

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA
A BILL TITLED, "RIGHT TO INFORMATION"

In the matter of an application under and in terms of Article 121 read with Article 120 and Article 83 of the Constitution of the Democratic Socialist Republic of Sri Lanka

BEFORE

K. Sripavan	-	Chief Justice
Anil Gooneratne,	-	Judge of the Supreme Court
Nalin Perera	-	Judge of the Supreme Court

S.C.(S.D.) No. 22/2016

Petitioner	N. Dharshana Weraduwege, Attorney-at-Law, No. 281/J/1, Cemetery Road, Pore, Athurugiriya.
Counsel	Petitioner in person
Respondent	Attorney General
Counsel	Nerin Pulle, Deputy Solicitor General with Nirmalan Wigneswaran, Senior State Counsel and E.D. Wickremanayake, State Counsel

S.C.(S.D.) No. 23/2016

Petitioner	Lt. Col. (Retd.) Anil Amarasekara, Pussallahena Estate, Kindelpitiya Millawa.
Counsel	Manohara de Silva, P.C. with Canishka Witharana, Malini Dissanayake, Tissa Yapa and Anusha Perera
Respondent	Attorney General
Counsel	Nerin Pulle, Deputy Solicitor General with Nirmalan Wigneswaran, Senior State Counsel and E.D. Wickremanayake, State Counsel
Interventient Petitioners	1. Professor Wijesooriya Arachchilage Don Sarath Wijesooriya, 46A 1, N.T.Perera Mawatha, Mulleriyawa.

2. Weligodage Saman Rathnapriya
Silva, 5/10, Welikadamulla,
Balpitiya

3. Benedict Joseph Stalin
Fernando, 65/4, Chiththampalam
Gardiner Mawatha, Colombo 2.

4. Dharmasiri Bandaranayake, 129,
Moranthuduwa Road, Wadduwa.

Counsel

M.A. Sumanthiran with Viran Corea,
Sarita de Foseka and T. Arulanandan
instructed by Sanjeewa
Kaluarachchi for the Intervient
Petitioners.

Intervient Petitioner

Dr. Gunadasa Amarasekera, No. 31/
14a, 2nd Lane, Koswatta, Nawala,
Rajagiriya

Counsel

K. Tiranagama instructed by
Swarnapali Wanigasekera

S.C.(S.D.) No. 24/2016

Petitioners

1. Benthara Gamage Indika Gamage,
333/4, Hapugasyaya, Nalanda.
2. Gonsalge Isuru Buddhika
Sirinimal, 142, Augusta Estate,
Bowalawaththa Road,
Uda Peradeniya

Counsel

Thishya Weragoda with Iresh
Seneviratne, Udari Mawaththa,
Chintaka Sugathapala instructed
by Niluka Dissassanaik

Respondent

Attorney General

Counsel

Nerin Pulle, Deputy Solicitor
General with Nirmalan
Wigneswaran, Senior State
Counsel and E.D.
Wickremanayake, State Counsel

Intervient Petitioner

Transparency International Sri
Lanka No. 5/1, Elibank
Road, Clombo 5.

Counsel	J.C. Weliamuna with Pulastr Hewamanne, Senura Abeywardene, Sulakshana Senanayake, Pubudu Silva and Sankitha Gunaratne
Intervient Petitioner	1. Lokupitumpage Roshan Namal Wijethunga, No. 32/30, Hettigewatta, Biyagama Road, Keleniya 2. Dr. Ranga Prasanna Kalansooriya, 243/4, Hiripitiya, Panniptiya
Counsel	Dr. Jayampathy Wickremaratne, P.C. with J.C. Weliamuna, Deanne Uyagoda, Chathurika Rajapaksha, instructed by Lilanthi de Silva
S.C.(S.D.) No. 25/2016	
Petitioner	Nuwan Ballantudawa, 415/34, Off High Level Road, Gangodawila, Delkanda, Nugegoda.
Counsel	Canishka Witharana, with Malmi Dissanayake, Tiss Yapa and H.M. Tillekeratne
Respondent	Attorney General
Counsel	Nerin Pulle, Deputy Solicitor General with Nirmalan Wigneswaran, Senior State Counsel and E.D. Wickremanayake, State Counsel
Intervient Petitioner	Amal Randeniya, Secretary, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12.
Counsel	Saliya Pieris with Pulastr Hewamanne
Intervient Petitioner	Liyana Arachchilage Jagath Bandara Liyana Arachchi, 56< Old Kesbewa Road, Gangodawila, Nugegoda..

