

A STUDY OF THE PROPOSED 20TH AMENDMENT TO THE CONSTITUTION AND THE DRAFT NATIONAL AUDIT ACT

There is undoubted recognition that an independent and strong Auditor General coupled with a dedicated and committed staff is an absolute necessity to ensure that the public finance is utilized effectively, efficiently, objectively and impartially by the institutions of government. It is also recognized widely that corruption, abuse of power, bribery, treating, mismanagement etc have been undermining good governance and the rule of law as well as the economic well being of the country.

One encounters utter waste in the public spending and realizes that the wielders of power are not effectively held responsible and answerable for their actions and inactions, though the national legislature is theoretically considered to have the duty of holding those responsible to account for their actions or inactions. It is true that Parliament is supposed to have full control over the public finance and that the Executive authorities, including the President and Cabinet of Ministers, are responsible for the due discharge of their powers and functions to the Parliament.

The Auditor General

The powers, functions and duties of the AG have not been elaborately spelt out in any law passed by Parliament. The AG's position and role are traceable to a few provisions of the Constitution. This has not made the position of the AG strong and stable when it comes to effectively discharging his role. It also becomes necessary to make the role and functions of the AG very clear and what his powers and duties are with regard to the disbursement of public finance in the country.

The proposed Constitutional Amendment gives greater independence and security of tenure to the AG as well as makes the appointment of the AG beyond the exclusive discretion of the President. While it elaborately gives the functions and powers of the AG, it also provides for the establishment of a Constitutional Audit Council, National

Audit Service Commission, National Audit Office and National Audit Service. One of the significant features of the Amendment is that it provides for the audit of the National Audit Office itself to be carried out through an independent auditor.

The AG is appointed by the President, but his nomination has to get the approval of the Constitutional Audit Council. He is to hold office during good behavior and subject to his attaining the age of sixty five years or his serving for a term of ten years whichever occurs first. The salary of the AG is a direct charge on the Consolidated Fund and it cannot be reduced once he is appointed. The AG is precluded from accepting any other office (whether paid or not). He is not permitted to hold any public office upon his retirement.

He is empowered to audit all government ministries and departments as well as other semi governmental institutions. The Amendment also authorizes the AG to audit, at his discretion, any person or body of persons in order to assist Parliament in the exercise of its control over public finance. The AG is given authority to have access to any books, records, returns and other documents, to summon any person for obtaining information and explanations, to have access to stores and other property and to exercise any other necessary powers. The AG is also constitutionally authorized to obtain the assistance of any technical, professional or scientific institution in the examination of any technical, professional or scientific problem relevant to any audit being carried out by him.

The draft National Audit Act gives the scope of audit and makes it clear that the AG could carry out financial audit, audit of management affairs, performance audit, value-for-money audit, environment related audit etc. The Act lists the functions and powers of the AG in detail. The powers include the power of disallowing value of every transaction, financial or otherwise, which has been made contrary to any law, and has caused deficiency or loss due to the fraud, negligence, corruption or misconduct of those involved in the transaction. He could recommend surcharges against any expenditure which is contrary to law to be imposed on the person who authorized such unlawful payment. Similarly he is empowered to recommend surcharge against any person due to

whose negligence or misconduct any deficiency or loss occurred. These recommendations are to be made to the appropriate Chief Accounting Officer (CAO) of the audited entity.

The AG is mandated to submit reports to Parliament on the performance of his functions. He has the duty to submit detailed audit report to audited entities. The AG is also authorized to release any audit report to the media if he considers such action would be in the public interest or in the interest of the national economy. He is also given the authority to withhold audit information from Parliament on grounds of national interest or national economy.

The Constitutional Audit Council

The Constitutional Audit Council consisting of seven Members of Parliament is empowered, among others, to review the annual estimates prepared by the National Audit Service Commission for the National Audit Office, submit the reviewed estimates and its recommendations to the Minister and Parliament, and to act as the appellate authority with regard to any appeal made against a surcharge imposed by a CAO of an audited entity.

The National Audit Service Commission

The National Audit Service Commission consists of the AG and four other persons who are appointed by the President on the recommendation of the Constitutional Audit Council with a retired Judge of the Supreme Court or Court of Appeal as its chairman. The Commission has the duty of preparing annual estimates for the National Audit Office and forwarding the estimates to the Constitutional Audit Council for review and recommendation. In addition, the Commission is importantly vested with the power of appointment, promotion, remuneration, transfer, dismissal and disciplinary control of the members of the staff of the National Audit Service. The National Audit Office consists of the AG and a staff comprising the members belonging to the National Audit Service.

General

The proposed Act makes the CAO of every audited entity to be responsible for financial planning, internal controls, maintenance of proper books and accounts, financial management and for providing management information. It casts the responsibility of preparing the annual and other financial statements of an audited entity on the CAO of the entity. The CAO of each Ministry has been required to appoint an internal auditor to such Ministry and to each Department coming under such Ministry. Every other audited entity shall have an internal auditor appointed by the Head of such entity. The proposed Act mandates the establishment of an Audit and Management Committee for every audited entity to undertake the review of operations on a continuing basis.

