IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application to determine whether the Bill titled 'National Audit Bill' or any part thereof is inconsistent with the Constitution in terms of Article 121 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Article 78 of the Constitution.

SC SD 14/2018

1. Transparency International Sri Lanka (Guarantee) Limited,
   No. /1, Elibank Road,
   Colombo 00500

2. Stanley Christoffel Asoka Obeysekere,
   No.11/5,
   Rajakeeya Mawatha,
   Colombo 00700

Petitioners

Vs

Hon. Attorney General

Respondent

Before:

Sisira J de Abrew	Judge of the Supreme Court
Priyantha Jayawardena PC	Judge of the Supreme Court
LTB Dehideniya	Judge of the Supreme Court

Counsel: Viran Corea with Sankhitha Gunaratne ,Maheshi Herath and Mangalesswary Shankar for the Petitioner.

Yuresha de Silva SSC with Anusha Jayatilake SC the Attorney General

The Court assembled for the hearing at 10.00 a.m. on 18.4.2018.

Determination

A Bill titled "National Audit Act No. 2018" was published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 16th March 2018 and placed on the Order Paper of Parliament on 3rd April 2018.

The long title of the Bill reads as 'An act to provide for the powers, duties and functions of the Audit Service Commission; the establishment of the office of the National Audit Office and the Sri Lanka State Audit Service; to specify the role of the Auditor General over public finance and to make provision for matters connected therewith or incidental thereto'

The jurisdiction of this Court to determine the constitutionality of the said Bill has been invoked in terms of Article 121(1) by a petition presented to the Court by the Petitioners.

The Petition to this Court was filed on 9th April 2018, within one week of the Bill being placed on the Order Paper of Parliament as required by Article 121(1).

The said Petition was taken up for consideration. Learned Counsel appearing for the Petitioners and the learned Senior State Counsel made submissions. The Petitioners, in their Petition have stated that several Clauses of the Bill titled 'National Audit Bill (hereinafter referred to as the Bill) are inconsistent with Article 14A (1) and/or Article 14A (2) of the Constitution. The Petitioners made submissions and filed written submissions. Learned Counsel for the Petitioners submitted that Clause 9 of the Bill violates Article 14A(1) of the Constitution. The Petitioners further submitted that Clause 9(1) of the Bill thus seeks to create a blanket bar to secure disclosure of any information by the members of the Audit Service Commission, any person appointed under the Act and others assisting such persons, and unduly curtails access to information, even if no harm or prejudice to the public interest would be caused, in a given instance. When considering the submissions of learned Counsel for the Petitioners, it is necessary to examine Clause 9 of the Bill and Article 14A of the Constitution.

Clause 9 of the Bill reads as follows.

"(9) (1) The members of the Audit Service Commission, any person appointed to any office under this Act or any other person assisting any such person for the purpose of carrying out the provisions under this Act or a qualified auditor engaged by the Auditor General for such purpose, except in the performance of his duties under this Act, shall not disclose any information received by him in the performance of his duties under this Act, and shall ---

(a) not be compelled by any person to disclose any information except on a request of Parliament or by an Order of court or subject to paragraph (b) to give effect to the provisions of any written law:

(b) not disclose any information under any law requiring the disclosure of information without prior consent given in writing of the relevant person or institution providing such information and until the report or statement prepared by the Auditor General relating to such information has been presented in Parliament, as may be required; and

(c) not enter upon the duties of his office until he makes and subscribes an oath of secrecy as set out in the Schedule hereto. The members of the Audit Service Commission shall subscribe an oath of secrecy before the Speaker of Parliament, while all other persons specified herein shall subscribe the said oath before the Auditor General.

(2) Subject to the provisions of subsection (1) of this section, any such member or person or qualified auditor who communicates any such matter to any person or suffers or permits any unauthorized person to have access to any books, papers or other records relating to any such matter, commits an offence."

Article 14A of the Constitution reads as follows.

"(1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-

(a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
(b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;

(c) any local authority; and
(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a), (b) or (c) of this paragraph.

(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence or for maintaining the authority and impartiality of the judiciary." [Emphasis added].

According to Clause 9 of the Bill the members of the Audit Service Commission and other officers attached to the Commission etc. shall not disclose any information received by them without prior written consent of the relevant institution or the person who provided the information and until the report or statement prepared by the Auditor General has been presented in Parliament. Further Clause 9 of the Bill places restrictions on the said officers to release information on their own.

Contention of learned Counsel for the Petitioners is that when an application is made to provide information, the officers attached to Audit Service Commission is precluded from releasing information without the consent of the institution that provided the information under the clause 9 of the Bill. Learned Counsel for the Petitioners therefore, contended that Clause 9 of the Bill violates Article 14A of the Constitution.