Counsel	Dr. Jayampathy Wickremaratne, P.C. with J.C. Weliamuna, Deanne Uyangoda, Chathurika Rajapaksha, instructed by Lilanthi de Silva
Intervenient Petitioner	Transparency International Sri Lanka No. 5/1, Elibank Road, Clombo 5.
Counsel	J.C. Weliamuna with Pulasthi Hewamanne, Senura Abeywardena, Sulakshana Senanayake, Pulasthi Silva and Sankitha Gunaratne
Intervenient Petitioner	Geoffre Alagaratnam, P.C. President, Bar Association of Sri Lanka, No. 153, Mihindu Mawatha, Colombo 12.
Counsel	Saliya Peiris with Pulastris Hewamanne

Court assembled for hearing on 05.04.2016 and on 06.04.2016 at 10.00 a.m.

A Bill titled "Right to Information" has been published in the Gazette of the Democratic Socialist Republic of Sri Lanka and has been placed on the Order Paper of Parliament on 24th March 2016. Four Petitioners challenged the constitutionality of the Bill by separate four Petitions filed by them.

The Preamble to the Bill states thus:-

"WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance."

Part I of the Bill sets out that every citizen has the Right of access to information and establishes that the provisions of the Bill shall prevail over other written laws;

Part II provides the several grounds on which right of access may be denied;

Part III specifies the duties of Ministers and Public Authorities with regard to maintaining records and the submission of annual report to the Right to Information Commission

Part IV provides for the establishment of an "Right to Information Commission", its composition, duties, powers and functions of the said Commission

Part V refers to the appointment of "Information Officers" through which the procedure specified therein may be utilized to obtain information

Part VI sets out the procedure for appeals against rejected requests for access to information.

Part VII specifies the duty to disclose reasons for a decision, offences under the Bill and the interpretation of certain words and phrases within the Bill

Since the Bill was enacted to foster a culture of transparency and accountability in public authorities and guarantees the right of access to information as provided in Article 14A of the Constitution it becomes necessary to examine the legal principles underlying the said Article.

Article 14 A of the Constitution reads thus:-

"14A (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.*
- (3) *In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.(emphasis added)*

The right to information was to some extent recognized as being included in the "freedom of speech and expression" in *Environmental Foundation Ltd. Vs. Urban Development Authority* [(2009) 1 S.L.R. 123]. S.N. Silva, C.J. held that although the freedom of information was not specifically guaranteed in the Constitution, for the "freedom of speech and expression including publication" to be meaningful and effective, it should carry with its scope an implicit right of a person to secure relevant information from **public authority** in respect of a matter that should be in the **public domain**. (emphasis added)

Thus, the "freedom of speech and expression including publication" which includes an implicit right to secure relevant information should be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which form the foundation of the Constitution, subject however to such restrictions and to the extent provided in the Constitution. The fundamental principle involved here is the person's right to know the information. In the case of *Dinesh Trivedi Vs. Union of India* (1977) 4 S.C. 306, Ahmadi C.J. stated as follows :-

"In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government, which having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is by no means, absolute"

The State has the right to regulate the exercise of a fundamental right in order to prevent it being abused, though it cannot curtail the right itself except on permissible grounds. Thus, it is open to the legislature to enact laws or regulations to regulate without transgressing the territory of restriction or abridgement. Any regulatory law or regulation impinging upon fundamental rights should therefore be closely scrutinized. The areas in respect of which such laws and regulations are to be enacted is a matter for the legislature. Once the legislature presents the Bill in respect of any matter referred to in Article 14A, the duty of this Court is to determine whether any of the provisions of the Bill are inconsistent with the Constitution.