When the AG recommends to the CAO of the audited entity the imposition of a surcharge against an officer of the entity over an unauthorized transaction, the CAO is mandated to follow 'due process' before arriving at a decision on such recommendation. When he arrives at a decision to impose the surcharge he shall forthwith communicate that decision to the AG and to the officer concerned stating his reasons for making such decision. Any person who is aggrieved by a decision of the CAO to impose surcharge, may make an appeal to the Constitutional Audit Council. The Audit Council has wide powers to deal with appeals against decisions to impose surcharges.

The AG, officers of the National Audit Office and any other person assisting the AG in the discharge of his duties and functions are given immunity from any proceedings, civil or criminal, for any lawful act which is done in good faith or omitted to be done in the normal course of exercising his duties and functions. The Act also protects 'whistle blowers' within any public authority.

Deficiencies in the proposed Constitutional Amendment and draft National Audit Act

When dealing with the institutions which are subject to the audit of AG, there is a glaring omission of the Presidential Secretariat in the listed institutions. There is no reason why the President's Office and Presidential Secretariat should not be referred to expressly in Art. 154(1).

In terms of Art.154 (3) discretion is granted to the AG to audit "any person or body of persons". There is not much guidance as to how his discretion should be exercised in selecting the person or body of persons for subjecting to his audit. This leaves the possibility of the power being used, at the AG's discretion, to audit non-governmental person/individual or body of persons/individuals.

The power of the AG to obtain assistance from any person or institution for any technical, professional or scientific problem relevant to any audit carried out by him is not that salutary. It leaves room for unnecessary lapses. When one compares Art.154 (5) with the present constitutional provision, the existing one presents a better, detailed and structured provision minimizing conflict of interests and abuse. It cannot be at his discretion that he should be authorized to enlist the services of persons or institutions having technical, professional or scientific capacities. There should be a body of qualified personnel in these different areas with expertise to help him conduct functional audits.

The composition of the Constitutional Audit Council, which is restricted to seven Members of Parliament, seems very restrictive and not broad based. It is also necessary to consider whether non-Members of Parliament drawn from professional organizations and private sector institutions be included in the membership of the Council. Given the political affiliations of the members, it is not salutary to confer appellate power to this Council against decisions of CAOs to impose surcharges on his officers on the recommendation of the Auditor General.

Concluding comments

The changes made by the Draft Act represent a major step forward in addressing the institutional and organizational shortcomings of public audit in Sri Lanka. However, public audit is one link in the process of public financial management. Two other important links are the capacity of the audited entities and of Parliamentary oversight.

Ex post Parliamentary control of finance is exercised by the standing Committee on Public Accounts (COPA) and Committee on Public Enterprises (COPE) based on the reports from the Auditor General. COPA/COPE scrutiny is hampered by lack of sufficient technical capacity of its members and the absence of a professional support staff. There is no process to effectively follow up on the AG's findings and recommendations, and COPA/COPE deliberations are not open to the media and public.

The internal financial control framework of the Central Government is contained in the Financial Regulations. The focus is on monitoring spending against the laid down budget, which does not encourage a culture of performance management. Furthermore, Ministry Secretaries, who are the CAOs of their respective Ministries, are vulnerable to Ministerial interference. Internal audit in government is also extremely weak, lacking the requisite resources and skills. Internal financial control is even weaker in Provincial Councils, local authorities and State-Owned Enterprises.

Therefore, it is clear that the reforms to strengthen public audit will have to be accompanied by complementary and concerted action to improve the internal financial management of audited entities and the effectiveness of Parliamentary oversight. In this regard, a promising recent international development has been the increased collaboration between public audit and civil society to increase Government accountability.

International examples have shown that citizen participation can exert a strong positive influence on highlighting mismanagement and corruption and demanding accountability from the Parliament and Government. This is particularly relevant to the Sri Lankan context, where financial accountability exercised by Parliament and the Government is

very weak. On the other hand, working with NGOs may also pose a threat to the AG's neutrality, since most NGOs have their own politico economic objectives.

In this regard, section 3 of the Draft Act already contains a salutary provision which provides that the AG may in his/her discretion inquire into any matter brought to his/her notice by any member of the public and to report thereon to Parliament if deemed necessary. This can be used by citizen groups to initiate public audit investigations.

However, section 6 provides that the AG and every officer or employee assisting him/her shall be required to agree to maintain secrecy with respect to any information received in the course of the audit except to give effect to the provisions of the Constitution or any other law. This prevents the kind of closer interaction between the SAI and civil society as in some other countries.

The major impediment in Sri Lanka in the way of civil society organizations exerting financial accountability by carrying out independent audits of public works is the absence of a freedom of information law. As a result, disclosure is very much the exception while secrecy is the norm, which greatly reduces the ability of civil society to perform this kind of function.

Finally, as mentioned previously, the AG reports to Parliament and the audited entities and not directly to the general public. Therefore, in the past there have been delays in obtaining reports by the public. Furthermore, the sittings of the Parliamentary Committees that receive the AG's reports – COPA and COPE – are closed to the public. As a result, the ability of civil society to bring pressure on these two key Committees to demand follow-up actions to audit findings is severely limited.

Therefore, it is suggested that two key requirements to complement the new legislation will be, to enact a freedom of information law and to open the sittings of COPA/COPE to the public and media.