal rights and duties

Researchers found that civics has to some extent been downgraded. Originally treated as a school subject on its own, it was subsequently dropped, and thereafter re-introduced as part of the "social studies" syllabus. This downgrading is hard to justify since the Constitution of 1978 places on all citizens a "fundamental duty" to uphold and defend the Constitution and the law, and a similar duty to protect nature and conserve its riches. (Article 28(a) and (f)).

Environment, on the other hand, has been introduced into the school syllabus relatively recently, and appears to be taught from a national and international perspective. However, it was not possible to ascertain how widely these standards were maintained throughout the school system, i.e. how standards in schools in the poorer areas compared with those in the more affluent schools. This would be important, as other studies have indicated that the poor suffer most from the consequences of environmental pollution and degradation.

The Legal Aid Law requires the establishment of a state-sponsored legal aid scheme but does not prescribe the extent to which persons should be aided, that being left to the Commission to work out within the limits of its budget, which however has been increasing in recent years.

In addition to the State sponsored Legal Aid Commission (created under the Legal Aid Law), the Bar Association of Sri Lanka and a number of NGOs run legal aid schemes. There are also a number of NGOs / CSOs which have shown a willingness to file public interest cases on behalf of persons whose environment is adversely affected.

Assessment of Practice

Access to Information

Information in an Emergency
Case Name: Regular Flooding in Ratnapura

Scope and Quality of Effort [1]

[1] Indicators 20, 21, 22, 23 and 24.

The existing system to collect and manage data to issue warnings on flooding in Ratnapura is adequate in scope and quality. The established mechanism as explained in the case description functions during an emergency. Further, improvements are being made to make the mechanism more effective. The relevant agencies act together to issue flood warnings when there is a threat of floods. The Meteorological Department (MD) issues weather forecasts while the ID issues flood warnings through the Ratnapura DS, Police and media when there is a threat of floods. Further, relevant agencies like the Disaster Management Centre (DMC) and the MD have prepared awareness leaflets, posters and other publications on floods and other disasters.

The relevant agencies collect general information required to issue warnings. The public may not have access to all the information (eg: raw data related to weather forecasts and warnings). However, the public can request for information on flooding from the relevant agencies. The relevant agencies do not always respond to all public information requests due to reasons such as the shortage of staff. Further, some of the responses may not be relevant, accurate and complete always.

With regard to the government's obligation to disclose information, there is no government document which reports on the monitoring system/penalties for non compliance to ensure that the agencies meet their obligation to disclose information.

Cost and Affordability [2]

Some information is issued by the relevant agencies free of charge while some can be obtained on payment. Weather forecasting and flood warnings are issued to the public through media and the websites of the relevant agencies. The people living in flood prone areas are warned through the DS, Police, etc and generally during floods in Ratnapura the mechanism explained above functions.

The Irrigation Department (ID) stores water resources development work and hydrological data for river development work and the ID may issue data (digital/hard copies) to the public on a nominal fee if requested. Leaflets and publications on floods are available for distribution.

The Meteorological Department (MD) has raw data and data in digital format may be issued on payment. For research purposes a 50% concession is given.

The Ministry of Disaster Management and Human Rights (MDMHR) issues some available data free of charge.

The Disaster Management Centre (DMC) issues leaflets, posters and other publications on floods free of charge.

[2] Indicator 25.

There are a few other information outlets with limited general information on floods and cost of obtaining the same is fairly reasonable. Obtaining information from websites is fairly costly.

Fairness and Equitability [3]

In the event of a threat of floods the Irrigation Department (ID) warns people through the DS, media, police and security forces. The Meteorological Department (MD) issues daily weather forecasts through media. The relevant websites of the agencies also carry information to the public. There is a satisfactory system to collect and disseminate information to the public on floods. The agencies have taken limited steps to reach disadvantaged groups and/or minorities to increase the fairness and effectiveness of the information dissemination system. In their effort to disseminate information the agencies concerned do not intend to discriminate any person. However, there may be some instances where information does not reach some members of the public in remote areas due to various reasons like lack of electricity, non availability of facilities, etc. The relevant agencies are further improving the information dissemination system. There are some instances where people do not respond to flood warnings issued by the relevant agencies.

Timeliness [4]

Time taken to issue flood warnings is kept at a minimum. When there is a threat of floods the Irrigation Department (ID) officers are alert 24 hrs a day, 7 days a week. The relevant agencies collect data and disseminate the same in a timely fashion. Steps will be taken to network the relevant agencies for effective exchange of data and to collect data directly at regional level. The public can request for flood related information from the relevant agencies. The relevant agencies may not respond to all such public requests for information. Some officers are very helpful in obtaining information.

Channels of Access [5]

There is flood related information available in different agencies, the head offices of which are mostly located in Colombo. Sometimes, information available at the head office may not be available through the regional officers. The Irrigation Department (ID) maintains water level measurement data in relation to the river Kalu Ganga and may issue the data to the public on request. The Meteorological Department (MD) will release rainfall measurements and other data on payment.

However, processed data (flood warnings and weather forecasts) is issued through the Ratnapura DS, Police, media, relevant websites, etc. as mentioned before in a timely fashion. The Disaster Management Centre (DMC) issues general information on floods. The District

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[3] Indicators 26 and 27.
[4] Indicators 28,29 and 30.
[5] Indicator 31.

Secretary (DS) is in the process of making a data base related to floods. A few other information outlets have some relevant information on floods.

The general public may not have access to all these places where information is available due to lack of knowledge to access the same, lack of facilities, etc.

Impacts of Laws and Government Effort on Access [6]

Flood warnings reached a majority of the affected persons on time and agencies have an organized system to disseminate information. The agencies are further improving the information dissemination system.

There were limited instances where the warnings did not reach some members of the public specially those in rural areas due to reasons like lack of facilities, etc. There are also instances where people do not respond to warnings.

Outcomes from the Provisions of Access [7]

A majority of the people living in flood prone areas of the Ratnapura District positively respond to warnings and move to safer places. It appears that there is no significant change in human activities that adversely affect the environment as a result of information received. People must become more sensitive to floods and landslides and the relevant authorities must strictly prohibit harmful human activities that lead to disasters like landslides and floods. There were limited instances where the warnings did not reach some members of the public specially those in rural areas. There are also instances where people do not respond to warnings.

Information from Regular Monitoring

Case Name: 1. Air Quality Monitoring System in Fort
2. Drinking Water Quality Monitoring System in Ambatale

Scope and Quality of Effort [8]

In relation to the Air Quality Monitoring System in Fort there is a fairly good system for data collection and management on ambient air quality. There are two fixed and one mobile fully automated continuous air quality monitoring stations which measure the peak and background air pollution in the City of Colombo. One of the fixed stations is located in front of the Fort Railway Station. It functions as a peak air pollution monitoring station with respect to transport. The other fixed station is located at the premises of the Department of Meteorology, Bauddhaloka Mawatha, Colombo 7. It functions as a background air pollution monitoring station in the Colombo City.

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[6] Indicator 39.
[7] Indicators 40 and 41.
[8] Indicators 20, 21, 22, 23 and 24.

There are well detailed government websites that cover most aspects of air pollution. The CEA and the government agencies (Air Mac and the Meteorological Department) to which the CEA releases air quality data publish the same through their websites. Processing of raw data takes about 7 days. Therefore, air quality data that is available to the public through websites does not reflect the current status on ambient air quality but the status of the week before. Earlier the public also had access to air quality data released by the CEA published through media. However, this has now been discontinued as the media charges for it and the CEA cannot afford the cost.

The general public may have difficulties in accessing the available information due to many reasons. For example, accessing websites require the ability to pay for internet facilities and a large number of people may not be able to afford it. Hence, the lack of resources and even the lack of knowledge and know how to obtain available data are constraints in accessing information.

People can write and request for information from the CEA and the information on air quality that is disseminated by the CEA on such requests is generally complete, relevant and accurate. However, it was observed during the research that the CEA may not answer each and every request sent to them (no specific reason can be given for this).

In contrast to the situation on Air Quality data, the case study on drinking water quality revealed that there was no public accessibility to drinking water quality data. The NWSDB does not have any policy to issue such information to the public. The NWSDB website does indicate that the Research and Development unit of the NWSDB monitors raw water quality parameters like physical, chemical and bacteriological parameters and heavy metal contents at the Ambatale in-take. It also takes mitigation action in collaboration with the Central Environmental Authority (CEA) and the Board of Investment (BOI) with regard to the pollution of the Kelani River by industries. However, information on the above mentioned parameters are not on the website nor released to the public in any other way.

Looking at the information that is available it was found that the public had access to the drinking water specifications (physical, chemical and bacteriological requirements) published by the Sri Lanka Standards Institute (SLSI). However, without information on existing drinking water quality there is no way to establish whether these standards are being met by the NWSDB.

Given the above situation (i.e. the non-availability of drinking water quality data) the question on how the NWSDB responds to public requests on this matter is important. It was found that the NWSDB may not respond to every request for information made by the public. Further, the responses given by the NWSDB (when it did respond) were not always complete, relevant and accurate in terms of the request for information. It is to be noted that this is in contrast to the CEA's response to public requests for air quality data which was overall more complete, relevant and accurate.

The question on the existence of a monitoring system and/or penalties for noncompliance with government obligations and regulation on disclosure of information was examined for both case studies on air and drinking water quality monitoring systems. It was found that there was no government document that reports on this matter in relation to both case studies.

Cost and Affordability [9]

Processed data on weekly ambient air quality data and other information on air quality is available free of charge through relevant websites. However, accessing websites is expensive for a majority of the public. Obtaining air quality data in bulk (eg: air quality data for 3 years) from the CEA is very expensive and prohibitive.

In relation to drinking water quality data the general public does not have access to same. Therefore, the question of cost of obtaining information does not arise.