The express recognition of the right as enshrined in Article 14A undoubtedly advances the sovereignty exercised and enjoyed by the people and accords with the Constitutional directive postulated in Article 4(d) of the Constitution, which requires that "the fundamental rights which are by the Constitution declared and recognized shall be **respected, secured and advanced by all organs of government** and shall not be abridged, restricted or denied, save in the manner and to the extent **hereinafter provided**". (emphasis added)

Accordingly, the right of access to information like all other rights recognized under the Constitution should also be enjoyed subject to certain overriding public interests in non-disclosure as well as the constitutional duties stipulated under Article 28(e) to the Constitution, where it is specifically stipulated that the exercise of and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka to respect the rights and freedoms of others. Hence, Clause 5 of the Bill in accordance with Article 14A(2) of the Constitution performs an equally important task in

ensuring that the right of access to information is suitably restricted to reflect these important countervailing considerations.

Therefore, the underlying approach of the Bill is to meaningfully give effect to the right of access to information enshrined in Article 14A(1) while successfully balancing such right with restrictions that are necessary in a democratic society as set out in Article 14A(2).

Mr. Pulle, Deputy Solicitor General assisted Court in the consideration of various Clauses of the Bill. The Court examined the Clauses contained in the said Bill and heard the submissions of the Petitioner, Counsel for the Petitioners and the Counsel for the Interventient-Petitioners.

Counsel for the Petitioners objected to Clauses 5(1) (c) (v), 5(1)(d), 5(1)(j), 5(3), 6, 8(1), 9(2)(a) 12,19, 20, 40, 43 on the basis that the said Clauses violate several provisions including Articles 3,4,12,13,14, 27 and 111c of the Constitution.

Clauses 5(1) (c)(v), 5(1)(d) and 5(3)

The main argument of the Counsel for the Petitioners was that "economy of Sri Lanka" referred in Clause 5(1)(c) is not caught up under Article 14A(2) of the Constitution which prescribes the restrictions that can be placed on the right of access to information. Thus, the contention was that the matters pertaining to "economy" does not fall within the permitted restrictions stipulated under Article 14A(2).

Learned Deputy Solicitor General, however, argued that the Petitioners contentions are based on the anachronistic notion of equating "national security" to "military security". Counsel stated that the concept of "national security" has undergone considerable growth and evolution from its traditional connotation of defence of a territory from internal or external attack or "military security". Mr. Pulle relied on the case of *Ex-Army men's Protection Services Private Limited Vs. Union of India and Others* [(2014) No. 2876/14] decided by the Indian Supreme Court where Kurian, J. observed as follows:-

*"It is difficult to define in exact terms as to what is **national Security**. However, the same would generally include socio-political stability, territorial integrity, **economic solidarity and strength**, ecological balance, cultural cohesiveness, external peace, etc. What is in the interest of national security is not a question of law. It is a matter of **policy**. It is not for the Court to decide whether something is in the interest of State or not. It should be left to the Executive: To quote Lord Hoffman in Secretary of State for the Home Department v. Rehman*

*" The matter of national security is not a question of law. It is a **matter of judgment and policy**. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of **national security** are not a matter for **judicial decision**. They are entrusted to the executive." (emphasis added)*

Ahmadi C.J. in Dinesh Trivedi's case (supra) quoted from the case of *S.P. Gupta Vs. Union of India*. where a seven judge Bench of the Constitutional Court declared that the disclosure of documents relating to the affairs of State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the State to protect the information relating to its crucial affairs. It was further held that, in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make his final decision depending upon the particular facts involved in each individual case. It is important to note that it was conceded that there are certain classes of documents which are necessarily required to be protected, e.g. Cabinet Minutes, documents concerning the national safety, documents which affect **diplomatic relations or relate to some State secrets** of the highest importance, and the like in respect of which the Court would ordinarily uphold Government's claim of privilege. (emphasis added).

Though Petitioners argue that the people at large have a right to know about the full details of entering into of overseas trade agreements referred to in Sub-Clauses 1(c) (v) and 3 of Clause 5 for the maintenance of democracy and for ensuring transparency in the

affairs of the Government, like all other rights, even this right has recognized limitations; it is by no means absolute. Accordingly, the inclusion of a restriction against the disclosure of information that would cause serious prejudice to the economy of Sri Lanka is justified as part and parcel of the interests of "national security". The combined effect of Clauses 5(1)(c)v and 5(3) read with Article 157 of the Constitution is that overseas trade agreements cannot be challenged in a Court of law and the fact that information relating to the same are denied would prevent those agreements from being challenged prior to their formulation. In any event, Clause 5(1)(c)v provides the following pre-qualifications on the information that can be restricted if:-

