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பாராளுமன்றம்
PARLIAMENT

2024 ජූනි 07වන සිකුරාදා
2024 ஜூன் 07, வெள்ளிக்கிழமை
Friday, 07th June, 2024

පූ.භා. 9.30ට පාර්ලිමේන්තුව රැස් විය.
කථානායකතුමා [ගරු මහින්ද යාපා අබේවර්ධන මහතා] මූලාසනාරූඪ විය.
பாராளுமன்றம் மு.ப. 9.30 மணிக்குக் கூடியது.
சபாநாயகர் அவர்கள் [மாண்புமிகு மஹிந்த யாப்பா அபேவர்தன] தலைமை வகித்தார்கள்.
The Parliament met at 9.30 a.m.,
MR. SPEAKER [THE HON. MAHINDA YAPA ABEYWARDANA] in the Chair.

නිවේදන
அறிவிப்புகள்
ANNOUNCEMENTS

ස්ත්‍රී පුරුෂ සමාජභාවීය සමානාත්මතාවය පනත් කෙටුම්පත: ශ්‍රේෂ්ඨාධිකරණයේ තීරණය
பால்நிலைசார் சமத்துவம் சட்டமூலம்: உயர் நீதிமன்றத் தீர்ப்பு
GENDER EQUALITY BILL: DETERMINATION OF THE SUPREME COURT

ගරු කථානායකතුමා
(மாண்புமிகு சபாநாயகர் அவர்கள்)
(The Hon. Speaker)

I wish to inform Parliament that I have received the Determination of the Supreme Court in respect of the Bill titled "Gender Equality", which was challenged in the Supreme Court in terms of Article 121(1) of the Constitution.

In the said Determination, the Supreme Court has determined the constitutionality of the Bill as follows:-

- The Supreme Court held that the promulgation of this Bill is inconsistent with Article 12 of the Constitution. The Supreme Court has also held that the objects of this Bill in Clause 2 read with Clause 3 and Clause 4 would be inconsistent with Articles 9, 10, 12, 14(1)(e) and 27(1)(g) of the Constitution. The Supreme Court has also held that Clauses 4, 7, 17, 18, 25, 26 and 27 are inconsistent with Articles 9, 10, 12(1), 14(1)(e), 14(1)(f), 27(1)(g) of the Constitution. The Supreme Court has held that power being vested in the Council set up under Clauses 5 and 6 read with Clause 7 are inconsistent with Articles 9, 10, 12(1), 14(1)(e), 14(1)(f) and 27(1)(g) of the Constitution. Therefore, Clauses 17 and 18 of the Bill, which set out the requirement of the office of "Gender Focal Point", and the provisions in Clauses 8 to 16 and 19 to 24 of the Bill, which are incidental provisions for the existence, management and exercise of powers and duties of the Council are also inconsistent with Articles 9, 10, 12(1), 14(1)(e), 14(1)(f) and 27(1)(g) of the Constitution.
- The objects of the Bill are inconsistent with Articles 3, 4(d), 9 and 10 of the Constitution and they are inseparable from the other provisions of the Bill. Therefore, the Supreme Court has determined that the Bill, as a whole, is inconsistent with Articles 3, 4(d), 9 and 10 of the Constitution.
- The Supreme Court has determined that the Bill, as a whole, cannot be enacted into law, unless the appropriate procedure laid down in Article 83 and/ or Article 84 read with Article 80 of the Constitution, which requires that the number of votes cast in favour thereof must amount to not less than two-thirds of the whole number of Members of Parliament (including those not present), is approved by the people at a Referendum.

I order that the Determination of the Supreme Court be printed in the Official Report of today's Proceedings of the House.

ශ්‍රේෂ්ඨාධිකරණයේ තීරණය:
உயர் நீதிமன்றத் தீர்ப்பு:
Determination of The Supreme Court:

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

In the matter of an application in terms of Article 121 read with Article 120, of the Constitution to determine whether the Bill titled "Gender Equality Act No. of 2024" or any part thereof is inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC SD No. 54/2024	Petitioners:	1. All Ceylon Buddhist Congress, No. 380, Bauddhaloka Mawatha, Colombo 07.
		2. Chandra Nimal Wakishta President, All Ceylon Buddhist Congress, No. 380, Bauddhaloka Mawatha, Colombo 07.
	Counsel:	Manohara R. De Silva PC, with Harithriya Kumarage AAL, instructed by Anusha N. Perusinghe AAL.
	Intervenient-Petitioners:	1. Shevindri Manuel No. 43/5, Bernadette Mawatha, Rilaulla, Kandana.
		2. Rossana Gail Flamer Caldera No. 119/16, Model Farm Road, Colombo 08.
	Counsel:	Thishya Weragoda AAL, Stefanie Perera AAL, Shevindri Samuel AAL and Rosanna Flamer-Caldera AAL instructed by Niluka Dissanayake AAL.

	Respondent:	Hon. Attorney General, Attorney General's Department, Colombo 12.
	Counsel:	Kanishka De Silva Balapatabendi DSG, with Abigel Jayakody SC.
SC SD No. 55/2024	Petitioners:	1. Ven. Bengamuwe Nalaka Anu-Nayaka Thero, Sri Pagngnananda Darmayathanaya, Station Road, Kelaniya. 2. Ven. Agulugalle Siri Jinananda Thero, Sri Pagngnananda Darmayathanaya, Station Road, Kelaniya. 3. Ven. Prof. Ittademaliya Indrasara, Sri Sammbuddaloka Viharana, Lotus Road, Colombo 01. 4. Ven. Prof. Konngassthenne Ananda, Sri Sumana Maha Pirivena, Mudduwa, Rathnapura.
	Counsel:	Canishka G. Witharana AAL with Sawani Rajakaruna AAL.
	Respondent:	Hon. Attorney General, Attorney General's Department, Colombo 12.
	Counsel:	Kanishka De Silva Balapatabendi DSG, with Abigel Jayakody SC.

BEFORE: **P. PADMAN SURASENA, J.**
YASANTHA KODAGODA, PC, J.
KUMUDINI WICKREMASINGHE, J.

P. PADMAN SURASENA, J.

The Bill titled "Gender Equality Act, No. of 2024" (hereinafter sometimes referred to as the Bill) was published in the Gazette on 10th April 2024 and was placed on the Order Paper of Parliament on 07th May 2024.

The above-mentioned Petitioners have filed two petitions [SC (SD) No. 54/ 2024 on 20th May 2024 and SC (SD) No. 55/ 2024 on 21st May 2024] invoking the jurisdiction vested in this Court by virtue of Article 120 read with Article 121 (1) of the Constitution, in respect of the aforementioned Bill. The Petitioners have prayed for a determination from this Court under Article 123 of the Constitution.

Upon receipt of the said petitions, Court issued notices on the Hon. Attorney General as required by Article 134 (1) of the Constitution.

It was thereafter that the Court assembled for the hearing of this Petition on 22nd May 2024. Court on that date, heard the submissions of the learned President's Counsels for the Petitioners in SC (SD) No. 54/ 2024, the submissions of the learned Counsel for the Petitioners in SC (SD) No. 55/ 2024 and the submissions of the learned Deputy Solicitor General for the Attorney General and concluded the hearing. At the conclusion of the hearing, the Court directed both parties to file their respective written submissions by 12 noon on 27-05-2024 and informed the parties that the determination will be communicated to His Excellency the President and to the Hon. Speaker of Parliament.

Thereafter, the Attorney at law for the Intervenient-Petitioners had filed the Motion dated 28-05-2024 in this court on 28-05-2024 along with the Petition of the Intervenient-Petitioners who had sought permission to intervene into the case SC (SD) No. 54/ 2024. The 1st Intervenient Petitioner has stated that she works for a social justice organisation named 'iProbono' aimed at advocating for policies that promote social equity and support vulnerable communities within the South-Asian Region. The 2nd Intervenient Petitioner has stated that she is an Attorney-at-Law and the founder and Executive Director of a non-profit organisation named 'EQUAL GROUND' which advocates for the rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer community in Sri Lanka. In their Petition, they have sought permission to make submissions before Court through their Counsel, in support of the Bill under consideration and prayed for a determination from this Court that none of the clauses of the Bill is inconsistent with any of the Articles referred to in Article 83 of the Constitution.

It is therefore the position of the Intervenient Petitioners that the Bill neither needs to be submitted for the approval of the people at a referendum nor needs to be passed by a Special Majority in Parliament for it to become law.

As the Intervenient-Petitioners, in their motion dated 28-05-2024, had stated that the Court had concluded the hearing of this Petition before the time permitted for any person to file petitions in this court with regard to this bill in terms of Article 121 of the Constitution, the Court reassembled on 30th May 2024 to hear the Intervenient-Petitioners in that regard.

When the Court reassembled on 30th May 2024 the learned President's Counsel for the Petitioners in SC (SD) No. 54/ 2024, at the very outset, objected to any move by Court to entertain the Petition filed by the Intervenient-Petitioners at that stage. Consequent to the said objection the court proceeded to hear the submissions of the learned President's Counsel for the Petitioners in SC (SD) No. 54/ 2024, the submissions of the learned Counsel for the Intervenient-Petitioners and also the submissions of the learned Deputy Solicitor General in that regard.

The learned Counsel for the Intervenient-Petitioners in his submissions sought to argue that the first reading of this Bill had taken place in Parliament on 09-05-2024 and hence the time period of 14 days referred to in Article 121(1) of the Constitution within which any person is entitled to file petition invoking its jurisdiction regarding this Bill started running from the date of its first reading which took place on 09-05-2024. The learned Counsel for the Intervenient-Petitioners relied on the Order of this Court in SC/ SD 70/2023, 78/2023, 82/2023, 86/2023, 102/2023, 108/2023, 110/2023 113/2023, 114/2023 and 121/2023.[1] The submission made by the learned Counsel for the Intervenient-Petitioners was that we should follow the above decision, as this court in that decision had held that the time period of 14 days must start running from the day that the first reading of the Bill took place in Parliament.