Fairness and Equitability [10]

Two questions were examined in relation to the case studies on the air and water quality monitoring system to ascertain fairness and equitability. One was whether the responsible government authority(s) made any special attempt to disseminate the relevant information to a wide range of stakeholders. The second was whether any special attempt was made by the responsible authority to reach minority/disadvantaged groups with the information in order to increase the fairness and effectiveness of the information dissemination system.

The situation in relation to ambient air quality data was that the CEA had not made any special attempt in relation to either of the two questions (mentioned above). As mentioned before ambient air quality data is publicized through the CEA (and MD) and Air Mac websites which is accessible to the public who have the facilities and/or and afford the facilities. Air quality data is no longer published through the media as there now is a charge on this the CEA is unable to bear the cost.

The findings on the two questions mentioned above are similar (or worse) in relation to drinking water quality data. Firstly, unlike ambient air quality data which is available to the public, drinking water quality data is not available to the public. Additionally, no effort is made by the NWSDB to reach a wide range of stakeholders or to reach minority/disadvantaged groups with the information.

Timeliness [11]

The CEA collects air quality data at regular time intervals and in a timely fashion. The data is disseminated to the public through the websites of CEA, Air Mac and the MD on a weekly

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[9] Indicator 25.
[10] Indicators 26 and 27.
[11] Indicators 28,29 and 30.

basis. Processing of raw data takes about 7 days and therefore there is a delay in the relevant data reaching the public. The public can also request for information from the CEA. However, there can be delays in obtaining a response from the CEA and every request may also not receive a reply.

In contrast to the above, although the NWSDB tests water quality through 17 laboratories island wide and through outside agencies on a regular basis applying SLSI standards, this information is not available to the public. Hence, the question of timeliness cannot be properly assessed. Also the NWSDB may not respond to all public requests for information and may not be always prompt in responding.

Channels of Access [12]

As far as ambient air quality data is concerned you can obtain data from the CEA, Air Mac and MD. Information and data from the Fort Air Quality Monitoring station is also available through the websites of the CEA, Air Mac and MD. In addition there are other websites that contain information on air quality[13]. However, not all people have the knowledge or the funds to pay for internet facilities and this channel can be seen as being open to a very small percentage of the public. On the other hand, the print media (i.e., newspapers) is a much more effective means of providing information and air quality data was previously available through this channel. Today, however, this is not available as there is a charge for publishing air quality data (whereas earlier it was free) and the CEA cannot afford it.

As far as drinking water quality data is concerned there is no channel of access for the public. The NWSDB has the data but there is no public accessibility to it. The public can obtain parameters for drinking water quality from the SLSI.

Impacts of Laws and Government Effort on Access [14]

Looking at the extent to which the relevant information on air quality reaches the public two factors can be noted. Firstly, the information will be most relevant to the public who are living, working or commuting within the cities particularly Colombo but also cities such as Kandy and Galle. The cities are the most congested and polluted areas in the country and the public to whom the information is relevant will be from all income categories from very low to high (including slum and shanty dwellers). However, the most vulnerable groups would be the low and middle income earners because of many reasons such as commuting in non-ac vehicles, buses and even walking and living close to polluted junctions and roads. As ambient air quality data is available only on the internet through government websites it is improbable that the information reaches the relevant people. The information is available (if they wish to obtain it) only to a small percentage of people who can afford or have the facilities and knowledge to access the websites.

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[12] Indicator 31.
[13] Such as www.nbro.gov.lk, www.usaep.org and www.cleanairnet.org.
[14] Indicator 39.

Secondly, the relevant information on the web is not the current or daily readings but information regarding the week before. This is because processing the raw data collected takes about 7 days and hence, the ambient air quality data that is on the web is one week old. Whether this is timely enough can be questioned[15].

Drinking water quality data on the other hand is not available or given to the public. Drinking water quality is relevant to all people but not even the higher income categories can obtain the information through the web as the information is not given. Only limited general information on some aspects of drinking water is accessible to the public. (Eg: notices on water cuts, billing issues, safe consumption of drinking water during natural disasters).

Outcomes from the Provisions of Access [16]

Examining the question whether the availability of information on air quality led to any deliberate actions to reduce or prevent negative impacts of air pollution on environment and human health, we can see some positive results. Both citizens and the government have taken action on this account. However, when considering whether there have been changes in choice and behavior in daily lives amongst the ordinary members of the public because of the availability of information on air quality, nothing significant can be noted. One of the reasons for this is that there is no effective dissemination of the information to the general public.

Drinking water quality data is not given to the public. Therefore, the question of change in individuals' choices in their daily lives or behaviour and taking deliberate preventive action against the negative impacts on human health and environment due to availability of such information does not arise. However, general information on health and environment issued through the media during floods has led to some change in individual choices and behaviour at times. For example, people look for safe and clean water for drinking and cooking during natural disasters like floods.

Facility-level information
Case Name: Pollution caused by Factories in the Biyagama Export Processing Zone

Scope and Quality of Effort [17]

The existing system to collect and manage data on the waste treatment plant at the Biyagama Export Processing Board (BEPZ) is limited in scope and quality and happens internally. The BEPZ maintains the data on the treatment plant but this is not accessible to the public. The Board of Investment (BOI) under which the BEPZ comes disseminates some general information to the public (such as location, number of enterprises in the zone and Environmental licencing procedure).

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[15] Going beyond the scope of this indicator, it must be mentioned that today many more people are aware of the state of air pollution than before particularly in the city of Colombo. This is largely because of the publicity given to this issue over the TV and through other means such as workshops, seminars, news paper articles and other publications in Sinahala, Tamil and English.

[16] Indicators 40 and 41.

[17] Indicators 20, 21, 22, 23 and 24.

The public can request for information from the BOI. However, the BOI may not answer all such public requests for information. When the BOI does respond the answers are relevant and accurate but not complete.

There is no monitoring system or penalties for non-compliance to ensure that the agency meets its obligations to disclose information.

Cost and Affordability [18]

Some general information related to the BEPZ can be obtained from the BOI free of charge through the available handouts and booklets. General information can also be obtained through the websites of the BOI or by telephone. However, accessing the internet and telephone calls are expensive for the general public. Specific information and data on the treatment plant of the BEPZ is not accessible to the public.

Fairness and Equitability [19]

The BOI has made only a very limited effort to reach a wide range of stakeholders to ensure that there is equal access to information for everyone. Researchers could not find any information in Sinhala or Tamil. Similarly, there is no evidence of any effort made by the BOI to reach out to disadvantaged groups and/or minorities with the relevant information in the selected case. The information dissemination system cannot be said to be effective.

Timeliness [20]

The researchers were not given adequate information to assess the extent to which the BOI collects and generates information (data on the treatment plant) at regular time intervals and disseminate the same to the people on time. With regard to specific requests for information from the public the BOI responds to some information requests promptly enabling the person who made the request to receive the information within a reasonable time frame.

Channels of Access [21]

The researchers could not find any channel through which to obtain data on the treatment plant and pollutants. This information is not available to the public. However, general information on the BEPZ can be found at the BEPZ, BOI and BOI website. The general public has access to some of the general information on the BEPZ. It must be noted that a large part of the public lack the skills and funds to obtain even the general information that is available and to access internet.

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[18] Indicator 25.
[19] Indicators 26 and 27.
[20] Indicators 28,29 and 30.
[21] Indicator 31.

Impacts of Laws and Government Effort on Access [22]

The information with regard to pollution by the factories within the zone would be most relevant to the public living and working in Biyagama particularly those who are living in and around the vicinity of the zone. The researchers did not come across any data and information on the treatment plant that was/is available to the people at Biyagama or others who may require it. Some relevant information such as the quality of the water in the river and streams receiving the discharge from the factories were displayed on a Board by the roadside. Other than this there is no evidence that relevant information was disseminated to the public in time (or at any point).

Outcomes from the Provisions of Access [23]

The Public as well as public organizations have taken some steps to minimize harm from the BEPZ to the environment and health.

It was found that individual choices and behavior changed remarkably over a long period of time since the establishment of the BEPZ. However, these changes were not due to the information disseminated by the relevant BEPZ or the BOI, but due to personal and group experiences of the health impacts of the pollution. People who used the streams and river for bathing, washing and drinking stopped doing so after the factories started discharging chemicals and waste into them. People complained of various serious health impacts when they used the water in the river/streams. These activities have now stopped except for bathing in the river. However, people now know when to use the river water and when not to use it (i.e they wait for the water to clear up and the discharge to get washed away with the tide prior to bathing).

It must be kept in mind that provisions of access were not effective in this instance.

Other types of Case Studies

Information sought through court cases

Case Name: 1. Galle Face Case
2. Genetically Modified Organism Case

Scope and Quality of Effort [24]

The UDA did not have a system for collection and integrated data management pertaining to the Galle Face case that was available to the public. The UDA also did not generate or collect information on environment related to the selected case and disseminate it to the public. The decision making process of the UDA to handover the control of the Galle Face Green to a private company to set up a "Mega Leisure Complex" was not transparent.

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[22] Indicator 39.
[23] Indicators 40 and 41.
[24] Indicators 20, 21, 22, 23 and 24.

In the Genetically Modified Organisms (GMO) case too the situation is almost similar. An integrated data management system accessible to the public could not be clearly identified during the research. However, a limited effort has been made by the Ministry of Healthcare, Nutrition and Consumer Affairs, the Consumer Affairs Authority and the Ministry of Trade, Commerce and Consumer Affairs to generate and collect information regarding GMOs. As far as collecting and disseminating information on health and environmental issues is concerned the agencies have adopted the precautionary principle by gazetting GMF labeling regulations. This happened as a result of a case filed by an NGO. The government on its own did not disseminate GMF related information to the public. In contrast the NGOs and media disseminated relevant information on GMOs to the public.