- (a) The disclosure of the information would cause **serious prejudice** to the economy by disclosing prematurely
- (b) The information **should relate to decisions to change or continue Government economic or financial policies (emphasis added)**

Dr. Jayampathy Wickramaratne placed his argument on a different basis and stated that the impugned restrictions in Clauses 5(1)(c)v and 5(3) have been included to ensure a balance between the right to information and the wider interests of the public, especially with respect to economic wellbeing and security of the State, to prevent "public disorder and crime" and to protect "the rights of others". Article 14A(2) contemplates the prevention of disorder and crime and the need to protect the rights of others. Counsel argued that the impugned restrictions fall within the substantive ambit of protecting the rights of others, in the context of ensuring the economic security of the public and also of preventing disorder and crime where the release of information enables wrongful gains and profiteering by certain elements at the expense of the public.

In **Autronic AG Vs. Switzerland** A 178 (1990) 12 EHRR 485, the European Court of Human Rights held that a State's interference with the right to information guaranteed under Article 10 of the European Convention on Human Rights, was compatible with its obligation under the Convention where the restrictions were in pursuance of the "prevention of disorder" and the need to prevent the release of confidential information, both of which were reasonable interferences under the Convention. The principle established by this case is that if the disclosure of information can create disorder in a particular sphere of

activity or affects the rights of others or lead to a crime, then it may be withheld in the wider public interest.

It may thus be noted that in the case of overseas trade agreements, a premature disclosure may benefit the person who requested such information but may adversely affect the economy of the country and thus the rights of the other people. Releasing the details of various reports, notes, letters, and other forms of written evidence while the negotiations are going on may help the party or his personal self-interest but adversely affects the interest of the public and create a dis-order by failing to protect the rights of others. The impugned restrictions can even be prescribed under Articles 15(2) and 15(5) not only to protect the right of others but also to regulate the exercise and operation of the fundamental rights declared and recognized by Article 14(1)(a) and 14(1)(g) in the interest of national economy.

Thus, it is not a blanket prohibition on all information relating to trade agreements. The Court is inclined to agree with the learned Deputy Solicitor General that the word "national security" be given an interpretation to ensure that the vital interests of the nation relating to "trade secrets and trade agreements" are safeguarded. If two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardized if disclosure is ordered and on the other hand, whether fair administration of justice would suffer by non-disclosure and decide which way the balance tilts. It is observed that in view of Clause 5(4) a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure. It is not a Rule of Law to be applied mechanically in all the circumstances. Thus, the Bill ensures that a balance is maintained between competing interests which would ultimately serve public interest and promote the discussion of public affairs. Accordingly, the inclusion of a restriction against disclosure of information that would cause serious prejudice to the economy of Sri Lanka is justified as part and parcel of protecting the rights of others and the economy of Sri Lanka. The Court therefore, holds that Clauses 5(1)(c)(v), 5(1)(d) and 5(3) are not inconsistent with any of the provisions of the Constitution.

Mr. Thishya Weragoda, in S.C.S.D. 24/2016 appeared for the First and the Second Petitioners who are the President and the Secretary of the Sri Lanka IT Professionals Association respectively and contended that Clauses 5(1)(c)(v) and 5(3) are in violation of Article 12(1) and 14(1)(g) of the Constitution, on the ground that the protection afforded to the Petitioners would be violated, if the said Bill is passed by Parliament.

Where a right or power given by the Constitution is challenged, the duty of the Court is to keep close to the words of the constitutional instrument and to see first whether the power is in fact granted, and secondly, whether there is anything else which restricts the rights so granted.

The freedom of speech and expression in Article 14(1)(a) which carries within its scope an implicit right of a person to secure relevant information from a public authority and which could be exercised in association with others in any lawful occupation, profession, trade, business or enterprise as provided in Article 14(1)(g) is in any event, subject to such restrictions as may be prescribed by law in terms of Article 15(5), in the interest of national economy for purposes of carrying on any occupation. Hence, the Court does not agree with the learned Counsel that Clauses 5(1)(c)(v) and 5(3) are in violation of Article 12(1) and 14(1)(g) of the Constitution.