When considering the above contention, Article 14A of the Constitution should be examined. Although Article 14A(1) of the Constitution gives a right to people to request for information discussed in the said Article, Article 14A(2) of the Constitution places certain restrictions. They are the restrictions that may be prescribed by law as are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence or for maintaining the authority and impartiality of the judiciary. In short restrictions can be placed by way of legislations on information discussed in Article 14A regarding the following subjects.

1. In the interest of national security, territorial integrity or public security.
2. For the prevention of disorder or crime.
3. For the protection of health or morals and of the reputation or the rights of others.
4. For prevention of contempt of court.
5. For protection of parliamentary privilege.
6. For preventing the disclosure of information communicated in confidence.
7. For maintaining the authority and impartiality of the judiciary.

Therefore, if the information requested by a person relates to the matters set out in Article 14A(2) of the Constitution, the person requesting information will not be entitled to receive such information. Further if a law prescribes certain restrictions on any information stipulated in Article 14A of the Constitution, the said information can be refused. Such a decision to refuse the release of information would not violate Article 14A of the Constitution. When I consider all the above matters, I hold the view that restrictions regarding information stated in Article 14A of the Constitution can be prescribed by law.

What is law? Article 170 of the Constitution defines what the law is. It reads as follows. "Law means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes Order in Council." Thus legislature can bring in legislation prescribing restrictions on information discussed in Article 14A of the Constitution. National Audit Bill intends to achieve the above purpose. In my view restrictions of this nature are permitted by Article 14A(2) of the Constitution and a Bill prescribing such restrictions cannot violate Article 14A of the Constitution. When I consider all the above matters, I am unable to agree with the contention of learned Counsel for the Petitioners. For the above reasons, I reject the above contention of learned Counsel for the Petitioners and hold that the Clause 9 of the Bill does not violate the Constitution.

Learned Counsel for the Petitioners next made submissions regarding the schedule of the Bill relating to Oath of Secrecy. The Oath of Secrecy described in the said schedule reads as follows.

"Oath of Secrecy

In terms of Section 9 of the National Audit Act No. ... of 2018.

I, ………………………… being member of the Audit Service Commission/ an employee of the National Audit Office/Auditor General's Department/Combined Services, an expert person assisting in the discharge of the duties of the Auditor

General as referred to in Section 8(a), do solemnly declare and affirm/swear that I shall maintain in utmost secrecy the information whatsoever which is given, stated, discussed or otherwise gathered in the performance of my duties and such information will not be disclosed, discussed or stated in any form whatever to any person in public or private, except-

(a) when required to do so by a Court of Law;

(b) when required by Parliament; or

(c) when specified under any written law, subject to section 9(b) of the National Audit Act No. .. 2018.

The obligations herein set out shall bind me during my term of office in the National Audit Office/Auditor General's Department/Combined Services and shall continue thereafter except in relation to any information that has come into public domain due to no breach of my obligations hereunder.

I append my signature to this oath on this …… day of …… Two Thousand …… .

Signature"

Learned Counsel for the Petitioners stressed the following words in the Oath of Secrecy: "subject to section 9(b) of the National Audit Act No. .. 2018". He submitted that the above words would violate Article 14A(1) of the Constitution since Clause 9(b) of the Bill violates Article 14A(1) of the Constitution. But I have earlier held that Clause 9 of the Bill does not violate the Constitution. Therefore I am unable to agree with the above contention of learned Counsel for the Petitioners and I reject the same.

Learned Counsel for the Petitioners next made submissions regarding Clause 13 of the Bill. Clause 13 of the Bill reads as follows.

"The Auditor General shall report to Parliament on any audit carried out during any financial year and may make such report publicly available through the official website of the National Audit office and shall not publish the report if he has or intends to provide any report, information, document, book, record or computer generated transcript obtained in the course of the audit to the law enforcement authorities."

According to Clause 13 of the Bill, the Auditor General shall not publish the document mentioned therein if he intends to provide it to law enforcement authorities. Learned Counsel for the Petitioners submitted that the said Clause of the Bill therefore violates Article 14A(1) of the Constitution.

I now advert to this contention. Why does the Auditor General want to submit it to law enforcement authorities? If some fraud or offence has been disclosed in the said report, shouldn't he submit it to law enforcement authorities? The answer should obviously be in the affirmative. If such a report is published, person who is suspected to have committed the fraud would take steps to negate the allegation mentioned in the report before the law enforcement authorities start investigation. Thus publishing such a report would benefit the alleged offender. As I have pointed out earlier, legislature can bring in legislation prescribing restrictions on information regarding prevention of disorder or crimes. When I consider all the above matters, I hold the view that Clause 13 of the Bill would not violate any Article of the Constitution. For the above reasons, I reject the above contention of learned counsel for the petitioners

We have examined the provisions of the Bill and in our opinion they do not violate the Constitution.

For the reasons stated above, we make determination that the National Audit Bill is not inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sisira J de Abrew

Judge of the Supreme Court.

Priyantha Jayawardena PC

Judge of the Supreme Court.

L.T.B. Dehedeniya

Judge of the Supreme Court.