In relation to a monitoring system or penalties for non-compliance with disclosure of information this is non-existence for the relevant agencies in both cases.

The question of accuracy and relevance of the information disseminated to the public by the UDA in the Galle Face case does not arise (overall). This is because no information was released to the public. The advertisement published by the UDA contained some information of the proposed development of the Galle Face. However, it was not adequate or complete. In the GMF case too the said question does not arise as information was not given out to the public by the responsible agencies. However, the information in the GMF labeling regulations can be taken as accurate and relevant.

As far as public requests for information are concerned the UDA in the Galle Face case did not respond to the request made by the EFL (the NGO which filed the case). The UDA also did not respond to the information request made during the research for this study[25]. Hence, no comment can also be made regarding the accuracy and relevancy of the responses to public requests. In the GMF case too there was no response to the written requests for information sent to the Consumer Affairs Authority, Ministry of Healthcare and Nutrition[26] and the Ministry of Trade Commerce and Consumer Affairs. However, there was some response to requests made by telephone. No comment on the accuracy and relevancy of the information provided through the telephone can be made.

Cost and Affordability [27]

The general public did not have access to information pertaining to the Galle Face case as the decision making process of the UDA was not transparent as mentioned before. Hence, the question of cost of obtaining information does not arise. In relation to GMF's some information is available through the media. The information given in government websites is limited and only those who have the skills and knowledge and funds for internet facilities (which are expensive) can access the web.

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[25] The request was made by the NGO coalition member carrying out the research on this case.
[26] The full name of the Ministry now is Ministry of Healthcare, Nutrition and Uva Wellassa Development.
[27] Indicator 25.

Fairness and Equitability [28]

On the Galle Face matter the UDA did not make an effort (nor have a plan) to ensure equal access to information for a wide range of stakeholders including disadvantaged and/or minority groups. In relation to GMF's the relevant agencies made only a limited effort in this regard and it was observed that government websites had very little information on it. Overall, the system of dissemination of information to the public by the relevant agencies cannot be seen as being effective or fair in relation to these two cases.

Timeliness [29]

With regard to the Galle Face case the UDA had no system to generate and collect information in a timely fashion to enable the public to stay adequately informed. The only information given by the UDA was through a notice published in a state owned English newspaper assuring the public that they would have uninterrupted access to the Galle Face Green. This too was published only after the media highlighted the issue in the news papers. Further, the UDA did not respond to public requests for information.

As far as GMF's are concerned the government does not generate or collect information on it at regular time intervals or in a timely fashion. Information was not disseminated to the public by the government on time. There were no written responses by the relevant agencies to public requests for information. Some information was given verbally.

Channels of Access [30]

Information relevant to the Galle Face project was available only at the UDA and this was not accessible to the public. On GMF's some information is found in a limited number of information outlets, but the information available is inadequate.

Impacts of Laws and Government Effort on Access [31]

The Galle Face Green is public property/area and the information on the project is therefore relevant to all the public. However, as mentioned above the information on the project was not available to the public and did not reach the public on time. Information on GMF's would also be relevant to all people but there is no evidence that information on this matter reached the public on time[32].

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[28] Indicators 26 and 27.
[29] Indicators 28,29 and 30.
[30] Indicator 31.
[31] Indicator 39.
[32] There is no legal requirement for dissemination of information under the Food Act except to the extent necessary to avoid misleading labeling.

Outcomes from the Provisions of Access[33]

The UDA failed to comply and respond to a request by an NGO for information on the proposed Galle Face project. The NGO concerned took action against this refusal by filing a case in the Supreme Court. As a result of this the project was stopped and the UDA was asked to disclose the relevant information. As the project was halted there was no change in the choice or behavior of the people in relation to their daily lives.

In the GMO matter too an NGO filed action in court because the relevant agencies did not disseminate adequate information to the public. As a result of this action taken by the NGO the Ministry of Healthcare and Nutrition gazetted the GMF labeling regulations.

The regulations are yet to be implemented. Once implemented, it will give the consumer a choice to select. As a result of the publicity and discussions on the case and the regulations greater awareness was created on GMFs. It can be said that this may have led to changes in individual choices and behavior for a very small percentage of the people.

Non-Compliance with disclosure requirements
Case Name: Southern Transport Development Project

Scope and Quality of Effort [34]

The available information shows that the system to collect and manage data on the STDP project was adequate in scope and quality. During the EIA process the Technical Evaluation Committee collected data in preparation of the Terms of Reference while the project proponent collected data to prepare the EIA report. However, in respect of the alteration to the approved route, an EIA was not done. Therefore, there was no system to collect and manage data on the altered route.

The EIA report of the STDP project was open for public comments. The public had access to project related information to this extent. The public can also request for information on the STDP from the relevant agencies. However, the relevant agencies (Road Development Authority and Ministry of Highways) do not always respond to all public information requests.

With regard to the government's obligation to disclose information, there is no monitoring system/penalties for non compliance to ensure that the agencies meet their obligation to disclose information. The CEA's failure to disclose information to the extent contained in the EIA process can be challenged in an appropriate court of law. The people affected by the altered route challenged the alteration in the Court of Appeal as there was no EIA for the same.

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[33] Indicators 40 and 41.
[34] Indicators 20, 21, 22, 23 and 24.

Cost and Affordability [35]

Project related data is given to the public through the EIA report. The EIA report was kept at different outlets for public perusal. A paper notice is issued to inform the public of the availability of the same. However, if a member of the public needs a copy of the EIA report that person has to bear the copying cost which is high. In the STDP case there were instances where NGOs assisted people to obtain the necessary information. In relation to the alteration of the STDP, the question of cost and affordability did not arise as there was no EIA for the same. Laws and a few other publications on the EIA process can be obtained from the CEA at a reasonable cost.

Fairness and Equitability [36]

The EIA was kept at the head office and the relevant branch office of the CEA, relevant divisional secretariats and local authorities for public perusal. Paper and gazette notices were published to inform the public of the same. Notices were also displayed on the notice boards of the said institutions informing the public of the availability of the EIA report. These notices were published and displayed in all three languages. The CEA did not make any special attempt to reach out to the disadvantaged groups and/or minorities discriminate any person.

In relation to the alteration of the route there was no EIA and therefore the above questions are not applicable to the same.

Timeliness [37]

The Project proponent collected the required information for the EIA and the CEA as the approving agency opened the EIA for public comments in the process of project approval. The STDP was approved after following the EIA process. The approved trace was subsequently altered and there was no EIA for the alteration. Therefore the question of timeliness does not arise in relation to the same. With regard to public requests for project related information it was observed that the relevant agencies including the project proponent do not always respond to public requests. The project proponent was reluctant to release information to NGOs.

Channels of Access [38]

The EIA report that contained project related information was available in different institutions such as the head office and relevant branch office of the CEA, the relevant divisional secretariats and local authorities. Paper and gazette notices were published to inform the public of the same. Notices were also displayed on the notice boards of the said

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[35] Indicator 25.
[36] Indicators 26 and 27.
[37] Indicators 28, 29 and 30.
[38] Indicator 31.

institutions notifying the public of the availability of the EIA report. These notices are published and displayed in all three languages. In relation to the alteration no EIA was done.

Impacts of Laws and Government Efforts on Access

The EIA of the STDP was open for public comments and the public were given 30 days to comment on the same. Public hearings were held subsequently. The public were notified of both these instances. However, in relation to the altered route no EIA was done and the affected people did not have access to information in relation to the alteration. Further, they were denied of an opportunity to participate in the decision making process.

Outcomes from the Provisions of Access [39]

The available information shows that the people affected by the altered route did not receive information on the alteration on time. They did not have an opportunity to participate in the decision making process. They challenged the alteration on the basis of the lack of an EIA for the same. However, the end result was that they were resettled with compensation being given. A public interest NGO challenged the decision to approve the STDP (before the alteration) based on the deficiencies of the EIA report. There is no information to show that the availability of information changed individual choices or behaviour or that the availability of information led to deliberate actions to prevent or reduce negative impacts on the environment or human health.

Impacts from projects outside national territory

Case Name: Sethusamudram Ship Canal Project

Scope and Quality of Effort [40]

Some information on the project is available at the Sethusamudram Ship Canal Project (SSCP) office of the Ministry of Foreign Affairs, and its website. The information is only available in English and a majority of the people are unable to read and understand it. Also the SSCP has not been very visible for the general public to even know that there is such a body. The relevant agency does not generate or collect information related to the project on a regular basis. There is a committee of experts in Sri Lanka (SSCP Committee) to monitor the project. The committee is rarely present at the physical location of the office. The committee attempts to disseminate available information through websites. No effort has/is made to take the information across to the people effectively (eg: through media).

There is no monitoring system or penalties for non-compliance to ensure the relevant agencies meet their obligation to disclose information. The staff of the SSCP office in Sri Lanka is extremely inefficient when it comes to disseminating and releasing information to the public and there is no policy on it. In relation to public requests for information the SSCP may not answer every request and even if answered only the basic information on the project is given.

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[39] Indicators 40 and 41.
[40] Indicators 20, 21, 22, 23 and 24.

Cost and Affordability [41]

The project related information is available through websites and at the Colombo SSCP office. Obtaining available information through websites is somewhat expensive and as mentioned many times before in the foregoing sections only a small percentage of the people will have the skills and know how to access the website.

Fairness and Equitability [42]

The government did/does not have a comprehensive plan or programme to either to reach out to a wide range of stakeholders or ensure equal access to information on the project for all. Similarly, no effort was made to reach out to disadvantaged or minority groups particularly those who may be affected. It can be said that the information dissemination system was not effective at all.