The learned Deputy Solicitor General in this regard submitted that the time period allowed for filing of petitions under Article 121(1) must start running from the date of the Bill being placed on the Order Paper of Parliament and not from the date on which its first reading takes place in Parliament. We observe that it is the same submission that was made by the learned President's Counsel for the Petitioners in this case.

[1] Decided on 19th October 2023.

We have gone through the decision dated 19th October 2023 in the afore stated Special Determination relied upon by the learned Counsel for the Intervenient-Petitioners. However, we observe that in the said case, this Court has clearly recorded as follows,

> *The learned Additional Solicitor General handed over to this Court a copy of the announcement made by the Hon Speaker in Parliament prior to 3rd October 2023. The learned Additional Solicitor General handed over to this Court a copy of the announcement made by the Hon Speaker in Parliament on 18th October 2023 wherein, referring to a letter dated 3rd October 2023 issued by the Secretary to the Leader of the House, the Hon Speaker had stated that a decision has been taken not to present to Parliament the said Bill on 3rd October 2023 and therefore, the said Bill is not on the Order Paper of the Parliament.*
>
> *In the above circumstances, we are of the view that this Court does not have the jurisdiction to determine the Constitutionality of the said Bill in terms of Article 121(3) of the Constitution, as the said Bill has not been placed on the Order Paper of the Parliament. Accordingly, proceedings in all ten petitions are terminated.*
>
> *However, a citizen shall have the right to invoke the jurisdiction of this Court in terms of Article 121(1) of the Constitution in respect of the said Bill published in the Gazette of 15th September 2023, in the event of the said Bill being placed on the Order Paper on a future date.*

What indeed had happened in that case is that the Bill was not placed in the Order Paper of Parliament on 3rd October 2023. This had happened subsequent to a decision taken not to present that Bill to the Parliament on that day. There is no such decision adverted to by the learned Counsel for the Intervenient-Petitioners in the instant case. Thus, that case can be easily distinguished from the factual position of the instant case.

We are satisfied that the situation in the instant case is not one that had occurred in the afore-stated Special Determination relied upon by the learned Counsel for the Intervenient-Petitioners. We are also unable to accept the argument of the learned Counsel for the Intervenient-Petitioners that this court in that case had held that the time period of 14 days must start running from the day that the first reading of the Bill took place in Parliament.

Let us at this stage, reproduce here Article 121 of the Constitution which is as follows:

Article 121

> *(1) The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed,* ***within fourteen days of the Bill being placed on the Order Paper of the Parliament*** *and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "citizen" includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.*
>
> *(2) Where the jurisdiction of the Supreme Court has been so invoked no proceedings shall be had in Parliament in relation to such Bill until the determination of the Supreme Court has been made, or the expiration of a period of three weeks from the date of such reference or petition, whichever occurs first.*
>
> *(3) The Supreme Court shall make and communicate its determination to the President and to the Speaker within three weeks of the making of the reference or the filing of the petition, as the case may be.* [emphasis added]

It has been clearly stated in Article 121(1) that the time period of 14 days referred to therein, shall commence to run from the date on which the Bill is placed on the Order Paper of Parliament. In the instant case, there is no dispute that this Bill was placed on the Order Paper of the Parliament on 07-05-2024. Even the learned Counsel for the Intervenient-Petitioners did not seek to challenge that aspect. His submission was that the first reading of this Bill took place in Parliament on 09-05-2024 and hence the said time period of 14 days shall commence to run from 09-05-2024. The time limits set out in Article 121(1), Article 121(2) and Article 121(3) are all time limits set for different steps of the same process. This Court in several previous determinations has held, that the compliance of the time limit set out in Article 121(1) is mandatory.

On the other hand, if we are to accept the argument of the learned Counsel for the Intervenient-Petitioners we have to then substitute the phrase 'the Bill being placed on the Order Paper of the Parliament' with the phrase 'the first reading of the Bill being taken place in the parliament'. We are unable to accept this argument.

If this argument is to be accepted then there would be a situation where this Court has to accept Petitions challenging Bills even after this Court has dispatched its determination to the President and to the Speaker of Parliament. That may happen in a scenario where there is a considerable gap of time between the Bill being placed in the Order Paper of Parliament and the date on which the first reading of that Bill takes place in Parliament. Another reason why we must reject the above argument is because of the strict time limits placed by both Article 121(2) and (3) of the Constitution. Acceptance of the argument advanced by the learned Counsel for the Intervenient-Petitioners would definitely frustrate the strict maintenance of time limits placed by both Article 121(2) and (3) of the Constitution.

It is mandatory for this Court to communicate this determination to the President and the Speaker within three weeks of filing the Petition. This means that there is no legal provision enabling this court to refrain from communicating its determination to the President and to the Speaker of Parliament within the 3 weeks of filing the relevant Petition merely because the first reading of the bill takes place in Parliament on a later date.

It is also relevant to further mention, in light of the above, that the legal maxim *'What cannot be done directly, cannot be done indirectly'* would operate in this instance. As opined by Maxwell,

> *"To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined: quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud."* [2]

The two-week time limit imposed by Article 121(1) prevents Petitions being filed on any date beyond that time limit which is clearly stated to run upon the Bill being placed on the Order Paper of the Parliament. To allow for an interpretation that it should be read as being the day on which the first reading of the Bill under consideration takes place, would potentially have the effect of extending the time limit set by Article 121(1) beyond the two weeks stipulated. Thus, the effect of such an interpretation would be an extension of the said time limit in an indirect or circuitous manner. Such an interpretation would therefore defeat the object of Article 121(1) of the Constitution.

[2] Maxwell, *Interpretation of Statutes*, 10th Edn, p 137.

Therefore, we are unable to accept the submission made by the learned Counsel for the Intervenient-Petitioners that the time permitted for any citizen to file Petition in respect of a Bill must start running from the date of the first reading.

For the above reasons, we hold that the time period allowed for filing of petitions under Article 121(1) must start running from the date of the Bill being placed on the Order Paper of Parliament and not from the date on which its first reading takes place in Parliament. Therefore, we hold that the Intervenient-Petitioners have failed to file their Petition within the time limit of two weeks set by Article 121(1) of the Constitution.

Let us now commence examining the Clauses of the Bill. The Bill comprises of 30 clauses and the Petitioners, in both these Petitions, have challenged the Bill as a whole. The Bill consists of the following clauses:

- Clause 1 – Short title and date of operation
- Clause 2 – Objects of the Act
- Clause 3 – Protection and advancement of gender equality
- Clause 4 – Powers of the Minister in ensuring implementation of this Act
- Clause 5 – Establishment of the Gender Equality Council
- Clause 6 – Composition of the Council
- Clause 7 – Powers, duties and functions of the Council
- Clause 8 – Term of Office
- Clause 9 – Chairperson of the Council
- Clause 10 – Disqualifications for being appointed or continuing as a member of the Council
- Clause 11 – Resignation and removal of members
- Clause 12 – Quorum and meetings of the Council
- Clause 13 – Remuneration of members
- Clause 14 – Members to disclose any interest
- Clause 15 – Proceeding, act or decision not invalidated by reason of a vacancy
- Clause 16 – Staff of the Council
- Clause 17 – Gender Focal Point
- Clause 18 – Functions of the Gender Focal Point
- Clause 19 – Fund of the Council
- Clause 20 – Council to maintain accounts
- Clause 21 – Financial year and audit of accounts
- Clause 22 – Annual Report
- Clause 23 – Declaration of secrecy
- Clause 24 – Delegation of powers of the Council
- Clause 25 – Offences
- Clause 26 – Offences by bodies of persons
- Clause 27 – Regulations
- Clause 28 – Act to prevail in case of inconsistency
- Clause 29 – Interpretation
- Clause 30 – Sinhala text to prevail in case of inconsistency.

The Petitioners have prayed for a determination that some of the provisions in the afore-stated Clauses of the Bill and/or the Bill in its totality is inconsistent with Articles 3, 4, 9, 10, 12(1) and (2), 14(1)(e), (f) and (g), 27 and 28 of the Constitution and therefore cannot be enacted into law, unless the appropriate procedure laid down in Articles 83 and/or Article 84 as read with Article 80 of the Constitution which requires that the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members of Parliament (including those not present), and is approved by the People at a Referendum.

Let us now proceed to examine whether this Bill or any provision thereof is inconsistent with any provision in the Constitution. At the outset, I note that this is not a Bill which proposes to amend an existing legislation. It is altogether a new Bill to create a new law. The purpose as to why it is sought to be passed in to a law can be gathered from its preamble.

On the question whether the Preamble and the long title of a statute can be made use of, to gather its purpose, Maxwell states: *"The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, as key to the understanding of it. Besides, as it usually states or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity..."*. [3]

[3] Maxwell, *Interpretation of Statutes*, 9th Edn, p 46; as quoted in Bindra, *Interpretation of Statutes*, 13th Edn. P 256.

In Sunpac Engineers (Pvt) Ltd. and Another Vs. DFCC Bank PLC and Others,[4] the Supreme Court, citing Maxwell[5], stated that the *"**Long title** is an important part of the Act and can be used as an aid to the construction of the Act."*

Lord Norman in Attorney General Vs. H. R. H. Prince Ernest Augustus of Hanover,[6] stated: *"When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions..."*.[7]

Thus, it is in that light that we must now look at the long title and the Preamble of this Bill. Let us first reproduce below, the long title of this Bill.