Clause 5(1)(i)

This Clause denies the right of access to information only if the disclosure of such information would amount to Contempt of Court. However, Article 14A(2) restricts the right to information for the purposes of "maintaining the authority and impartiality of the judiciary" as well. Failure to include this restriction violates Articles 3, 4, 12(1) and 14A(2) of the Constitution.

Clause 6

Clause 6 of the Bill provides for the severability of information, so that information that is exempt can be retained whilst information that is not can be disclosed. The Petitioners claim that the said provision infringes Articles 14A(1) and (2) of the Constitution and thereby infringes other Articles thereof, including Article 1, 3, 4, 12, 13, 14, 27 and 111C of the Constitution.

As indicated above, the underlying approach to the Bill is to meaningfully give effect to the right of access to Information enshrined in Article 14A(1) whilst successfully balancing such right with restrictions that are necessary in a democratic society as set out in Article 14A(2). Clause 6 is a prime example of achieving an equitable middle path. Clause 6 ensures that any restriction on a citizen's right of access to information, even in relation to a single record or document, is enforced only to the extent that it is necessary and never as a blanket ban. Furthermore, it takes into account certain practical considerations by requiring that access, if at all, on reasonable severability being achievable between exempted and permitted information. Hence, Clause 6 not only identifies the distinct probability that a single record or document may contain both exempted and permitted information but also to provide for a practical solution whereby competing interests may be balanced. Thus, Clause 6 does not violate any of the provisions of the Constitution.

Clause 8(1)

Mr. Canishka Witharana brought to the notice of Court that there is a discrepancy between the English version and the Sinhala version, in that the word "person" referred to in the said Clause should be corrected to read as "citizen" as appearing in the Sinhala version of the Bill. The Court notes that in the event of any inconsistency between the Sinhala text and the English text, the Sinhala text shall prevail.

Clause 9(2)(a)

This Clause empowers the Minister to make available updated information to a member of public upon a written request. This Clause violates Articles 3,4, 12(1) and 14 of the Constitution as the right of access to information is given to a "citizen" and not to a member of the public.

Clause 12

The Petitioners proposed that the Commission be constituted exclusively by retired judicial officers as in the case of the Commission to Investigation Allegations of Bribery and Corruption and that the Commission be made subject to Parliamentary control.

Learned Deputy Solicitor General submits that salutary safeguards have been put in place in the Bill in respect of the Commission, in the context of its composition as well as in the

discharge of its obligations. Extremely stringent safeguards have been put in place to ensure that the Commission comprises of persons "who have distinguished themselves in public life, with proven knowledge, experience and eminence in the fields of law, governance, public administration, social services, journalism, science and technology or management" (Clause 12(2)(i)). The Constitutional Council has been vested with the power to ensure persons nominated satisfy the criteria and to reject nominations that do not meet the criteria set out above and call for fresh nominations. (Clause 12(2)(b)). In fact, the Constitutional Council could make its own nominations in the event, the organisations referred to in Clause 12(1) do not provide satisfactory nominations. (Clause 12(3)). Thus the Bill has taken utmost precaution to ensure suitable nominations are made through the Constitutional Council.

The proceedings before the Commission are not judicial proceedings; they are administrative proceedings requiring the evaluation of information. The Commission to Investigate Allegations of Bribery or Corruption established under Act No. 19 of 1994 is not analogous to the "Right to Information Commission" because the subject matter of the respective Commissions are fundamentally different and must be viewed through completely different procedural perspectives – the former from a criminal prosecution and the latter from the balancing of competing interests in the informational sphere.

From a functional perspective, adequate safeguards have been placed by providing for an appeal to the Court of Appeal and thus ensuring judicial oversight. The funds of the Commission are subject to audit by the Auditor General. Clause 16(2) ensures transparency in relation to the funding received by any other sources, and thus the fears expressed by the Petitioners cannot materialize. Clause 18 mandates that the provisions of Part II of the Finance Act No. 38 of 1971 shall apply to the financial control and accounts of the Commission. Clause 37 further provides that the report containing the activities of the Commission shall be tabled before Parliament and a copy thereof shall be sent to the President.