Timeliness [43]

The government did not generate, collect or disseminate information pertaining to the project regularly or in a timely fashion. The government also did not have the EIA report in time. Information was not therefore available for the public to be adequately informed on time when it was crucial and useful. NGOs worked on their own to gather information from various available sources (that included Indian sources). Subsequently, the SSCP committee has now updated their website with 2003/2004 information on the project.

The SSCP office promptly responded to some of the requests for information by the public. However, the information released was inadequate and the public was asked to obtain information from the website.

Channels of Access [44]

Information on the project was available only at the SSCP office in Colombo and its website. Only the basic information on the project is made available by the SSCP committee through the website.

A large proportion of the affected people are in the north-west coastline (which is also a part of the on-going conflict with the LTTE). To travel to Colombo to obtain information from the SSCP is both expensive and impractical for many reasons. Accessing the web is expensive and not an option for most people—particularly for those affected by this project.

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[41] Indicator 25.
[42] Indicators 26 and 27.
[43] Indicators 28, 29 and 30.
[44] Indicator 31.

Impacts of Laws and Government Effort on Access [45]

The information on the project was not available to the public to be adequately informed on time when the project was being planned and launched by the Indian Government. Further, a vast majority of the people were/are unaware of the SSCP office or their website. Neither of the two are easily accessible or affordable to a majority of the people.

Outcomes from the Provisions of Access [46]

The government did not disseminate information to keep the public informed about the project and its short/long-term impacts. There are no visible changes in individual choices and behaviour on this account as most affected people are unaware of the project and the negative impacts it can have on their livelihoods and environment. Most of the deliberate actions to avoid and/or reduce the negative impacts were taken by NGO's who kept themselves informed about the project. Both campaigns and discussions were organized by NGOs to raise the awareness of the public and to pressurize the relevant government agencies to take appropriate action to prevent adverse effects of the project.

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[45] Indicator 39.
[46] Indicators 40 and 41.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions: Law and Practice

Constitutional Law

Clean and safe environment

The Constitution does not contain any specific *right* to a clean and safe environment. However as part of the 'Directive Principles of State Policy' it declares that 'The State shall protect, preserve and improve the environment for the benefit of the community'. Likewise the Constitution casts a 'fundamental duty' on the citizen 'to protect nature and conserve its riches'. Although not legally enforceable by themselves, these provisions have been invoked as an aid to interpretation and a justification for public interest litigation on environmental matters.

Against this background, a number of non-environment specific fundamental rights have been applied by the Courts to give relief to petitioners in environment-related cases. Most notable is Article 12(1) which guarantees equality before the law and equal protection of the law. Thus if a person is wrongfully denied the benefit of any environmental protection or environmental information that other persons similarly placed would be legally entitled to (such as an EIA process), it becomes a fundamental rights issue and an aggrieved person is entitled to seek relief in the Supreme Court.

In addition, the constitutional rights to pursue one's chosen occupation and to chose one's place of residence (subject to some restrictions) have been invoked where traditional livelihoods such as rice farming, or basic needs such as access to clean water, have been threatened as a result of industrial pollution.

Rights to Information and Public Participation

While there is no specific right to information contained in the Constitution, the right to freedom of speech and expression under Article 14(1) (a) has been judicially interpreted to include the right to information, and wrongful denial of information that should be in the public domain can also become an equal treatment issue.

The right to public participation is likewise not expressly guaranteed in the Constitution, but the constitutional rights to equality, freedom of expression and freedom of association and assembly provide a conducive background against which environment-specific laws may be interpreted. Unfortunately only two of the environment-specific Acts of Parliament reviewed for this study, namely the Coast Conservation Act and the National Environmental Act, were found to contain specific rights to information and public participation.

Given the fact that amendment of the Constitution is a more complicated process than amending an ordinary Act of Parliament, we would not recommend constitutional amendment

for this purpose, but would recommend that the constitutional principles set out above should be invoked in justification of suitable amendments to the environment-specific Acts.

Access to Justice

Constitutional guarantees on access to justice are strong, inclusive of equal protection and non-discrimination provisions, the presumption of innocence, the right to be represented by an Attorney, and the right to access the courts including a direct application to the Supreme Court in the case of infringement of fundamental rights. These are all listed in Chapter III of the Constitution headed 'Fundamental Rights'. Thus there is no need for any amendments to the law in this respect, although there is a need for more funding for legal aid so that the poorer sections of society can fully avail themselves of their legal rights.

Freedom of expression and association

Freedom of expression and association are constitutionally guaranteed by Articles 14(1)(a) and 14(1)(c), but the Constitution itself permits these rights to be restricted by law on a number of grounds including national security, public order, public health or morality, or for the purpose of securing due recognition of the rights and freedoms of others, or of meeting "the just requirements of the general welfare of a democratic society": Article 15(7). As there is a process for challenging Bills (draft laws) on grounds of inconsistency with any provision of the Constitution before they are passed, and emergency regulations can also be challenged on the same grounds, there is no need for constitutional amendment.

Access to Information Framework Law

It is evident that the lack of a framework law on access to environment-related information is hampering access to information by the public. Legal provisions relating to access to information are statute-specific and vary from one sector to another. The only mandatory disclosure provisions are to be found in the National Environmental Act, the Coast Conservation Act and certain consumer protection provisions. Even the provisions in the NEA have been significantly diluted by removing the access to information and public participation provisions from the IEE process, thus confining it only to projects that are deemed to require an EIA. At the scoping stage where the decision is taken as to whether to require an IEE or and EIA, public participation is only optional at the discretion of the Project Approving Agency.

The fact that some international funding agencies have adopted a practice of writing information disclosure requirements into the terms of reference of funded projects is a sign of the extent to which Sri Lankan law lags behind international standards in this respect. Furthermore, as Sri Lanka has language rights written into its Constitution, any statutory disclosure provisions will necessarily include a requirement that such information be in both national languages (Sinhala and Tamil) as well as English. This will equalize the imbalance presently found in institutions that are focused more on attracting foreign investment than keeping the local public informed.

A further issue that arises is whether access to environmental information should be treated as part of a general Access to Information Act or whether it requires a special Act on the lines of the Aarhus Convention or other similar international legislation. In Sri Lanka it is the media, and not the environmental groups, who have been vocal in demanding a Freedom of Information Act (as they prefer to call it). An Act that confines itself to making information available to those who demand it (such as journalists) may not be effective in taking environmental information to the poorest and most vulnerable sections of society.

Access to Information Practice

Information in an environmental emergency adequate: Overall the results obtained under the various indicators on the case study on Regular Flooding in Ratnapura yielded positive results in relation to Access to Information. It stands out against the other case types and cases studied under A2I as the most people friendly. There are a few inadequacies such as information not reaching very remote areas. However, the responsible agencies are working towards constant improvement. It can be said that the information available and the warnings issued is adequate for the public to avoid and face a situation of floods.[1]

Information from regular monitoring not uniform: In relation to air quality monitoring coming under the Central Environmental Authority (CEA) there is a system to collect and manage data. The public have access to the weekly readings and other general information which is released through the web and/or given on request to the public. There is a slight delay in processing and updating the data on the web and it must also be kept in mind that only a very small percentage of the people have access to internet facilities. It could be said that earlier the public had greater access to this information when it was published in the newspaper. This service is not available now as there is now a cost attached to publishing it. With regard to obtaining detailed data and information in air quality data collected over time there is a high price. It can be said that the public have no access to this data as the price is prohibitive.

In contrast to the above the case study on the drinking water quality monitoring system at Ambatale stood out as one of the worst in terms of access to information. Although there is access to general information there is no public access to drinking water quality data. This information is not even available at a cost. Additionally, the National Water Supply and Drainage Board (NWSDB) did not respond to requests for information on same.

Absence of monitoring system/penalties for non-compliance on information disclosure: None of the responsible agencies in all the cases studied had a system for monitoring and/or penalties for non-compliance in relation to the government's obligations to disclose information.

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[1] It would be difficult to state whether this case is representative of all environmental emergency types and disasters in the country without further research and study.

Facility-level information - no public access to data on treatment plant at Biyagama Export Processing Zone (BEPZ): There is no access to the data/information on the waste treatment plant at the BEPZ.[2] This information is maintained and managed internally and not released to the public. There is also no response to requests for information on this subject from the BOI.

Responsible agencies response to public requests varied: The responsible agencies[3] in the case on environmental emergency (Ratanapura case) and the case on air quality monitoring were the most people friendly in terms of responding to public requests for information. These agencies assisted the public with information requests (with only a few instances where there may not have been a response). In contrast to this the performance of the responsible agencies in respect to public requests for information in all other cases under A2I was not satisfactory. Agencies such as the Board of Investment (BOI), NWSDB and the SSCP (in the cases on BEPZ, water quality monitoring and Sethusamudram Ship Canal respectively) released some general information but not the information requested. The UDA (Galle Face case) did not respond to public requests for information at all whilst the responsible agencies in the Genetically Modified Organisms (GMO) case did not respond to any written requests. The latter responded a little to a few requests made by telephone.

Use of internet not an effective means of providing information to the public:

It was found that a number of responsible agencies in the case studies utilized the web to provide general and/or specific information to the public. The web is an important mode of providing information however, only a fraction of the people in the country has internet facilities and/or has the resources to access same. Computers and internet facilities are also found mostly in the cities and gets scarce or are non-existent in most rural areas. Further, a majority of the population do not have the skills and knowledge to use the internet as yet. Providing information mainly on the web (such as in the Sethusamudram Ship Canal Project, Air Quality Monitoring data and Genetically Modified Foods) will therefore not reach a wide-range of stakeholders.