Long Title

AN ACT TO MAKE PROVISIONS FOR THE FORMULATION AND IMPLEMENTATION OF THE NATIONAL POLICY ON GENDER EQUALITY AND EMPOWERMENT OF WOMEN; TO APPOINT OR DESIGNATE GENDER FOCAL POINT, TO ENSURE GENDER EQUALITY OF PERSONS OF DIFFERENT GENDER IDENTITIES TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

As can be seen from the long Title mentioned above, there are four items that could be identified as the objectives of passing this Bill in to law. Those four objectives are: firstly, the formulation and implementation of the National Policy on Gender Equality and Empowerment of Women; secondly, to appoint or designate Gender Focal Point; thirdly, to ensure Gender Equality of persons of different gender identities; fourthly, to provide for matters connected therewith or incidental thereto.

Out of the above four objectives we can identify the 1st and the 3rd objectives as primary objectives of this Bill. This is because, the 2nd objective is designed merely to achieve the 1st and 3rd objectives mentioned above and the 4th objective is merely to make provisions incidental or connected to the afore-said primary objectives.

[4] SC/Appeal/11/2021, SC Minutes of 13.11.2023 at 19-20.
[5] Maxwell, *Interpretation of Statutes*, (12th Edn) 4.
[6] [1957] AC 436.
[7] At page 467.

Let us now turn to the first of those two primary objectives of the Bill as found in its long title i.e., the formulation and implementation of the National Policy on Gender Equality and Empowerment of Women. The concern raised by the Petitioners in relation to **the 'National Policy on Gender Equality and Empowerment of Women'** found in several clauses of the Bill namely: in the Long title; in the 2nd Paragraph of the Preamble; in Clause 4(e); in Clause 7(a); in Clause 7(h); in Clause 7 (i) is arbitrary in nature. What is the **'National Policy on Gender Equality and Empowerment of Women'** referred to in this Bill? At the least, it is hard to find out. It is not specific as there is no reference in the Bill, to any particular static Policy or any document containing such Policy. Nor has the Bill incorporated such Policy as a schedule to the Bill.

In the course of the hearing and thereafter with the written submissions, the Petitioners have submitted to Court, a copy of a document which the official website of the Ministry of Women, Child Affairs and Social Empowerment had claimed to be the 'National Policy on Gender Equality and Women's Empowerment'. The Petitioners had downloaded it from the official website of the Ministry of Women, Child Affairs and Social Empowerment.

Upon the afore-said document being submitted to Court by the Petitioners, the learned Deputy Solicitor General too thereafter submitted a document in Sinhala language which she claims to be the 'National Policy on Gender Equality and Women's Empowerment'. I observe that the contents of the two documents: one submitted by the Petitioners; the other submitted by the learned Deputy Solicitor General; differ in certain aspects.

This Court in the Special Determination of the Bill titled 'The Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill,[8] held as follows:-

"Clause 6(3) states that the rules of prayer centre in force on the day preceding the date of the commencement of this Act shall be deemed to be the rules of the Corporation made under this Act. It is submitted that by virtue of this provision these rules acquire the force of law.
Since the rules now in force do not form part of the bill, it is submitted that there is an abdication of legislative power by Parliament, which is violative of Article 76(1) of the Constitution.

[8] S. C. S. D. 02/2001 published in the Decisions of the Supreme Court of the Republic of Sri Lanka for the Years 1991-2003 Vol VII at page 239/244.

We uphold the submission of the Petitioner that rules of the centre which do not form part of the Bill cannot be given the force of law in the manner it is sought to be done by clause 6(3). That, Parliament cannot give the force of law to any rules that have not been placed before it. This provision would therefore be inconsistent with Article 76(1) of the Constitution".

The case of Joseph Perera alias Bruten Perera Vs. The Attorney General and others[9] lays down the trite law that finds vagueness or arbitrary conduct of the state, a violation of Article 12 of the Constitution. The relevant extract is reproduced as follows:

*"Regulation 28 violates Article 12 of the Constitution. The Article ensures equality before the law and strikes at discriminatory State action. Where the state exercises any power, statutory or otherwise it must not discriminate unfairly between one person and another. **If the power conferred by any regulation on any authority of the State is vague and unconfined and no standard or principles are laid down by the regulations to guid and control the exercise of such power, the regulation would be violative of the equality provision because it would permit arbitrary and capricious exercise of power which is the antithesis of equality before law."*** *[emphasis added]*

The Petitioners in SC (SD) 54/2024 have cited the Special Determination of this Court in relation to 'The Energy Supply (Special Provisions) Bill'[10] and 'The Electricity Reform Bill'[11] which will be pertinent in the instant determination. The following two paragraphs from the above Special Determinations of this Court would be relevant to the above discussion. They are as follows:

"Clause 5(g) empowers the Committee to "supervise and regulate" the activities of persons engaged in certain lines of business. They are not Public Corporations or statutory bodies, but persons engaged in private business. It would be inconsistent with Article 12(1) of the Constitution to vest power in the Committee to supervise such persons without laying down adequate guidelines for its exercise in the law itself."[12]

[9] (1992) 1SLR 199
[10] S. C. S. D. 01/2002
[11] S. C. S. D. 09/2002
[12] S. C. S. D. 01/2002 published in the Decisions of the Supreme Court on Parliamentary Bills for the Years 1991-2003 Vol VII at page 262.

"We are of the view that those provisions entail a situation in which the security of tenure of employees is adversely affected. There are no guidelines or a scheme with regard to the selection of the employees who are not to be offered employment. This provision, in our view, is arbitrary and offends Article 12(1) of the Constitution."[13]

As has already been adverted to above, the Bill in the long title, in the 2nd paragraph of the Preamble as well as in Clauses 4(e), 7(a), 7(h), and 7(i) has referred to a policy identified as 'the National Policy on Gender Equality and Women's Empowerment'. However, the said National Policy on Gender Equality and Women's Empowerment is neither a part of the Bill nor identifies the said policy with certainty. Therefore, the said 'National Policy on Gender Equality and Women's Empowerment' cannot be granted a force of law as stated by this Court in the afore-stated decisions. Thus, those provisions in the Bill become **vague** and therefore become **arbitrary** and hence would deny the equal protection of law guaranteed to every person by Article 12 of the Constitution thereby becoming inconsistent with Article 12 of the Constitution. Similarly, those provisions in the Bill would also be inconsistent with Article 76 of the Constitution.

I will discuss the other main objective namely, the objective in the long title of the Bill to ensure Gender Equality of persons of different gender identities in due course in this determination.

Let us next look at the Preamble of this Bill. It is reproduced below.

Preamble

WHEREAS the Constitution of the Democratic Socialist Republic of Sri Lanka recognizes that all persons are equal before the law and entitled to equal protection of the law and are entitled to all rights and freedoms without discrimination based on race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

[13] S. C. S. D. 09/2002 published in the Decisions of the Supreme Court on Parliamentary Bills for the Years 1991-2003 Vol VII at page 293

AND WHEREAS the State ensures equal opportunity to all persons irrespective of differences in sex or ***gender identity*** *in the* ***National Policy on Gender Equality and Empowerment of Women****:*

WHEREAS the ***Constitution*** *of the Democratic Socialist Republic of Sri Lanka also* ***recognizes*** *special provisions being made by law, subordinate legislation or executive action for the advancement of women* ***in order to eliminate gender disparity****:*

NOW THEREFORE BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:- [emphasis added]

There are four paragraphs in the Preamble. Out of those four, only the first three paragraphs shed light on the purpose which this Bill plans to achieve. I note that the 1st paragraph is a mere reproduction of the wordings in Article 12(2) of the Constitution and it does not state what the Bill proposes to achieve.

According to the 2nd paragraph of the Preamble, the Bill focuses on **gender identity** and **gender equality**. Although the 2nd paragraph mentions about empowerment of women, I see that it is not one of the objects of this Bill. This is because nothing about empowerment of women is mentioned under Clause 2 of the Bill which has set out the objects of this Bill.

Therefore, I am unable to accept the empowerment of women as one of the objects of this Bill. Thus, the only general object of the Bill according to the Preamble and Clause 2 of the Bill is primarily to identify a concept described as '*gender identity*' and afford it equality through a secondary concept identified as *'gender equality.'*

Gender Identity

The Bill has defined the concept '*gender identity*' in Clause 29 of the Bill. It is as follows:

> *"gender identity" means the cultural, economic, social and political characteristics, role and opportunities through which women, men and others are socially constructed and valued.*

Let us digress a bit at this stage to Article 12 of the Constitution. It is reproduced below.

> *(1) All persons are equal before the law and are entitled to the equal protection of the law.*
>
> *(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:*
>
> *Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any Public Corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office:*
>
> *Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.*
>
> *(3) No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.*
>
> *(4) Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.*

Article 12(1) neither identifies nor distinguishes different categories of persons. It applies to all human beings across the board, thereby giving equal protection of law to every one of them.

In the course of the hearing, it was common ground between the learned President's Counsel for the Petitioners[14] and the learned Deputy Solicitor General that the word '**sex**' appearing in Article 12(2) of the Constitution and the word '**gender**' appearing in many places in the Bill are not the same. Mr. Canishka Witharana appearing for the Petitioners in SC SD 55/2024, relied on the definitions of those two words contained in Merriam-Webster Online Dictionary and Thesaurus to show this difference. It is worthwhile reproducing those definitions from the said source. The definition for 'sex' is given below.

> ***Sex*** *- either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs or structures.*[15]

The learned Deputy Solicitor General similarly cited definition for 'sex' from Black's Law Dictionary (2nd Edn).