Article 33(2)(h) of the Constitution stipulates that in addition to the powers, duties and functions expressly conferred or imposed on or assigned to the President by the Constitution or other written law, the President shall have the power – (h) to do all such

acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do. Article 41G(2) of the Constitution provides that the Constitutional Council shall perform and discharge such other duties and functions as may be imposed or assigned to the Council by the Constitution, or by any other written law. (emphasis added)

The appointment of the Members by the President upon the nomination of the Constitutional Council is therefore in accordance with the express provisions of the Constitution and is not inconsistent with any provisions thereof. This Court in any event cannot decide as to who should be the Members of the Commission. The legislative function is the primary responsibility of Parliament as the elected body representing the people. The only remedy would be for the Court declare the incompatibility of the Bill with the provisions of the Constitution.

Clauses 19 and 20

The Petitioners challenge the two Clauses on the basis that they are not in accordance with the provisions of the Constitution, in that the members, officers and other employees cannot be deemed to be "public officers" and they are not appointed by the Public Service Commission.

Learned Deputy Solicitor General states that the above provision would be amended to accord with the standard provisions found in several acts such as the Commissions of Inquiry Act, No. 17 of 1948 (section 9), The Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (section 18(1)) and The Human Rights Commission of Sri Lanka Act No. 21 of 1996 (section 23). The provisions of the respective acts are set out below respectively:

Section 9 of the Commissions of Inquiry Act

The Members of a Commission appointed under this Act shall, so long as they are acting as such Members, be deemed to be public servants within the meaning of the Penal Code, and every inquiry under this Act shall be deemed to be judicial proceeding within the meaning of that Code.

Section 18(1) of the Commission to Investigate Allegations of Bribery or Corruption Act

"The Members of the Commission, the Director General and Officers and Servants, appointed to assist the Commission shall be deemed to be public servants within the meaning of the Penal Code, and every investigation conducted under this Act shall be deemed to be judicial proceeding within the meaning of that Code".

Section 23 of The Human Rights Commission of Sri Lanka Act

"The Members of the Commission and the Officers and Servants appointed to assist the Commission shall be deemed to be public servants within the meaning of the Penal Code, and every inquiry or investigation conducted under this Act, shall be deemed to be judicial proceeding within the meaning of that Code." (emphasis added).

Thus, the words "public officers" appearing in Clause 19 be substituted with the words "public servants".

Clauses 19 and 20 of the Bill are identical to Clauses included in many enactments to ensure inter alia the following:

- (a) That the functions of the officers of the institution are not obstructed;
- (b) That the officers of the institution do not conceal a design to commit an offence which should be prevented
- (c) That persons participating in any proceedings before the body do not commit perjury; and
- (d) To ensure that there are adequate safeguards against bribery and corruption, Clause 20 provides for the application of Bribery Act to the Commission.

These Clauses do not convert the proceeding into judicial proceedings nor do they make the Officers administering the proceeding Judicial Officers. The very fact that the proceedings are deemed to "judicial proceedings" for the purposes of a specific enactment, implies that they are not judicial proceedings

Clause 19 in its present form violates Articles 3, 4, 12(1) and 55 of the Constitution.

Clause 40

The Petitioner in S.C.(S.D.) 22/2016 have alleged that Clause 40 would effectively provide immunity to information officers who release sensitive information, the disclosure of which would otherwise be punishable under Section 125 of the Army Act No. 17 of 1949 (as amended) and similar provisions of the Navy Act No. 34 of 1950 (as amended) and the Air Force Act No. 41 of 1949 (as amended).

The argument of the Petitioner is manifestly misconceived. As expressly stated in Clause 40, such immunity from punishment shall only be available to an information officer who releases or discloses "information which is permitted to be released or disclosed on a request submitted under this Act." Therefore, in considering what information may be permissibly released, it is necessary to refer back to Clause 5. Upon perusal of Clause 5, it is evident that Clause 5(1)(b) expressly provides that a request for access to information shall be refused where the disclosure of such information "would undermine the defence of the State or its territorial integrity or national security". Hence, under no circumstances would an information officer be afforded the benefit of Clause 40, where an injurious disclosure is made of the type of information contemplated under any of the aforementioned acts. (emphasis added).

In any event, in terms of Clause 4, the provisions of this Bill shall have effect notwithstanding anything to the contrary in any other written law.