Non-disclosure leading to court cases: In the two cases (Galle Face and GMO) studied under this sub-heading information had to be sought through court cases. The main reasons that prompted court action were the lack of response to public requests for information, lack of collection and dissemination of information to the public and non-transparency of the decision-making process. In the Galle Face case the information sought was released during the court case by the private developer while the State agency involved refused disclosure till the end and was heavily penalized in costs for its intransigence. The court ordered the project to be terminated. In the GMO case the responsible agency gazzetted the GMF regulations as a result of the case. The publicity given to this case and the related discussions led to changes in individual choices and behaviour for a small percentage of people. Both cases were filed

[2] It would be difficult to state whether this case is representative of all industrial facilities and/or zones in the country without further research and study.

[3] Please see section A2I Analysis and Main Findings for the names of the responsible agencies in these two cases.

by NGOs. The lack of a framework law on access to information (and disclosure provisions in the UDA Law in the Galle Face case) was evident from these cases.

Information on projects outside national territory poor: The Sethusamudram Ship Canal Project (SSCP) studied under this heading was the first instance of a project initiated by a neighbouring country (India) impacting on Sri Lanka. The government of Sri Lanka did not have access to the EIA report on time. An office under the Ministry of foreign Affairs was set up to deal with the project and some information was available here. However, the office was in Colombo very far from the affected areas of the northwest coastline. The affected people were mostly from the poor and lower income deciles and it was impractical and expensive to travel to Colombo to obtain information. Further the information available at the office was only in English and therefore not useful to a majority of the people.

There was also no established system to collect and manage data/information that was accessible to the public and no effort made by the Ministry and SSCP office to disseminate information to the public. Even public requests for information were not always responded to. If and when there was a response only basic information was given. Some information was provided on the web. However, as already mentioned access to internet facilities are available only to a very small percentage of the people mainly in the cities. The affected people being mainly from the lower income deciles have no access to the internet. Given the foregoing situation most affected people were unaware of the project or its impacts on their livelihoods and environment.

Role of NGOs/CSOs very important: Overall NGOs/CSOs played a vital and important role in facilitating access to information to the people. They disseminated information and kept the public informed particularly when there was a lack of information on a given project/subject. The Sethusamundram and GMO cases are good examples where the NGOs carried out awareness programmes for the public and conducted campaigns and discussion to pressurize government agencies to take appropriate action. The Galle Face and GMO cases are good examples where NGOs filed action in court to obtain information for the public. The court action in these cases led to positive and beneficial results for the public.

No tradition/practice to reach out to the disadvantaged/minority groups: All cases showed that no special steps were taken by responsible agencies to reach out to the disadvantaged or minorities. However, there is no intention to discriminate any person or groups of people. All people/groups are treated as the 'public' within the existing administrative system[4]. In practice it can (may) sometimes lead to the disadvantaged/minorities being left out of the existing information framework. This study indicates that the existing framework needs to take into account (at least one or two) special groups (based on decided criteria) who get left out of the general process. In general there is also no practice to reach out to a wide range of stakeholders.

[4] Examples are utilizing only the web to provide information to the public, having printed material only in English where a majority of people cannot read or understand it and having information only in Colombo and/or in places not accessible to most people.

Availability of information leads to positive steps to improve health and environment: Several cases studies showed that the availability of information led to steps being taken to reduce the negative impacts on environment and health. For example, the availability of air quality data has led to action being taken both by citizens and the government to reduce air pollution. In the GMO case GMF labeling regulations have been gazetted. In the Biyagama case although there was a lack of information given by the government the people themselves through experience have taken steps to avoid the polluted water.

Skills and knowledge needed to make use of access provisions: Overall it was evident that an adequate degree of skills, awareness and knowledge (and even resources) are needed to make good use of the existing access provisions and practices. Those who are unable to read and write and/or have no knowledge of where and how to obtain information (whatever the project or policy) are at a disadvantage. The Sethusamudram case is an example. Also a lack of resources including funds can hamper the utilization of the available access provisions. For example, accessing the web for information and obtaining copies of EIA reports are expensive. Often NGOs and CSOs fill in this gap and assist the people. However, there may be instances where it may not happen.

Southern Transport Development Project (STDP) approved and implemented openly contravening disclosure requirements: The EIA process for the project (as originally proposed) was conducted well by the CEA which is the responsible agency. For example, the EIA was kept in different outlets and opened for public comments, the relevant paper and gazette notices were published in all three languages and public hearings were held. However, the EIA process was not held in relation to the deviations of the trace which were proposed for the project much later. Therefore, the public were denied their right to information and participation in this instance. Nevertheless, the project was approved and implemented. The affected people filed action in court and were granted compensation for the infringement of their rights.

Public Participation Framework Law

It should be remembered that although the EIA process requires the public to be given an opportunity to submit their comments, a public hearing is optional at the discretion of the project approving agency. This aspect of the law may be regarded as unsatisfactory, as the rights of the public may vary from project to project and area to area, depending on the mindset of the approving agency at any particular time. While perhaps not all projects require a public hearing, there should be clear guidelines based on project type and magnitude for determining whether such a hearing should take place. It is a well established principle that unfettered discretion is contrary to the principles of public law.

Public Participation Practice

Public participation in policy making satisfactorily solicited: In relation to policy making the Ministry of Environment and Natural Resources (MONER) made extensive efforts to solicit public participation in the decision making process (in the case on National Policy on Bio-

Safety) Compared to the other cases studied the MOENR played a very positive role in ensuring public participation in the Bio Safety case[5]. Extensive steps were taken by the MOENR in this regard such as keeping the public informed, creating awareness, meeting with stakeholders and making the policy available at no cost[6]. It is commendable that this was done even though there was/is no legal requirement to do. As there was general agreement on the policy with most comments being in favour of it there were no major changes in the final draft.

Enforcement of public participation provisions of NEA not consistent in project level decision-making: The provisions of the NEA apply in three of the cases (Kandy-Colombo Expressway, Biolan and Eppawala cases) studied under project level decision- making. The Central Environmental Authority (CEA) is the project approving agency and the responsible agency for administering the provisions of the NEA in these cases. The research shows that the CEA is not consistent in enforcing the EIA regulations in all cases in a similar manner. For example, the CEA ensured public participation in two stages of the EIA process in the Kandy-Colombo Expressway case whilst in the Biolan case public participation was solicited only in one stage. In the Eppawala case the CEA failed to conduct an EIA and the public were denied the right to participate. It is to be noted that the manner in which the CEA enforces the EIA regulations impacts on the extent of public participation and opportunities for same in the EIA process.

Enforcement of public participation provisions in Coast Conservation Act in project level decision-making reasonable: The provisions of the Coast Conservation Act (CCA) apply in one case (Galle Port Development) studied under project level decision-making. The Coast Conservation Department (CCD) is the project approving agency and the responsible agency for administering the provisions of the CCA in this case. In keeping with the EIA regulations the CCD held public participation sessions at two of the most important stages in this case. Other than this the CCD made only a limited effort solicit public input. The public did not have a clear idea about the project.

Effort to keep the public informed of the decision-making process at project level inadequate: Several factors need to be mentioned here. Firstly, the National Environmental Act (NEA) and its regulations on the EIA process are available to the public. However, only an educated person will be able to read and understand these documents. The CEA has prepared three sets of guidelines on the implementation of the EIA process. Two of these are for the Project Approving Agencies (PAAs) and Project Proponents (PPs), and one is for the public. The guidelines for the PAAs and PPs are available whilst the set of guidelines made for the public on how to participate in the EIA process is not in circulation now. No clear reason is given by the CEA for this situation. The guidelines are also only available in English further limiting the number of people who will be benefited by the same. The CEA has a publication with a simplified version of the EIA process. This too has been designed for the benefit of the PAAs and PPs. Secondly; the CEA did not make any special effort in any of the three case studies

[5] No comment can be made (without further research) on whether this case is representative of policy making in general in the country and whether all government agencies act in the same manner.

[6] Please see section on public participation practice for details.

to provide information to the public on the decision options and their health and environmental impacts. The EIA report is the only document that contains such information. In the Eppawala case even this was not available as no EIA was carried out.

Similar to the NEA, the CCA and its regulations are also public documents. However, it cannot be easily read or understood by the general public. Further, the CCD did not make any special effort to provide information to the public on the decision options and their health and environmental impacts. Some information on this can be found in the EIA report.

No public participation in regulatory decisions: In relation to regulatory decisions, the Urban Development Authority (UDA) did not solicit public input into the decision-making process in the Galle Face case under the UDA Law. Similarly, the National Gem and Jewellery Authority (NGJA) made no effort to ensure public participation or to obtain public input in the licensing procedure under the NGJ Act (Bogawanthalawa case). It is observed that there is no scope for public participation within the existing law and its practice in relation to these two cases.

Absence of monitoring system/penalties to ensure compliance with obligation to ensure public participation: There is no monitoring system and/or penalties for non- compliance in relation to the government's obligation to facilitate public participation in all the decision making processes considered.

No special strategy to minimize participation costs in EIA process: The Costs of public participation in the EIA process is high. Overall, there is no strong commitment or strategy on the part of the CEA to ensure that participation costs are kept low. However, sometimes the CEA takes steps that help to keep costs of participation low in the decision making process. For example, holding public participation sessions in three different locations along the trace in the Kandy-Colombo case and keeping the EIA report in several locations for public inspection. By contrast, no special effort was made by the CCD to keep costs of public participation low in the Galle Port case.

No tradition/practice to reach out to the disadvantaged/minority groups: All cases showed that no special steps were taken by responsible agencies to reach out to the disadvantaged or minorities. The CEA and the CCD simply follow the laid down procedure on EIAs in the NEA and CCA respectively. The MOENR (in the National Biosafety Policy) too had no special plan to reach out to the disadvantaged/minorities. However, there is no intention to discriminate disadvantaged/minority groups and/or exclude any stakeholders from the relevant decision-making process. All people are treated as the 'public' (irrespective of class and ethnicity) in the existing laws/regulations and there is no obligation for the agencies to take any extra steps. In practice, though such groups can get left out[7] when there is no special effort to bring them into the process as they lack the resources and opportunity to participate. This indicates that the existing decision-making processes need to have some strategy to

[7] For example, affected people who can't read or write may not have a way of commenting on EIAs, some people who lack the resources may not be able to obtain copies of EIAs or travel to places where EIA are available and some may lack the funds to travel to public hearings etc.

include the disadvantaged/minorities at least in instances where they are affected by a proposed project/policy.