> ***Sex*** *– 'The distinction between male and female; or the property or character by which an animal is male or female'.*[16]

Thus, the above definitions provided by both the Petitioners as well as the learned Deputy Solicitor General convince us that any person's sex has to be either male or female and not any other. Moreover, since the definition refers to the reproductive organs and structures as a basis of distinction, I am also convinced that this categorization of persons is based upon a biological criterion.

On the other hand, the phrase ***gender identity*** according to Marriam-Webster Online Dictionary refers to a person's internal sense of being male, female, some combination of male and female, or neither male nor female. The same source has expressed the view that ***gender expression*** refers to the physical and behavioural manifestations of one's **gender identity**.

The learned Deputy Solicitor General produced a definition for 'gender' from Black's Law Dictionary (2nd Edn) as given below.

> ***Gender*** *– 'Defined difference between men and women based on culturally and socially constructed mores, politics, and affairs. Time and location give rise to a variety of local definitions. Contrasts to what is defined as the biological sex of a living creature'.*[17]

Therefore, I am also convinced that the phrase ***gender identity*** is a category different from the categories of male or female. Therefore, I am also convinced that there can be only two components under the term '**sex**' . Those components are firstly the category of male and secondly the category of female. I, therefore, hold that ***gender identity*** is a phrase that denotes a distinct standalone category that is different to the category identified as sex in Article 12(2) of the Constitution.

Let us now turn to Article 12(2) of the Constitution. Article 12(2) has not recognized a concept or category called ***gender*** or ***gender identity***. We were unable to locate, nor did the learned Deputy Solicitor General pointed out to any provision in the Constitution which has recognized or referred to ***gender identity*** as a category of persons in addition to males or females. Indeed, the 1st paragraph of the Preamble of the Bill also seems to have accepted the fact that the Constitution has not recognized a concept or category called ***gender*** or ***gender identity*** as it has deliberately excluded such category from the list of categories which it states the Constitution has recognized. Therefore, I hold that the ***gender identity*** is not something which the Constitution of this country has recognised.

The 3rd paragraph of the Preamble of the Bill, states thus: *WHEREAS the* ***Constitution*** *of the Democratic Socialist Republic of Sri Lanka also* ***recognizes*** *special provisions being made by law, subordinate legislation or executive action for the advancement of women* ***in order to eliminate gender disparity*** . This is the same phraseology that is found in Article 12(4) of the Constitution. Therefore, it is clear to us, as manifested from paragraph 3 of the Preamble of the Bill (as set out above) that the power to promulgate the instant Bill has been derived from the provision in Article 12(4) of the Constitution.

I, however, find that Article 12(4) of the Constitution has not recognized such category therein as *'**gender**.'* Thus, the paragraph 3 of the Preamble of the Bill would be inconsistent with Article 12(4) of the Constitution. Article 12(1) grants equal protection of law to all persons irrespective of their sex. Therefore, making a law affording certain rights or privileges only to some persons would be violative of Article 12(1). It is in that light that I see that Article 12(4) of the Constitution operates as a proviso to Article 12(1). Therefore, making a law affording certain rights or privileges only to some persons other than for the purpose set out in Article 12(4) would violate the Constitution.

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[14] Learned Counsel for the Petitioners in SC SD 55/2024 associated himself with the submissions made by the learned President's Counsel who appeared for the Petitioners in SC SD 54/2024.

[15] Merriam-Webster Online Dictionary and Thesaurus, https://www.merriam-webster.com/dictionary/sex

[16] Black's Law Dictionary (2nd Edn) as quoted in the written submissions of the State Attorney for the Attorney General, at paragraph I.

[17] Ibid, at paragraph J.

In the Special Determination of the 'Local Authorities (Special Provisions) Bill'[18] this Court has stressed the point that Article 12(4) cannot be used to depart from the basic principle laid down in Article 12(1) of the Constitution in following terms:

> *"As referred to earlier, Article 12(1) of the Constitution has clearly laid down the principle that all persons are equal before the law and are entitle to the equal protection of the law. It is true that Article 12(4) of the Constitution has stated that nothing in Article 12 would prevent special provisions being made by law for the advancement of women, children or disabled persons.*
> *Article 12(4) cannot be used as a weapon in order to depart from the basic principle laid down in Article 12(1) of the Constitution. The right to equality, which is one of the most important fundamental rights guaranteed by our Constitution, has clearly laid down the concept that all are equal before the law and are entitled to the equal protection of the law. This would be applicable equally to all persons and should be regarded as of paramount importance.*
> *Article 12(4) of the constitution is not a weapon, but only a shield for the State in order to justify any kind of departure from the main stream* ***purely to encourage the advancement of women, children or disabled persons****. Accordingly, Article 12(4) cannot be used to authorize affirmative action on behalf of women, children and disabled persons"* [emphasis added]

Thus, although the framers of this Bill appear to have derived authority to promulgate this Bill under Article 12(4) of the Constitution, having regard to the nature of provisions contained in this Bill, I see no such authority can be derived from Article 12(1) of the Constitution to promulgate it as claimed in the paragraph 3 of its Preamble.

Mr. Manohara De Silva, PC appearing for the Petitioners in SC (SD) 54/2024 contended that this Bill therefore proposes to indirectly amend the Constitution. As shown above, the inclusion of the concept of gender in the reproduction of Article 12(2) in Paragraph 1 of the Preamble is one such instance of an attempt to impliedly amend the Constitution. Apart from this, the learned President Counsel indicates in his written submissions that the Bill seeks to extend the prohibition set out in Article 12(2) to non-citizens on grounds not specified in Article 12(2) such as age, national origin, marital and parental status, disability and health status.

[18] S. C. S. D. 02/2010 to 11/2010 published in the Decisions of the Supreme Court on Parliamentary Bills for the Years 2010-2012 Vol X at page 29.

This is done by virtue of the definition given to 'discrimination' under the interpretation clause; Clause 29 of the Bill. It is reproduced below:

> *"discrimination". means the differential treatment of an individual or group of people based on a specific characteristic including race, caste, color, sex,* ***gender identity****,* ***national origin****, language, religion,* ***age****,* ***marital*** *and* ***parental status****,* ***disability****, or* ***health status****;* [emphasis added]

The learned President's Counsel for the Petitioner further cites this Court's determination in the '13th Amendment Bill' where it was contended that an addition to Article 83, which itself is an entrenched provision, must follow the procedure set out by the constitution for the amendment of entrenched provisions. To attempt to add to the list in Article 83 by way of a new Constitutional provision would amount to an implied repeal of Article 83 which circumvents the requirement of a referendum.[19]

The Bill under consideration similarly attempts to circumvent the requirement for a constitutional amendment under Article 82(5), which reads as follows:

> *(5) A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79.*

Since, ordinary legislative enactments require a mere simple majority as opposed to the more onerous special majority required for Constitutional amendments, to impliedly amend a Constitutional provision; in this case Article 12(4), would clearly be an evasion of the requirement imposed by Article 82(5).

Clause 2 and Clause 3 of the Bill

Clause 2 of the Bill sets out the objects of the Act as follows:

> *(a) to establish and* ***facilitate gender equality*** *principles in making social, economic, political, cultural and technological policies;*
> *(b) to ensure that every person enjoys, without discrimination* ***based on sex or gender identity*** *the fundamental rights and freedoms guaranteed by the Constitution;*
> *(c) to facilitate the identification and elimination of systematic and structural* ***causes of gender inequality and gender-based discrimination****, including direct discrimination and indirect discrimination, multiple and intersectional discrimination, in policy, programmes and delivery of services to person of different gender identities;*
> *(d) to take measures to redress disadvantage, marginalization, sexism, stigma, categorizing, stereotyping, prejudice and violence and to accommodate men, women,* ***persons of different gender identities*** *through structural change;*
> *(e) to protect human dignity* ***irrespective of sex or gender identity****;*
> *(f) to provide equal opportunities and an enabling environment to achieve results on* ***gender equality****; and*
> *(g) to establish* ***principles of gender equality*** *and ensure compliance of such principles in the conduct of public institutions, businesses, civil society organizations, employment and other legal entities and individuals.*
> [emphasis added]

Clause 2 of the Bill has listed seven items as the objects of this Bill. The main focus on each of those seven items can clearly be seen from the phrases therein highlighted (in bold) by us. Thus, all seven objects of this Bill, both individually and collectively are directed firstly to recognize hitherto non-existent category called gender (I have earlier adverted to the difference between sex and gender) and then confer to those in that category equal rights as males and females. This is manifest in no uncertain terms when the Bill in its Clause 3 has stated:

> *Every person shall have the right to* ***gender equality*** *and no person shall be denied of such right.* [emphasis added]

I have already mentioned above, that our Constitution does not recognize the presence of *gender equality*. The Constitution only recognizes that no person can be discriminated on the basis of sex. The framers of the Constitution in their wisdom, has deliberately left out recognizing ***gender equality***. I am mindful of our task here which is to examine the Bill to ascertain whether any of the clauses of the Bill or the Bill in its totality is inconsistent with anv provision of the Constitution. In those circumstances, I cannot conclude that Clause 2 of the Bill is consistent with Article 12 of the Constitution.

Although the Preamble has mentioned about the empowerment of women in its Paragraph 2, I note that it is a reference to "The National Policy on Gender Equality and Empowerment of Women" and not merely to 'empowerment of women'. This argument is buttressed by the fact that there is none out of the seven limbs in Clause 2 which talks about empowerment of women as an object of the Bill. Therefore, I hold that the empowerment of women is neither the purpose of the promulgation of this Bill nor any of the objects of this Bill.

Moreover, I have already concluded that the National Policy on Gender Equality and Women's Empowerment is not a part of the Bill. This was in addition to our conclusion that there is a great uncertainty in the said policy. It was in that backdrop that I have held that the 'National Policy on Gender Equality and Women's Empowerment' will not have force of law.