Clause 43

This Clause defines a "Public Authority" as in Paragraphs (j) and (k) in the following manner:-

- (j) higher educational institutions including private universities and professional institutions;
- (k) private educational institutions including institutions offering vocational or technical education.

In terms of Clause 3, every citizen shall have a right of access to information which is possession, custody or control of a "public authority". Article 14A(1) refers to the institutions from whom information could be obtained. The information could be obtained

only from those institutions or persons referred in Articles 14(1)(a), 14(1)(b), 14(1)(c) and 14(1)(d).

The institutions referred to in Articles 14(1)(a), 14(1)(b), 14(1)(c) are either controlled by the State or State agencies. The persons referred to in Article 14(1)(d) are persons who are in possession of any information from the institutions controlled by the State. Private educational institutions or private Universities are not caught up within the ambit of institutions which are partly or wholly controlled by the State. Hence, these two definitions violate Articles 3, 4 and 14A of the Constitution.

The definition to the term "public funds" is superfluous as the term "public funds" is not used in the Bill. The learned Deputy Solicitor General and Mr. Weliamuna agreed that the said definition should be deleted from the Bill.

Conclusion

The Bill contemplates the protection of individual right and /or collective rights of citizens in line with the spirit of Article 14 of the Constitution and overriding public interest reflected under Clause 5(4) of the Bill. The Court considered whether the Bill contains an inconsistency with Article 3 read with Article 4(d) which would warrant the application of Article 83 requiring a referendum. Article 3 is a safeguard which prevents an alienation of the elements that constitute sovereignty of the people and its exercise as provided in Article 4. The Court makes the following determination in terms of Article 123(2)(b) of the Constitution:-

- (i) Clause 5(1)(j) violates Articles 3, 4, 12(1) and 14A(2) of the Constitution and may only be passed by the special majority required under the provisions of Article 84(2) of the Constitution
- (ii) Clause 9(2)(a) violates Articles 3, 4, 12(1) and 14 of the Constitution and may only be passed by the special majority required under the provisions of Article 84(2) of the Constitution
- (iii) Clause 19 violates Articles 3,4, 12(1) and 55 of the Constitution and may only be passed by the special majority required under the provisions of Article 84(2) of the Constitution

- (iv) Clauses 43(j) and 43(k) violate Articles 3, 4 and 14A of the Constitution and may only be passed by the special majority required under the provisions of Article 84(2) of the Constitution

Hence, the Bill in its present form is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the people at a Referendum.

However, if following amendments are made to the aforesaid Clauses, the inconsistency will cease to operate, and the Bill may be passed by a simple majority.

Clause 5(1(j)) – the disclosure of such information would be in contempt of court or **prejudicial to the maintenance of the authority and impartiality of the judiciary.**

Clause 9(2)(a) – the words “member of the public” to be replaced by the word “citizen”.

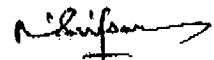
Clause 19 – the words “public officers” to be replaced by the words “public servants”.

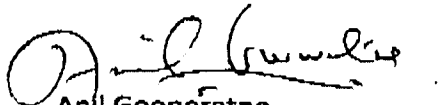
Clause 43 (j) – “higher educational institutions including private universities and professional institutions, **which are established, recognized or licensed under any written law or funded, wholly or partly, by the State and/or a public corporation or any statutory body established or created by a Statute of a Provincial Council.**

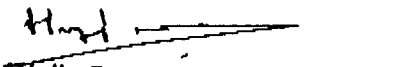
Clause 43(k) “private educational institutions including institutions offering vocational or technical education, **which are established, recognized or licensed under any written law or funded, wholly or partly, by the State and/or a public corporation or any statutory body established or created by a Statute of a Provincial Council.**

The Court wishes to place on record its deep appreciation of the valuable assistance given by the learned Counsel for the Petitioners, the President’s Counsel for the Intervent-Petitioners, the Petitioner in S.C. S.D. 22/2016, the learned Counsel for the Intervent

Petitioners and the learned Deputy Solicitor General who appeared on behalf of the Attorney General.


K. Sripavan
Chief Justice


Anil Gooneratne
Judge of the Supreme Court.


Nalin Perera
Judge of the Supreme Court