In general there is also no practice within government agencies to reach out to a wide range of stakeholders. In relation to this the performance of the MOENR in the Bio-safety case was exceptional.

Some practical problems within the EIA process prevent effective public participation: There is a reasonable time period given at the start of each stage of the EIA process under the NEA and CCA for public participation. However, in practice there are instances where the public are not able to effectively participate or utilize the time period provided. Some of the reasons for this are the non availability of the EIA report at places and times as notified, difficulties in understanding the technical language in the EIA report, delays in providing EIA copies to those who request it and discrepancies in the translations of these reports.

Removal of public participation from IEEs a draw back: An amendment to the NEA in year 2000, took away the right of the public to study and comment on IEE Reports prior to their approval. An IEE Report now becomes a public document only after approval. This was a major setback to the public's right to information and participation, especially as there are no statutory guidelines as to which types of projects may be approved by IEE and which ones require EIA. Obviously there will now be a strong temptation on the part of the authorities, to approve as many projects as possible by IEE only.

Access to past and pending decisions, supporting documents and comments on final decision in policy making satisfactory: In researching the Bio-safety case it was found that the MOENR maintained drafts of policies and related documents which were accessible to the public. There was separate unit for biodiversity within the MOENR and supporting documents for the decisions on policies on this subject were kept here. These were accessible to the public and adequate for the public to keep themselves informed. However, it is difficult to assess the extent to which the public actually consult these documents. Supporting documents for the decision making process were available in several other publicly accessible places as well including the internet. The MOENR also kept records of comments made and information gathered during the commenting process and the final decision. If there are public requests for this information it will be made available by the MOENR.

Access to past and pending decisions, supporting documents and comments on final decision at project-level restricted: The CEA maintains a database of past and pending EIA/IEE decisions for official use. The general public may have access to the same with the sanction of the Chairman of the CEA. The CEA library also maintains past and pending EIA/IEE reports and documents that may be relevant for some cases. These reports and documents are accessible to the general public. However, supporting documents and/or files and records on the EIA process maintained on a project basis are not accessible to the public. There is also no system for the public to receive information on how decisions are made by the CEA on public comments and whether they are incorporated or not into the final decision.

With the sanction of the Chairman of the CEA the public may have access to the final decision.

With regard to the EIA process under the CCA, only people who participated in the EIA process had access to the past and pending decision registry of the CCD. Similarly, there was only limited public access to the registry of supporting documents kept in the CCD library on the decision-making process. In relation to the final decision and comments made the CCD had no records in an accessible format. However, with the sanction of the Director of the CCD the public may have access to the comments made, comments incorporated and reasons for any rejection of comments.

Access to past and pending decisions and supporting documents in regulatory decisions not satisfactory: The UDA did maintain selected past and pending decisions and supporting documents. However, there is very limited public accessibility to these. In fact the UDA did not give access to the supporting documents in the selected decision-making process of the case study (Galle Face). The National Gem and Jewelry Authority (NGJA) only kept limited and specific records on decisions on licences and there is limited public access to these. This cannot be viewed as being satisfactory for the public to keep themselves informed.

Influence of public input on final decision at project level varied but encouraging: Public input into cases and the extent to which it influences the final decision varies from case to case. Two of the project level cases Kandy-Colombo amd Galle Port had a fairly positive result with more protection being given to environmental and health issues. In one of the cases Biolan Waste to Energy public comments on the EIA report were negligible and there was no effect on the final decision. In the fourth case (Eppawala Phosphate Mining) the EIA process was not held and thus no public comment was possible. However, a group of persons from the affected area, assisted by an NGO, filed a case which had a positive outcome with the project being halted.

Lack of opportunities for public participation in regulatory decisions leads to changes in the final decision through litigation: The decision-making process of the Galle Face case was not transparent and there were no possibilities for public participation or access to information. Hence, an environmental NGO challenged the decision on the basis of lack of access to information. This changed the final outcome with the project being halted. Similarly in the Bogawanthalawa case there were no opportunities for public participation (as the licensing process does not require it). Hence, the public could not influence the final decision. However, an environmental NGO challenged the illegal mining activities in court and as a result these activities were halted.

Access to Justice Framework Law

It may be said that out of the three main aspects studied for this Report, Access to Justice is the area where Sri Lanka's laws are strongest. The only significant impediment appears to be the cost factor. Litigation at market prices is expensive, as it is in most countries, and although there are publicly and privately funded legal aid schemes, their reach is still

insufficient to provide equal access to the legal system for all citizens. However, in the field of environmental protection this shortcoming has to some extent been overcome due to a number of active public interest organizations that are willing to file action on behalf of the aggrieved public. Many of the court cases under review were filed by such organizations.

A noteworthy feature of the court cases that were reviewed for all sections of this Report is that most of them were "settled" in the sense that the respondent State agencies came into court and agreed to do what was asked of them under the law. The Galle Face Green, Eppawela and Southern Transport Development cases are the only ones where there was a full argument followed by judgment. In each of these cases the judgment included the award of heavy costs against the errant State agencies. (The Kurunegala quarry case is excluded from this list as it was a case between private parties).

It can therefore be said that the Courts generally consider the infringement of rights relating to environment to merit serious penalties.

However it may also be noted that many of the cases that were settled without a contest leave open the question of how effectively the terms of the final settlement can be monitored. It will be up to the petitioners to monitor and report to court if there is non-compliance.

Access to Justice Practice

Existing judicial system and access to justice satisfactory: Overall the four cases studied showed that the system of courts and access to it was reasonable and satisfactory.

The reasons for this include the following:

- There are several forums both judicial and administrative from which relief could be sought for environmental problems. These forums are the Supreme Court, Court of Appeal, District Court, Magistrate Courts and the Provincial High Court.[8]

- The independence and impartiality of the judiciary is guaranteed by strong standards and law. The Constitution of Sri Lanka provides for the independence of the judiciary, making interference with the judiciary a punishable offence. The MC is governed by the Judicial Service Commission (JSC) and interference with the judiciary and JSC are offences under the Constitution.

- Access to information and fact finding within court procedure is satisfactory. In the three CA writ applications and the public nuisance case in the MC both parties to the case and the general public had access to all information. In the CA petitions all relevant information,

[8] There are also a few publicly funded entities from which relief can be sought such as the Human Rights Commission and the Ombudsman. However, such entities cannot enforce their decisions in the same way that a Court can enforce its judgments.

documentation and exhibits were placed before the court. In the MC case information and evidence was places before court and a field visit was also carried out.

- The procedure of the CA and MC are transparent and held in public except in special circumstances. Parties to the case and public have access to the pleadings and all other documents.

- In most cases the courts consider all appropriate laws and facts including scientific and technical data. Both the Horton Plains and Kantale cases are good examples and the litigants were satisfied with the court orders. The STDP case can be viewed as an exception where the CA failed to consider all appropriate laws and facts including scientific and technical data when deciding the case and the litigants were not satisfied with the court order.

- On the question of legal standing the courts have extended 'locus standi' to a person or an organization genuinely concerned in any matter. This has enabled NGOs/others to take public interest litigation on important environmental issues.

- There are no restraining rules or limits to access. The application procedures and timeframes are known and documented. There are also clear schedules with adequate notice and reasonable time to act.

The courts have no duty or responsibility to reduce costs and reach out to a wide range of stakeholders: Under the adversary system of justice followed in Sri Lanka a court is required to hold the scales of justice evenly. Therefore, the courts are not required to take steps to reduce costs of litigation. Litigation fees to be paid to courts are generally low and set by the Ministry of Justice. The State has established a Legal Aid Commission by an Act of Parliament to provide legal aid to poor litigants, and in addition the Bar Association and other private bodies also run legal aid schemes.

The courts are also not required take steps to make the forum accessible to a wide range of people, disadvantaged or minorities. The Courts have extended 'locus standi' to a person or an organization genuinely interested in the matter concerned which benefits minorities and other disadvantaged groups.

Public access to and understanding of court procedure, rules and claims limited: The rules and procedures governing writ applications in the CA are gazetted, whilst the public nuisance procedure (such as in the Kurunegala case) is contained in the Code of Criminal Procedure (CCP). It is true that the gazettes and the CPC are public documents. However, whilst Acts of Parliament and Gazette notices are published in the two national languages (Sinhala and Tamil) and English, the general public finds it difficult to read and understand the legal language in these documents. Further, the said documents are found only in a few places which limit public accessibility. In the cases examined it was found that members of the public were unaware of court procedures.

Costs of litigation high for the public: Although the fees paid to courts for writ/other applications are low, costs of litigation in general (which includes lawyers' fees, photocopying costs, scientific testing of noise and water quality) are very high in Sri Lanka. Often the NGOs assist the public in environmental cases in this regard.

Role of CSOs/NGOs positive: CSOs/NGOs have played a crucial and effective role in matters of access to justice on behalf of the public. CSOs/NGOs assist the public in numerous ways such as providing information, guidance on court procedure, rules and types of claims, legal aid and litigation.

Intimidation did not prevent legal action: The degree and extent of intimidation and whether it affects/prevents court action is best assessed according to each case. In two of the cases (Kantale Bund and Horton Plains) there is no evidence of intimidation and/or it preventing court action. However, there was intimidation in the other two cases (STDP and Kurunegala). However, it did not prevent the litigants from bringing in the claim.