The Petitioners submitted that the clauses of this Bill if passed into a law would prevent the religious establishments such as the Sasana, Convent, Bhikku universities, Pirivenas, Churches, Mosques from being selective in the admissions to such establishments in relation to persons they select as servers of their respective worship activities on the basis of the type of gender or sex.

Mr. Manohara De Silva PC, and also Mr. Canishka Witharana appearing for the Petitioners in the two Petitions brought to our notice that under the current regime regulating the process of ordaining Bhikkus, it is not permissible for either a female or a person who is neither a male nor a female to be ordained to become a Bhikku. It is in that backdrop I now turn to Article 9 of the Constitution which states as follows:

> *The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).*

Article 9 is self-explanatory. According to Article 9 of the Constitution, it is the solemn duty of the State to protect and foster the Buddha Sasana. The Republic of Sri Lanka shall give to Buddhism the foremost place. The Buddha Sasana in this country is primarily protected, managed, fostered by those who are in charge of that task namely, the Buddhist religious

[19] S. C. No. 07/1987 to 48/1987 (Special) published in the Decisions of the Supreme Court on Parliamentary Bills for the Year 1987 Vol III at page 79.

leaders. The Chief Prelates of the different chapters are forerunners in this regard. The duty on the State and the Republic is to give a helping hand such as making an appropriate legal frame work to make the environment conducive for those religious leaders to take appropriate steps to ensure that the Buddha Sasana is given foremost place, protected and fostered in this country.

In order to further understand the effect of this Bill on Article 9 of the Constitution, it is necessary to now turn to the definition of the phrase private institution set out in Clause 29 of the Bill. It is as follows:

> *"private institution" means an institution* ***established, recognized or licensed under any written law*** *and include a higher educational institution, a university and a professional institution and an institution offering vocational or technical education, other than those funded wholly by the Government.*

I observe that the places such as higher education institutions, universities and professional institutions are included under that definition. Therefore, the institutions such as Buddhist Universities, Pirivenas which are recognized under legislation[20] will also fall within the ambit of private institutions defined in the Bill and consequently be subject to the provisions of the Bill requiring gender equality to be promoted in respect of the functions of the said institutions.

As pointed out by the Petitioners, I observe that Clause 28 of the Bill states that the Bill will prevail in the event of inconsistency with any other written law. This is clearly stated in Clause 28 of the Bill which is reproduced below for easy reference.

> *28. Notwithstanding anything to the contrary in the provisions of any other written law for time being in force, the provisions of this Act shall have effect in respect of all matters relating to the achievement and enhancement of gender equality and accordingly in the event of any inconsistency or conflict between the provision of this Act and such other written law the provisions of this Act shall prevail.*

Thus, the provisions of this Bill will have the force of amending the contrary provisions in other laws and therefore the provisions of this Bill will supersede the laws, rules practices pertaining to Buddha Sasana which would thereby contravene Article 9 of the Constitution which gives foremost place to Buddhism.

[20] Buddhist Temporalities Ordinance 19 of 1931 as amended; Buddhist and Pali University of Sri Lanka Act No. 74 of 1981; Universities Act No. 16 of 1978; Pirivena Education Act No. 64 of 1979.

The Petitioners also submitted that the clauses of this Bill if passed into a law would stop the public and private institutions of education from confining their admissions to a particular sex, male or female, which may result in a male person who has acquired a different gender identity gaining admission to an institution confined only to males.

A possible example of such a legal provision which is potentially in conflict with the Bill under consideration is Section 2 of the Pirivena Education Act No. 64 of 1979. It reads as follows:

> *2. The objects of Pirivena Education shall be to provide educational facilities-*
>
> *(a) to* ***bhikkhus***[21] *; and*
>
> *(b) to* ***male lay pupils*** *over fourteen years of age who are desirous of following a course of studies imparted in a Pirivena and who wish to receive their education in a Buddhist environment.* [emphasis added]

Limitation of the enrolment of students to males maybe viewed in contravention of the Gender Equality Bill in so far as it prevents the enrolment of other gender identities. The natural consequence of the operation of the said Bill and its Clause 28, would be that the Gender Equality Bill would prevail over the Pirivena Education Act so as to repeal or nullify the operation of Section 2 of the latter.

Similarly, the provisions of this Bill will supersede the laws, rules practices pertaining to other religions and their denominations as well. This would have the effect of contravening Article 10, which affords an absolute right not even subject to the constitutional limitations under Article 15, and additionally Article 14(1)(e) which provides for the manifestation of the freedoms afforded under Article 10. Articles 10 and 14(1)(e) have been reproduced below:

> *10. Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.*
>
> *14. (1) Every citizen is entitled to –*
>
> *(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching;*

[21] The term Bhikku, in common parlance, refers to an ordained, male Buddhist monk as opposed to a female Buddhist monk, more commonly known as a Buddhist nun, referred to as a bhikkhuni.

Thus, I hold that Clause 2 and 3 of the Bill are inconsistent with Article 9, 10, 12 and 14(1)(e) of the Constitution. Article 9 and 10 are one of the Articles mentioned in Article 83(a) of the Constitution. Therefore, any Bill for the Amendment of or the Repeal of which is inconsistent with Article 9 and/or 10 '*...shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80'.*

Same Sex Marriages

The Petitioners also submitted that the clauses of this Bill if passed into a law would permit the same sex marriages that may have an adverse impact on cultural sensitivities of different communities living in Sri Lanka. In order to evaluate this argument, let us now turn to the law relating to marriages in this country.

In this country, any marriage must take place only between opposite sexes i.e., a male and a female. This is manifest from the following provisions of law. That is not only our law but also our culture for there cannot exist a practice of any culture which is contrary to law. Moreover, I observe that the above proposition is buttressed by the definition of the term 'Culture' found in Merriam-Webster's Online Dictionary which has defined Culture as 'the set of **values**, **conventions**, or **social practices** associated with a particular field, activity, or societal characteristic'.

The Marriage Registration Ordinance No. 19 of 1907.

The Marriage Registration Ordinance No. 19 of 1907 presupposes that parties to any marriage must be a male and a female. This can be gathered from its Section 16 which is reproduced below:

Section 16 of the Marriage Registration Ordinance No. 19 of 1907.

> 16. No marriage shall be valid
>
> (a) where either party shall be directly descended from the other; or
>
> (b) where the **female** shall be sister of the **male** either by the full or the half-blood, or the daughter of his brother or of his sister by the full or the half-blood or a descendant from either of them, or daughter of his wife by another father, or his son's grandson's or father's widow; or
>
> (c) where the **male** shall be brother of the **female** either by the full or the half-blood, or the son of her brother or sister by the full or the half-blood, or a descendant from, either of them, or the son of her husband by another mother, or her deceased daughter's or granddaughter's or mother's or grandmother's husband. [emphasis added]

The Kandyan Marriage and Divorce Act No. 44 of 1952.

The Kandyan Marriage and Divorce Act No. 44 of 1952 also presupposes that parties to any marriage must be a male and a female. This can be gathered from its Section 5 (1) which is reproduced below:

Section 5 (1) of the Kandyan Marriage and Divorce Act No. 44 of 1952.

> *(1) No Kandyan marriage shall be valid –*
>
> *(a) if either party thereto is directly descended from the other ; or*
>
> *(b) if the* ***female party*** *thereto is the sister of the* ***male party*** *thereto either by the full or the half-blood, or the daughter of his brother or of his sister by the full or the half-blood, or a descendant from either of them, or the daughter of his wife by another father, or his son's or grandson's or father's or grandfather's widow ; or*
>
> *(c) if the* ***male party*** *thereto is the brother of the* ***female party*** *thereto either by the full or the half-blood, or the son of her brother or of her sister by the full or the half-blood, or a descendant from either of them, or the son of her husband by another mother, or her deceased daughter's or granddaughter's or mother's or grandmother's husband.*
>
> [emphasis added]

Section 22 (3) of the Kandyan Marriage and Divorce Act further provides as follows:

> *(3) Such marriage shall be solemnized-*
>
> *(a) by the Registrar asking the* ***male party*** *to the marriage, and at the same time causing such party to take the* ***female party*** *by the hand, " Do you take this* ***woman*** *(her name in full must be mentioned) to be your wedded* ***wife*** *? " ; and*
>
> *(b) after such* ***male party*** *has answered the question in the affirmative, by the Registrar asking the* ***female party*** *to the marriage, and at the same time causing her to take the male party by the hand, " Do you take this* ***man*** *(his name in full must be mentioned) to be your wedded* ***husband*** *? " ; and*

(c) *by the female party answering the question in the affirmative.*

[emphasis added]

Moreover, the 'Application for Certificate of Marriage (General or Kandyan) and/or search of Registers' specifically requires for two entries as 'Full name of male party' and 'Full name of female party' which is indicative of the presupposition that a marriage is between a male and female party.

The Muslim Marriages and Divorce Act No. 13 of 1951.

The Muslim Marriages and Divorce Act No. 13 of 1951 also presupposes that parties to any marriage must be a male and a female. This can be gathered from its Section 80 which is reproduced below:

Section 80 of the Muslim Marriages and Divorce Act No. 13 of 1951,

*80. (1) Every **male Muslim** who enters into any contract purporting or intended to be a contract of marriage, or has or attempts to have carnal intercourse, with a **woman** who to his knowledge is –*

(a) his daughter or other lineal descendant: or...

*(2) Every **Muslim woman** of or above the age of twelve years who enters into any contract purporting or intended to be a contract of marriage with any man, or permits any man to have carnal intercourse with her, knowing such **man** to be-*

(a) her son or other lineal descendant; or...

[emphasis added]

Marriages under Tesawalamai law.

The Matrimonial Rights and Inheritance (Jaffna) Ordinance 01 0f 1911 which deals with matters pertaining to marriages under Tesawalamai law, is no exception in this regard. S. 3 (cited below) is evidence of the above presupposition.

3. *(1) Whenever a **woman** to whom the Tesawalamai applies marries a **man** to whom the Tesawalamai does not apply, she shall not during the subsistence of the marriage be subject to the Tesawalamai.*

*(2) Whenever a **woman** to whom the Tesawalamai does not apply marries a **man** to whom the Tesawalamai does apply, she shall during the subsistence of the marriage be subject to the Tesawalamai.* [emphasis added]

In order to fully consider and understand the effect that this Bill would have on marriages of persons, we need to first understand what is meant by *"gender equality"*. The phrase '*gender equality*' has been defined in Clause 29 of the Bill. It is as follows:

"gender equality" means equality between persons of different sex and gender identity without gender based discrimination and include equal opportunity of enjoyment of, or access to, -

(a) education;
(b) employment;
(c) health care and health care information;
(d) private and family life;
(e) justice and dispute resolution;
(f) public places and building;
(g) public services;
(h) media, information and communication technologies;
(i) protection from violence; and
(j) economic, political and social activities;

[emphasis added]

Once again turning to the dictionary definition provided in Merriam-Webster's, the term *family life* has been described as *'the kind of life a person normally leads when one is **married** and **has children'**.*

Article 8(1) of European Convention on Human Rights (hereinafter referred to as the ECHR) provides for a similar right to private and family life which is worded as follows:

Everyone has the right to respect for his private and family life, his home and his correspondence.

In interpreting this Article, the European Courts of Human Rights (hereinafter referred to as the ECtHR) has recognised that this right encompasses several aspects as seen below.

In Niemitz v. Germany[22], the ECtHR has established that, the respect for private life encompasses a certain right to develop relationships with others when it states as follows:

[22] *Niemitz v. Germany*, App No. 13710/88 (ECtHR, 16 December 1992).

"The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life".
However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."[23]

Further, in the case of Schalk And Kopf V. Austria[24], before the ECtHR, the applicants argued that they were discriminated against as a same-sex couple as they did not have access to marriage. Interpreting Article 8 of the ECHR in relation to same-sex relationships, the courts held that *"It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8"*[25] and finally concluded that "*the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8."*[26]

The above definitions pertaining to 'Private and Family life' show the potential for an interpretation of the Bill to allow for same-sex marriages through the recognition of the concept of gender equality for persons of different sex and gender minorities. However, I note that there is no such right as right to respect for one's private and family life or one's home and correspondence found in our law. Moreover, I note that the right to private and family life is found only in this Bill and not in our Constitution.

I also note that the fact that the Bill has included the phrase 'marital status' in the definition of the term 'discrimination' confirms the fact that this Bill proposes to recognize marital status for those who can fall, under the category of gender identity. While the definition of 'gender identity' in Clause 29 is not at all clear, it has certainly encompassed person other than males and females. This can be gathered from the phrase "women, men and others" included in the definition. Thus, a person who claims to have a gender identity of a category other than a male or a female will have an equal opportunity of enjoyment or access to private and family life, as per the definitions of 'gender equality' and 'discrimination' set out in the Bill.

[23] Ibid, Paragraph 29.
[24] Schalk and Kopf v Austria, App No. 30141/04 (ECtHR, 24 June 2010).
[25] Ibid, Paragraph 90.
[26] Ibid, Paragraph 95.

Thus, it is clear that when this Bill becomes law it becomes possible for any interested party to claim legal status for same-sex marriages through the definitions and provisions of this Bill. This is something which neither our Constitution nor our culture has envisaged. All the religions practiced in this Country have not deviated from this culture for both culture and religion is part and parcel of the practice of the people of this country. Practice of culture and religion in general cannot be contrary to law of the country.

Are the sexual activities between partners belonging to the same sex criminalized in this Country?

As the possibility of claiming legal status for same-sex marriages looms large in the afore-stated scenario, I will now have to proceed to examine whether the sexual activities between the partners belonging to the same sex are at present criminalized in this country.

Primarily two offences described in Sections 365 and 365A of the Penal Code would be relevant in this regard. They are as follows:

Section 365 Penal Code

*Whoever voluntarily has **carnal intercourse against the order of nature** with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be punished with fine and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for injuries caused to such person.*

[emphasis added]

Section 365A Penal Code

*Any person who, **in public or private**, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, **any act of gross indecency with another person**, shall be guilty of an offence, and shall be punished with imprisonment of either the description for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less then ten years and not exceeding twenty years and with fine and shall also be ordered to pay*

compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.

[emphasis added]

The terms 'Carnal Intercourse against the order of nature' and 'Acts of Gross Indecency' have been recurrently interpreted to include homosexual activity. This is apparent through the academic discourse and case law on the matter as cited below.

"[24.64] The original version of section 365A of the Penal Code was gender-specific, criminalising acts of 'gross indecency' by males, in public or in private. Along with the offence of 'carnal intercourse against the order of nature', it operated, in effect, to criminalise homosexual acts.

[24.65] As a result of amendments in 1995, section 365A now extends to women as well. As with the offence of carnal intercourse against the order of nature, lack of consent is not an element of the offence, and the defence of consent is excluded..."[27]

In the case of Galabada Payalage Sanath Wimalasiri v Officer-In-Charge, Police Station, Maradana[28] this Court has taken the following view.

*There is no question that the individuals involved in the case are **adults** and the **impugned act** [oral sex between two male parties], **no doubt was consensual.** Section 365A was part of our criminal jurisprudence almost from the inception of the Penal Code in the 19th century. A minor amendment was effected in 1995, however, that did not change its character and the offence remains intact.*

This offence deals with the offences of sodomy and buggery which were a part of the law in England and is based on public morality. The Sexual Offence Act repealed the sexual offences of gross indecency and buggary in 2004 and not an offence in England now.

The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and may be the rationale that led to repealing of the offence of gross indecency and buggery in England.

The offence however remains very much a part of our law.

[emphasis added]

[27] Wing-Cheong Chan and others, *Criminal Law in Sri Lanka* (1st Edn, LexisNexis, 2020) 390.
[28] SC Appeal No.32/11 at pages 11,12.

Article 12(1) has guaranteed to all persons an entitlement to the equal protection of the law. This is a fundamental right guaranteed under the Constitution. Therefore, every citizen of this country in particular parents of young and young adult children are entitled and would certainly look forward for the protection of law in respect of their young and young adult children. They take consolation under the afore-mentioned Sections in the Penal Code as they have criminalized the sexual acts such as: carnal intercourse which are against the order of nature happens between any two persons or between a person and an animal; any act of gross indecency committed either in public or private with or without consent. They are part of our criminal law. All citizens are entitled to the equal protection of law under Article 12(1) of the Constitution. 'Law' here includes criminal law as well. Criminal law operates against the offender by imposing a punishment on him in order to afford full protection to the citizen thereby preventing them falling victims to such crimes. This is one of their fundamental rights.

It is opportune at this juncture to remind that any deviation from Article 12 is only permitted in terms of Article 15(7) which is as follows:

*"the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or **morality**, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society."*

This means that neither Article 12 nor Article 15 have permitted any deviation from the Fundamental Right to the equal protection of the law which would damage or endanger morality. The point I make here is that the deviations from Article 12 are possible only to protect morality and not to endanger morality.

Thus, the provisions in this Bill would confer certain rights to do certain acts which the Penal Code of the country has criminalised as serious offences which are triable in High Courts. As Clause 28 of the Bill states that the Bill will prevail in the event of inconsistency with any other written law, the provisions of this Bill will have the force of amending the contrary provisions in the Penal Code. The de-criminalisation of homosexual relationships and recognition of same-sex marriages would have significant cultural and moral implications to the present moral fabric of Sri Lankan society. It would be contrary to the accepted moral and cultural standards in our Nation at present. They would be inconsistent with Buddhism and the practices of any other religion in this country. It is certainly against Article 9 of the Constitution which requires the State to give the foremost place to Buddhism.

Are the provisions of this Bill against Article 27(1)(g)?

Since the provisions of this Bill will have the force of amending the contrary provisions in the Penal Code resulting in de-criminalisation of homosexual relationships and recognition of same-sex marriages which would be contrary to the religions practiced in this country, the question arises as to whether our Constitution has offered any guidance about the possibility or impossibility of enacting such laws.

In this regard, the Directive Principles of State Policy contained in Article 27(1)(g) would be relevant. It is as follows:

27. (1) The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

(2) The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include –

*(g) **raising the moral and cultural standards** of the People and ensuring the full development of human personality; and...*

While I am cognizant of the fact that the Directive Principles of State Policy are not justiciable, they have time and again been held to be of value as guiding principles for the State. Justice Sharvananda's opinion to this effect given in the majority decision of the 'Thirteenth Amendment to the Constitution Bill and Provincial Councils Bill' is as follows:

"True the Principles of State policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation."[29]

[29] S. C. No. 07/1987 to 48/1987 (Special) published in the Decisions of the Supreme Court on Parliamentary Bills for the Year 1987 Vol III at page 35.

This sentiment has been echoed in the more recent decision of this court in regard to the 'Divineguma Bill'[30] as extracted below:

"Chapter IV of the Constitution as stated by the Learned President's Counsel deals with the Directive Principles of State Policy. As clearly state in Article 27(1) of the Constitution, the said directive principles set out in Article 27(2) are to guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and governance of the country. Article 27(2) of the Constitution gives a general out of several areas on which a democratic socialist society would be established as pledged by the State."