Implementation of Court decisions varies amongst cases: The extent to which a Court decision is implemented varies amongst cases in general. For instance, according to the litigants there was partial compliance with the Court order in the Kurunegala case, while the decision in the Horton Plains case was fully complied with. In the Kantale case there has been around 80% compliance with the court order.

Most court decisions led to positive outcomes to reduce the negative impacts on environment and health: In three of the cases studied (out of four) the court decisions led to a change in the behavior of the Respondents and resulted measures being taken to reduce the negative impacts on the environment and human health. In the Kantale case not only was steps taken by the state to look after the bund of the Kantale tank but also to look into the safety of other tanks in Sri Lanka. In the Horton Plains case there was a significant change in behaviour of the respondents with steps being taken to mitigate the negative impacts on the environment. In the Kurunegala case some measures were taken by the respondents for the benefit of the affected people. One of the measures taken was permit the quarry to operate only three times a week instead of the entire week.

The STDP case was an exception where the court decision did not result in a behavioural change in the Respondents. No measures were taken to reduce the negative impacts on the environment.

Was the STDP case a failure of Justice? The STDP case can be viewed as an exception where provisions for access to justice did not result in a favourable decision for the affected people. The Court of Appeal (which in this case was a court of first instance, as writ applications go direct to this court) declined to give relief to the affected parties despite the fact that there had been a clear violation of the EIA procedure, thereby denying the affected parties a public hearing that they should have been entitled to by law. The Supreme Court sitting in appeal reversed the finding of the Court of Appeal and awarded the petitioners monetary

compensation for the infringement of their right, but declined to stop the expressway project in question. The petitioners were not satisfied with the outcome of this case.

Capacity Building Framework Law

It may be said that the best contribution that the State can make towards capacity building is to provide the facilities to create a well educated, civic conscious citizenry. The material available to this study with regard to civic and environmental education gives out mixed signals, but is also insufficient to gauge the quality of this education nation-wide.

In respect of capacity building within public institutions, an excess of governmental interference could be unhealthy, and the present policy of leaving each institution to determine its training requirements subject to its budget is not bad in principle, provided however that an overall adequate budget is provided. Public pressure, and even public interest litigation where required, also encourages institutions to build up their capacity in areas where they have fallen short. The activism displayed in the cases under review should therefore be encouraged. However, it may also be argued that a uniform level of capacity building among official agencies will occur only when there is a uniform law governing access to information and right to public participation.

The capacity of the judiciary to appreciate the nature of public interest claims in relation to the environment appears, on the whole, to be well-developed.

Capacity Building Practice

Access to Information

Capacity building for government agencies inadequate: CB for government agencies directly on access to information is almost non-existent. Firstly, none of the agencies (excepting for two) in all cases examined under A2I had staff explicitly responsible for disseminating information and responding to public requests. The effort put in by the two agencies which had some staff allocated for this task was minimal and not effective. One of the agencies only gave basic information if requested and the other did not have enough information on the subject to give[9]. Secondly, there is no training offered directly on A2I in any of the agencies. A few agencies such as the CEA and Meteorological Department (MD) offer both local and foreign training on environment and related topics. Thirdly, in relation to the government allocation some agencies felt it was adequate for the collection and dissemination of information whilst a greater number felt it was not adequate. Fourthly, the performance of staff in carrying out their responsibilities in providing information to the public varied. The staff in the agencies in the Ratnapura case and the CEA assisted the public whilst staff in other agencies did not perform satisfactorily. Performance also depended on the response of individual officers.

[9] Please see section on CB A2I for details.

Capacity building for sub-national level agencies poor: The situation in relation to sub-national agencies is worse than that of government agencies. CB for sub-national level agencies (where applicable)[10] on access to information and environment is non-existent. The only exception is that sub-national level agencies in the Ratnapura case are offered some training on disaster management whilst the Environmental officers of the BOI are offered training on public health issues. However, in comparisons to the training required under A2I this can be considered as minimal and not significant. As far as facilitating access to information was concerned only the sub-national level agencies in the Ratnapura case played a satisfactory and positive role. The other agencies (where applicable)[11] either played a very limited role or simply failed to play any role at all.

Capacity building for public not adequate: The effort put into building the capacity of the public is not adequate. It was evident from all seven cases that there were no public guidelines on access to information. The only exception was that the agencies in two of the cases (the Ratnapura case and air quality monitoring case) made an effort to assist the public with information requests and dissemination of information through publications and websites. The situation on conducting capacity building activities for the public was similar. Only the agencies in the two cases mentioned above did anything in this regard. The agencies in the Ratnapura case carried out public awareness programmes and community based activities whilst the CEA put in some effort into distributing leaflets and other documents with information on air quality, and updating their website.

The media played a role in providing information to the public and highlighting issues in some cases. However, a lot more can be done by the media to facilitate access to information to the public. The roles of CSOs/NGOs come out strongly in some cases which are significant. In other cases their involvement is less.

Public Participation

Capacity building for government agencies in policy-making good: The Ministry of Environment and Natural Resources (MOENR) performed well with regard to the National Policy on BioSafety. Many steps were taken by the Ministry to facilitate stakeholder participation within the proceedings to adopt the policy. For example, an officer was assigned for the decision-making process, the staff were given some training on public participation, how to conduct workshops, raise awareness and the decision-making process. The staff of the MOENR executed their public participation responsibilities satisfactorily and the budget allocation for the purpose was also felt to be adequate[12].

Capacity building for government agencies in project-level decisions fair: CB for government agencies in relation to public participation in the cases under project level decisions can be said to be fair. The two responsible agencies in the four cases examined were the CEA and

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[10] There are no sub-national agencies for the cases on air and water quality monitoring and Galle Face.

[11] *Ibid.*

[12] No comment can be made on whether this case is representative of all/most instances of national policy-making in the country without further research.

the CCD. Firstly, it is true that there is no staff explicitly responsible for public participation. However, there were officers in the various departments of these two agencies who assisted the public with information. Secondly, although there was no direct training on public participation, it was covered under the training and guidelines given on the EIA process to officers of both these two agencies. Further, these two agencies also offered training both local and foreign on the environment and related topics to their officers.

In relation to the staff executing their public participation responsibilities the CEA performs fairly well in cases where the EIA process is properly enforced (such as in the Kandy-Colombo Expressway case). However, when the CEA fails to enforce the due process there is failure in all aspects of public participation (such as in the Eppawala case). With regard to the CCD (in the Galle Port case) the people felt that the performance of the officers in executing their responsibilities ranged from adequate to not adequate. With regard to the government budget the CCD felt it was not sufficient for the EIA process.

Capacity building for government agencies in regulatory decisions poor: There were no CB activities in relation to public participation in the responsible agencies (i.e. UDA and NGJA) involved in the two cases studied under regulatory decisions. There was no staff assigned for the task and no training offered on public participation or environment. The staff of these two agencies did not interact with the public on the decision-making process. There was also no budget allocation for this purpose. It must be noted, however, that public participation is not a requirement under the licensing process in the case coming under the NGJA[13].

Capacity building for sub-national level government agencies in policy-making good: The MOENR offered some training on public participation to the relevant sub-national level agencies. These agencies adequately facilitated public participation in the decision-making process.

Capacity building for sub-national level government agencies in project-level decisions reasonable but varied: Some training is given to sub-national level agencies coming under the CEA and CCD on the EIA process and public participation is covered within this context which is reasonable. However, there are some variations in the manner in which staff of sub-national level agencies respond to the public. For example, in the Kandy-Colombo some sub-national level officers assisted the public satisfactorily whilst some officers did not. There was one instance where sub-national level staff had refused to show the EIA to the public who required it for commenting. This can be seen as an obstruction to public participation. The people also felt that some sub-national level officers in this case study did not have the knowledge on the EIA process or how to facilitate public participation. In the Galle Port case facilitation of public participation by sub-national level officers was mostly adequate.

Capacity building for sub-national level government agencies in regulatory decisions poor: No training was given by the NGJA to sub-national level officers on public participation in the decision-making process in the Bogawathalawa Gem Mining case. These agencies also

[13] This can be seen as one of the main reasons for the lack of effort in this area.

did not facilitate public participation in the decision-making process[14]. However, it must be noted that the relevant law on the licensing process does not require public participation[15].

Capacity building for the public in policy-making positive: The MOENR played a key role in inviting the public to participate in the National Policy on Biosafety and carrying out CB activities. Public awareness programmes were conducted on the draft policy and the decision-making process. There were press notices and the importance of participation was highlighted in the draft policy.

Capacity building for the public in project-level decisions not adequate: The effort put into CB for the public by the relevant agencies is minimal and inadequate. The laws regulations, guidelines and publications on the EIA process are accessible to the public. These documents are available at the CEA in Colombo. These documents are also expected (by law) to be available at the regional offices of the CEA. However, in practice they are not always available in the regional offices (particularly where it may be needed for a project at a given time). Traveling to Colombo to obtain and/or refer same is costly and not practical. In instances where the documents are not available the public cannot make use of them. Reading and understanding the contents of these documents can also be a problem for a large number of people. Additionally, the "Public Participation Handbook" published by the CEA is no longer in circulation. Even though the handbook was only in English it was the only one of its kind for the public. No clear reason is given by the CEA for its non-circulation. The CEA does not conduct any CB programmes for the public.

Capacity building for the public in regulatory decisions poor: There were no guidelines on public participation in both cases on regulatory decisions. In the Galle face case the process followed by the UDA was not transparent and there a newspaper notice in English. In the Bogawanthalawa Gem Mining case coming under the NGJA there are no public guidelines on the licensing process. Neither agency conducts any CB activities for the public. As public participation is not a requirement in the licensing process the NGJA is of the view that they have no responsibility towards CB of the public.

Role of media in CB of the public varied: The role of the media varies from case to case with both positive and sometimes negative results. Overall, the primary contribution of the media has been to highlight and give information on an issue/project. These instances have been very effective and strong such as in the Galle Face, Eppawala and Bogawanthalawa cases. The information provided enabled NGOs to take action on behalf of the public with positive results. On the negative side there have been instances where the media carried advertisements/articles hiding the adverse impacts of the project such as in the Kandy-Colombo Expressway case. These news items were published as the project proponent made payment for same.

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[14] There is no sub-national level government involvement in the Galle Face case coming under the UDA.

[15] This can be seen as one of the main reasons for the lack of effort in this area.

Role of CSO/NGOs in CB for the public positive: CSO/NGOs worked towards enhancing public participation in most of the cases. They have assisted the public effectively particularly when there is a lack of access to information and public participation in the decision-making process such as in the Galle Face and Eppawala cases. It is the CSOs/NGOs that carry out most of the CB activities for the public such as awareness programmes, commenting on EIAs and disseminating information.

Lack of skills and knowledge amongst the public: It was observed in all cases that in general a majority of the people did not have enough skills and knowledge to participate effectively in the decision-making process.

Access to Justice

Capacity building of the Courts has no specific focus on A2I, PP or A2J: It is clear from the four cases studied that there is no special focus on A2I, PP or A2J in relation to environment within the CB activities of the relevant courts. Firstly, there is no staff explicitly responsible to respond to public inquiries from citizens wishing to bring claims and/or providing information to the public. However, the registry staff of the Court of Appeal (CA) and Magistrates Courts (MC) generally helps the public with inquiries and information (to varying degrees). Secondly, judges of the superior courts do not undergo any training. Hence, A2I, PP, A2J and even environment is not covered. Judges of the lower courts particularly Magistrates undergo training by the Sri Lanka Judges Institute (SLJI). There is a training programme of six months for these judges and the public nuisance procedure and environment is covered to some extent within this. However, access to information, public participation and access to justice are not covered in this. Thirdly, the degree to which court staff executes their access to justice responsibilities depends on each individual. Some are very helpful in assisting the public whilst others are not. There have been numerous occasions on which people had to spend a considerable amount of time to get information.

Capacity building for sub-national level agencies poor: There was sub-national level agency involvement only in two (Kurunegala Quarry and STDP cases) out of the four cases studied[16]. It was observed that there was no direct training on access to justice offered for the sub-national level agencies in these two cases. However, officers of the North Western Provincial Environmental Authority in the Kurunegala case were given the opportunity for both local and foreign trainings on environment. It was reported that access to justice was covered in these trainings. Nevertheless, it can be said that this training is inadequate as NWPEA failed to facilitate access to justice for the affected people in the Kurunegala case. It was this neglect that prompted the affected people to take court action. In the STDP case too the affected people felt that the sub-nation level agency which was the Akmeemana Pradeshiya Sabha made no effort to facilitated access to justice.

[16] There was no direct sub-national level government agency involvement in the Kantale and Horton Plains cases.

Capacity building for the public poor: Guidelines on how to use the forum (the CA and MC) are not easily accessible for the public. The relevant documents are available in a limited number of places which are mainly accessible to lawyers. Further, the documents are mostly in English and the public find it difficult to read and understand them. As far as CB activities for the public on how to use the forum are concerned the CA and MC do not conduct such activities. It is to be noted that there is requirement or responsibility for the CA and MC to do so.

Role of CSOs/NGOs in CB for the public positive: The NGOs play an important role in conducting capacity building activities for the public and providing information and publications for the public (such as the one on public nuisance procedure). Organizations like the Legal Aid Commission and the Bar Association of Sri Lanka also conduct CB activities for the public. The NGOs also give legal aid. In three out of the four cases studied (STDP, Kantale and Horton Plains cases) it was the NGOs who assisted the people to bring in the claims.

Lack of skills and knowledge amongst the public: In general a large number of the public do not have knowledge on how to use the Courts. Often they also lack the skills to access and acquire the required knowledge and information.

Role of media in CB of the public significant: The research showed that the media played a crucial role by keeping the public informed in three (out of the four) cases. The media highlighted the environmental threat in respect of the Kantale and Horton Plains cases and kept the public informed on the progress and outcome of the STDP case. The media did not give any coverage to the Kurunegala case.

General Capacity Building

Training on access rights to public school teachers poor: The government does not provide specific training or curriculum resources on access rights to public school teachers. Also very limited opportunities/incentives have been provided for environmental education.

Rules and regulations for registration and operation of CSOs and media equitably implemented: The government equitably implements rules and regulations for registration and operation of CSO and media.

Legal Aid for general public adequate: The scope and extent to which the government has provided free legal aid to the general public is adequate. The State has established the Legal Aid Commission by an Act of Parliament to provide legal aid to poor litigants.

Recommendations Law and Practice

Constitutional Law

Given the fact that amendment of the Constitution is a more complicated process than amending an ordinary Act of Parliament, we would not recommend constitutional amendment for this purpose, but would recommend that the constitutional principles set out above should be invoked in justification of suitable amendments to the environment-specific Acts.

Access to Information and Public Participation Framework Law

It is recommended, firstly, that there should be greater transparency at the scoping stage where decisions are taken on the terms of reference for a development project and on the question of whether to require a project proponent to submit an Initial Environmental Examination (IEE) or an Environmental Impact Assessment (EIA).

It is further recommended to restore the public's right to study and comment on IEE Reports which was part of the original NEA but was taken away by an amendment in the year 2000.

It is also recommended that general provisions relating to access to environment-related information be introduced (i.e. not specific to the IEE/EIA process), along with a requirement that the relevant State agencies adopt a pro-active approach in disseminating such information to the poor and less educated, as well as those living in remote areas.

Access to Information Practice

- All relevant Ministries, statutory authorities and other agencies be required to formulate a set of guidelines (which should as far as practicable be uniform) with regard to information disclosure, and such guidelines should be displayed prominently in the offices of these agencies in a place accessible to the general public.

- Such guidelines should apply to information of any environmental matter that may impact on the lives of the people; it should not be limited to information about "prescribed projects" under the NEA.

- Provision should be made for a pro-active approach on the part of the Central Environmental Authority and other Project Approving Agencies in respect of dissemination of information to the poor and less educated segments of society.

- It should be mandatory for significant judgments of the law courts such as the judgment in the STDP case to be circulated to all environment-related agencies and staff made familiar with their requirements, so as to avoid repetition of errors.

- Internal mechanisms should be established to monitor compliance with A2I provisions. In the event of non-compliance interested parties may take legal action under Sri Lanka's legal system which is dealt with hereinafter.

Public Participation Practice

- The practice of making National Policy documents available in draft form for public comment prior to their adoption by the Government is a salutary practice that should be made a statutory requirement in all areas of environment and development.

- While perhaps not all prescribed projects require a public hearing, there should be clear guidelines based on project type and magnitude for determining whether such a hearing should take place.

- The CEA should reprint its handbook on public participation (with any necessary updates) and make the same readily available at an affordable price to members of the public in all parts of the country.

- Lacuna in laws other than the NEA which enable projects having an impact on the lives of people of the area to be approved without public participation (e.g. under the Mines and Minerals Act) should be addressed by suitable amendments to these other Acts.

- Internal mechanisms should be established to monitor compliance with PP provisions. In the event of non-compliance interested parties may take legal action under Sri Lanka's legal system which is dealt with hereinafter.

- More legal aid should be made available to ensure that the public will be able to challenge acts of non-compliance with the law as in the Eppawela and Galle Face cases.

- The strengthening of access to information provisions as recommended in the previous part of this report will also encourage public participation.

Access to Justice Framework Law

Out of the three main aspects studied for this Report Access to Justice is the area where Sri Lanka's laws are strongest. Hence there is no need to recommend any changes to the framework law.

Access to Justice Practice

The only recommendation to be made with regard to this generally satisfactory area of the law is the provision of more legal aid to reach the poorest and most remote regions, and for awareness-raising among the people with regard to their rights to information, public participation and access to courts and tribunals.

Capacity Building Framework Law

It is debatable whether capacity building can be enforced by law. However, a uniform level of capacity building among official agencies is more likely to occur when there is a uniform law governing access to information and right to public participation.

Capacity Building Practice

- Restore the CEA handbook for the public regarding approval process for prescribed projects.

- Give a proper training to relevant public officers regarding transparency and importance of maintaining consistent standards.

- Create a culture of transparency and cooperation with the public in respect of environmental matters.

- Streamline procedures in court offices which were sometimes found to be dilatory.

- Channel more funding to the Legal Aid Commission to advise and assist aggrieved persons.

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The **Law and Social Sciences Research Network** (LASSnet), which is hosted at lassnet.blogspot.com, was constituted to map the field of Law and Social Sciences in South Asia. The network started with 14 people in conversation at the Centre for the Study of Law and Governance, Jawaharlal Nehru University (JNU) in December 2007. The network has grown to over 210 members in a year and a half. This was the first time this virtual community met. In many ways, the energy that each person brought to the conference signalled the consolidation of the academic and political interest in situating inter-disciplinarity at the heart of the study of law, society and politics.

The inaugural Law and Social Sciences Research Network (LASSnet) Conference held at the Jawaharlal Nehru University, New Delhi, from 8-11 January 2009 marked the coming of age of the law and social science research community in India. The conference was organised by the Centre for the Study of Law and Governance, JNU, with support from the Ford Foundation, New Delhi and the Max Planck Institute for Social Anthropology, Halle. The conference was held over four days where over a hundred papers were presented in 35 panels spread over seven sessions (see www.lassnet.org & lassnet.blogspot.com).

The next LASSnet conference will be hosted by the Alternative Law Forum and Centre for Study of Culture and Society in Bangalore. The network continues to be anchored at the Centre for the Study of Law and Governance. If you wish to be part of the LASSnet community, please write to: lassnet@gmail.com.