Thus, it is clear that those Directive Principles of State Policy shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka. It is important to understand that the establishment of a just and free society must be achieved within the framework of these Directive Principles of which one is ***raising the moral and cultural standards*** *of the People.*

Clause 4

This Clause lays down the powers and responsibilities of the Minister under this Bill. Said powers are exercised for the purpose of achieving the objects set out in Clause 2 of the Bill. This is clear from the wording used in Clause 4 itself which is reproduced below.

*4. (1) **For the purpose of achieving the objects of this Act** and implementing the provisions of this Act, the Minister shall be responsible for –*

(emphasis added)

Since, I have already shown above that the objects of this Bill are inconsistent with the Constitutional provisions cited above, provision in Clause 4 which empowers the Minister to achieve the objects of the Bill would also become inconsistent with those Constitutional provisions.

Clause 7(d) of the Bill

The Bill proposes to set up a Council with wide powers. These powers have been set out in its limbs (a) to (o) under Clause 7. For convenience, I reproduce Clause 7 of the Bill which is as follows:

Clause 7

The powers, duties and functions of the Council shall be –

[30] S. C. S. D. 01/2012 to 03/2012 published in the Decisions of the Supreme Court on Parliamentary Bills for the Years 2010-2012 Vol X at page 82.

*(a) to recommend measures to the Government on the promotion, protection, upgrading and advancement of **gender equality** and to have an integrated machinery for the implementation of National Policy on Gender Equality and Empowerment of Women;*

*(b) **to scrutinize pending Bills before the legislature** which may have an impact on women from a gender equality and women's empowerment perspective;*

(c) To advice the Minister on the formulation of regulations and directions as required under this Act;

*(d) to give such direction and take all such other measures as are necessary, in consultation with the relevant public institution and private institution, to promote the furtherance of, and safeguarding **the right to gender equality**;*

*(e) to initiate and implement schemes for the promotion, protection and advancement of **gender equality**;*

*(f) to identify the principal causes of **gender inequality** and promote effective measures for its prevention and control;*

*(g) to report to the Minister with a copy to the Women Caucus of Parliament appointed by the Speaker on mainstreaming of **gender issues** and regarding steps to be taken for implementing;*

*(h) to provide necessary support to public institutions and private institutions for taking special measures to **implement the National Policy on Gender Equality and Empowerment of Women**;*

*(i) to evaluate public institutions and private institutions in the implementation of **National Policy on Gender Equality and Empowerment of Women** under paragraph (h);*

*(j) to undertake research, educational programmes and other measures including gender mainstreaming and digitalization, for the purpose of **promoting gender equality**, in society and in workplaces;*

*(k) to organize periodic awareness training programmes on **gender equality to government officials and the general public**;*

*(l) to promote awareness, education and research on **gender** related issues;*

(m)to develop and annual work plan to implement the provisions of this Act:

(n) to review the annual progress in line with the Annual work plan and report to the Minister who in turn shall report to the Minister for immediate attention for ensuring gender equality; and

(o) to do all such other acts or things as may be necessary for the discharge of all or any of functions of the Council.

[emphasis added]

A closer look at these duties would show that all duties of the Council are primarily to recognize, promote, protect, upgrade and advance the gender equality. I have already held that the concept gender equality is inconsistent with the Constitution. Therefore, provisions in Clause 7 would also be inconsistent with the Constitution.

The Petitioners also adverted to the Clause 28 of the Bill which they allege will have far reaching effects on other laws. By virtue of Clause 28, the provisions of this Bill will supersede any other written law. I have already held that the objects of this Bill are inconsistent with the Constitution. This means that the Council proposed to set up through this Bill for the purposes of advancing such objects would also necessarily have to be inconsistent with the Constitution. Be that as it may, it would suffice for us to point out further, some more inconsistencies in the powers and duties of the Council under this Clause.

I note that even the religious institutions come under the purview of the directions of this Council. That includes the Acts of incorporation of the different Buddhist Chapters and thereby, may impose requirements to maintain gender equality in practices such as ordination which are key to the promotion and protection of Buddhism. As I have already stated above, such power being vested in the Council set up under this Clause would be in contravention of Article 9 of the Constitution. Similarly, in relation to the other religions practiced in this country, such power being vested in the Council set up under this Clause would result in the potential infringement of the fundamental rights enshrined in Article 10 coupled with 14(1)(e) which provide for Freedom of religious belief and freedom to manifest one's religion and the associated practices and teachings.

The resultant position is that the Council set up under Clause 2 of the Bill will be empowered to make a direction under Clause 7(d) to any religious institution to take steps to maintain the gender equality in their routine affairs. Such direction can include the actions such as: to ordain a person who has a different gender identity as a bhikku; to ordain a person who claims to be a female person although born a male or a person who claims to be in some other category other than a male or female; to direct a religious institution to appoint as a server, a person who claims and is known to be a Lesbian, Gay, Bisexual, Transgender or any other person who is inclined in any abnormal sexual practices against the order of nature, religions, morality and culture of the people of this country. Moreover, such directive could be made on any religious leader or any educational institution which includes Maha Nayakas, Cardinal, Moulavi or any Poosaari. Obviously, such directive would be to the detriment of those religions which includes Buddha Sasana.

As regards the Clause 7(b), I observe that the Council set up under Clause 7 of the Bill has been given powers to scrutinize pending Bills before the Legislature of this country. In terms of Articles 3 and 4, Legislative power of the people is part of their sovereignty. The Sovereignty of the people cannot be alienated as per Article 3. On the other hand, according to Article 4(a), the Legislative Power of the People shall be exercised by Parliament. Therefore, the Legislative Power of the people which the Parliament has been entrusted to exercise on behalf of the people, cannot anyway be directly or indirectly be conferred on the Council set up under Clause 7.

As regards the Clause 7(h), I observe that one of the powers and duties of the Council is to take measures to implement the National Policy on Gender Equality and Empowerment of Women. The Bill sheds no light at all on what is 'National Policy on Gender Equality and Empowerment of Women'. When that is an entity which is unknown to the Act of Parliament, the question arises as to who decides on such policy. In any case, that policy is not something static. Therefore, no one will be able to ascertain whether such policies are inconsistent with the Constitution. Thus, while I am unable to hold that this Clause is not inconsistent with the Constitution, I also have to hold that this Clause is vague to the extent that no citizen would understand or know what the law of the country with regard to those matters in issue.

Petitioner's raise the concern that 'clause 7(d) is not circumscribed by any guidelines, thereby conferring the Council set up under this Clause free run in every aspect pertaining maintenance of gender equality. The absence of such guidelines would render these provisions vague and therefore would lead to the arbitrary exercise of power under the guise of such directions to be made under such power by the Council to be set up under this Clause. As has already been pointed above in the Special Determination by this Court in 'The Energy Supply (Special Provisions) Bill'[31] and 'The Electricity Reform Bill'[32] which have been cited above,[33] such provision be violative of Article 12 of the Constitution.

Clauses 17 and 18 of the Bill

Clauses 17 and 18 of the Bill set out the requirement of the office of 'Gender Focal Point' and the functions of the said officer respectively as follows:

17. (1) Every Public institution and private institution shall appoint or designate from amaongst its staff a person responsible for identifying and reporting activities relvant to gender mainstreaming and gender equality 9hereinafter referred to as the "Gender Focal Point").

(2) The Gender Focal Point shall, be an officer who holds a position not below an Additional Secretary or an Additional or Deputy to the Head of the respective institution, and be the main point of contact in the respective institution with regard to addressing gender issues.

(3) Each Gender Focal Point shall prepare a plan of activities targeting their areas of responsibility and report directly to the Council on a quarterly basis with a copy to Women Parliamentarians Caucus in Parliament.

18. Each Gender Focal Point shall, within their respective public institution –

(a) promote implementation, of gender equality-based policies and practices;

(b) be responsible for mainstreaming gender equality issues in the programmes;

(c) make recommendation to the Council to review and amend the policies and programmes to align with the achievement of gender equality and in accordance with gender budgeting principles, to ensure gender mainstreaming;

(d) organize and implement programmes, systems and measures to minimize the occurrence of gender-based discrimination or violence;

(e) conduct follow-ups, analysis and audits on the implementation of programmes from a gender equality perspective and in accordance with gender budgeting principals;

[31] S.C. S.D. 01/2002 (n 13).
[32] S.C. S.D. 09/2022 (n 14).
[33] At pages 12 and 13.

(f) endeavour to promote gender balance in decision making processes;
(g) to promote the adherence to guidelines on gender equality at inquiries regarding work place sexual harassment;
(h) create an environment, free of harassment and violence and set up appropriate follow-up mechanisms;
(i) provide access to counselling services and health care services for individuals affected by gender-based violence or discrimination; and
(j) support to the Council to implement the Annual work plan.

The overarching function of the Gender Focal Point as evident through Clause 18 is to promote and achieve gender equality. I have already held that neither the concept called ***gender identity*** nor the concept called ***gender equality*** are concepts which the Constitution of this country has recognised. In view of that conclusion, any provision in the Bill to appoint and designate any officer as the Gender Focal Point under these Clauses whose function would be to promote and achieve gender equality would also be inconsistent with the provisions in the Constitution.

Clause 8 to 16 and 19 to 24 of the Bill

The provisions in Clauses 8 to 16 and 19 to 24 of the Bill, are merely incidental provisions for the existence, management and exercise of powers and duties of the Council. They are:

- Clause 8 – Term of Office
- Clause 9 – Chairperson of the Council
- Clause 10 – Disqualifications for being appointed or continuing as a member of the Council
- Clause 11 – Resignation and removal of members
- Clause 12 – Quorum and meetings of the Council
- Clause 13 – Remuneration of members
- Clause 14 – Members to disclose any interest
- Clause 15 – Proceeding, act or decision not invalidated by reason of a vacancy
- Clause 16 – Staff of the Council
- Clause 19 – Fund of the Council
- Clause 20 – Council to maintain accounts
- Clause 21 – Financial year and audit of accounts
- Clause 22 – Annual Report
- Clause 23 – Declaration of secrecy
- Clause 24 – Delegation of powers of the Council

I have already held that the powers and duties of the Council set up under Clause 7 of the Bill, are inconsistent with the provisions of the Constitution. Therefore, any provision contained in Clauses 8 to 24 of the Bill with regard to the maintenance, administration, management and exercise of powers and duties by that Council would also become inconsistent with the Constitution.

Clauses 25, 26 and 27 of the Bill

Clauses 25 and 26 set out the Offences under the Bill
They read as follows:

25 *Any person who –*
(a) contravenes the provisions of this Act or any regulation made thereunder; or
(b) fails to comply with an order or directive of the Council;
shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate, be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

Clause 25 of the Bill attaches Penal sanctions for those who contravene any provisions of this Bill or any regulations made thereunder. Moreover, it also attaches Penal sanctions for those who fail to comply with an order or directive of the Council set up under Clause 7. I have already held that setting up of the Council under Clause 7 which has been conferred with powers and duties of that nature are inconsistent with the Constitution, in particular Article 9 of the Constitution. Therefore, it is needless to say that attaching penal sanctions to those who contravene those provision and such directives of the Council set up under Clause 7 are also inconsistent with Article 9 of the Constitution. The same argument will apply to Clause 26 of the Bill as well. This is because Clause 26 has extended the penal sanctions to every director, secretary and officer of that body corporate any offence under this Act committed by a body of persons and every partner of that firm when that body of persons is a firm.

Clause 27 of the Bill confers upon the Minister the power to make regulations in order to give effect to the preceding clauses of the bill. It is reproduced below:

27. *(1) The* ***Minister*** *may, for the purpose of* ***giving effect to the principles of this Act, make regulations*** *in respect of any matter which is required by this Act to be prescribed or in respect of which regulations are required or authorized to be made under this Act.*

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication, or on such later date as may be specified in the regulation.

(3) (a) Every regulation made by the Minister shall, within three months after its publication in the Gazette, be brought before Parliament for approval.

(b) Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval, but without prejudice to anything duly done thereunder.

(4) Notification of the date on which a regulation is deemed to be rescinded shall be published in the Gazette.

Under this Clause the power of the Minister is to make regulations for the purpose of giving effect to the principles of this Act. I have already held that the objects of this Bill are inconsistent with the Constitution. Therefore, Clause 27 also becomes inconsistent with the Constitution.

Clause 28

As mentioned in the discussion under Clause 3, this Clause will be in contravention of Article 9 of the Constitution in so far as it would have the effect of superseding any other law, including those Acts of incorporation and regulation of the various Buddhist Chapters in the country.

I have held that the promulgation of this Bill is inconsistent with Article 12 of the Constitution. I also have held that the objects of this Bill in Clause 2 read with Clause 3, Clause 4 would be inconsistent with Articles 9, 10, 12, 14(1)(e) and 27(1)(g) of the Constitution. In the same way, I have also held that Clauses 4, 7 ,17, 18, 25, 26 and 27 are inconsistent with Articles 9, 10, 12(1), 14(1)(e), 14(1)(f), 27(1)(g) of the Constitution. I have held that power being vested in the Council set up under Clauses 5 and 6 read with Clause 7 are inconsistent with Articles 9, 10, 12(1), 14(1)(e), 14(1)(f) and 27(1)(g) of the Constitution. Therefore Clauses 17 and 18 of the Bill which set out the requirement of the office of 'Gender Focal Point' and the provisions in Clauses 8 to 16 and 19 to 24 of the Bill, which are incidental provisions for the existence, management and exercise of powers and duties of the Council are also inconsistent with Articles 9, 10, 12(1), 14(1)(e), 14(1)(f) and 27(1)(g) of the Constitution.

According to Article 4, the fundamental rights is one of the components of the Sovereignty of the People. Article 4(d) not only unequivocally calls upon all the organs of government to respect, secure and advance, the Fundamental Rights which the Constitution has declared and recognized, but also calls upon all the organs of government not to abridge, restrict or deny, save in the manner and to the extent provided in the Constitution. According to Article 3 of the Constitution the sovereignty of the People is inalienable.

I have already held that some of the Articles of the Constitution with which the main provisions of this Bill are inconsistent are Articles 10, 12 and 14 of the Constitution which confer fundamental rights on the citizens of this country. As shown above the fundamental rights are part of the sovereignty of the people of this country. Thus, any derogation of the fundamental rights guaranteed by the Constitution would amount to the derogation of the sovereignty of the people. In terms of Article 4(d) the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all the arms of government and shall not be abridged, restricted or denied save in the manner and to the extent provided in the Constitution. That is one of the ways through which the people are entitled to exercise and enjoy their sovereignty. Thus, for the reasons stated in this determination the main provisions of the Bill have also become inconsistent with Article 4 read with Article 3 of the Constitution.

Thus, the objects of the Bill are inconsistent with Articles 3, 4(d), 9 and 10 of the Constitution and they are inseparable from the other provisions of the Bill. This compels us to hold that the Bill as a whole is inconsistent with Articles 3, 4(d), 9 and 10 of the Constitution.

Thus, I determine that the Bill as a whole cannot be enacted into law, unless the appropriate procedure laid down in Articles 83 and/or Article 84 read with Article 80 of the Constitution which requires that the number of votes cast in favour thereof must amount to not less than two-thirds of the whole number of Members of Parliament (including those not present), and is approved by the People at a Referendum.

I place on record our appreciation of the assistance given by the learned Counsel who appeared for the Petitioners, the learned Counsel for the Intervenient Petitioners and the learned Deputy Solicitor General who represented the Hon. Attorney-General, in this proceeding.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J.

Honourable Justice P. Padman Surasena was pleased to share with me the draft Determination prepared by him relating to the Bill titled 'Gender Equality' published in the Gazette of 17th April 2024 and subsequently placed before the Order Paper of Parliament on 7th May 2024. Having perused the afore-stated draft Determination, I find myself in agreement with the finding reached by Justice P. Padman Surasena, that the Application made by the 1st and the 2nd Intervenient Petitioners in SC SD Petition No. 54/2024 cannot be permitted due to the reasons enumerated in Justice Surasena's draft Determination.

Furthermore, I find myself in agreement with Justice Surasena's finding that, taken as a whole, the Gender Equality Bill is inconsistent with Article 12 of the Constitution read with Articles 3 and 4 of the Constitution. Therefore, I agree with Justice Surasena's finding that the Bill as a whole cannot be enacted into law unless the procedure laid down in Article 83 or 84 of the Constitution read with Article 80 of the Constitution is followed by Parliament and the Bill is approved by not less than two thirds of the whole number of Members of Parliament and subsequently approved by the People at a Referendum.

However, in view of the salient features contained in the afore-stated Bill and due to some of the findings reached by Justice Surasena, it is necessary for me to lay down my own reasons for the afore-stated finding that the Bill as a whole is inconsistent with Article 12 read with Articles 3 and 4 of the Constitution. Therefore, it is to be noted that my agreement with Justice Surasena's draft Determination is only to the extent provided herein.

Prior to a discussion on some of the objectionable features of the Bill, it is necessary for purposes of clarity that I state, that the jurisdiction vested in this Court in terms of Article 121 of the Constitution, is unique in that, its role is not to sanction or condemn the policy underlying a Bill, but to, in terms of Article 123(1) of the Constitution, arrive at a finding and express such finding on whether a Bill or any provision thereof is inconsistent with the Constitution, and if so, state which provision or provisions of the Constitution is inconsistent with the Constitution. It is necessary to place on record that the Constitution has vested discretion in this Court to consider the constitutionality of a Bill as a whole and or to examine and comment on the constitutionality of individual clauses. Thus, for good reason, this Court is under no compulsion to examine and comment on all clauses of a Bill. Particularly where the objectionable clauses go into the very root of the Bill and revision of such clauses would not be feasible unless the entire character of the Bill is changed, then, this Court is entitled to comment on the Bill as a whole.

A consideration of the totality of the clauses of the Bill gives rise to the finding that the overall underlying objective of the enactment of the Bill is to ensure and provide for gender equality and women's empowerment. It is necessary to observe that policy makers appear to have taken cognisance of the need to ensure that all persons of this country independent of or notwithstanding their 'sex' and their 'gender' are treated equally before the law and are accorded equal protection of the law.

The Black's Law Dictionary, 11th Edition provides that, 'sex' means the sum of the peculiarities of structure and function that distinguish a male from a female organism. Thus, 'sex' is a natural inheritance of a human being. While both the Black's Law Dictionary (11th Edition) and the Merriam – Webster's Dictionary of Law (1996 Edition) do not provide a definition of the term 'gender', the Oxford English Dictionary provides that, contextually 'gender' means 'the state of being male or female (chiefly in cultural or social contexts)'. While the term 'gender' is not interpreted in the Bill, the term 'gender identity' has been interpreted as 'the cultural, economic, social and political characteristics, role and opportunities through which women, men and others are socially constructed and valued'. In contemporary usage, it is well accepted that 'gender' means the male sex or the female sex, especially when considered with reference to social and cultural differences rather than biological ones, or one of a range of other identities that do not correspond to established ideas of being a male or a female. These identities have acquired the nomenclature of lesbian, gay, bisexual, transgender, intersex, queer / questioning, a-sexual and many other terms (such as non-binary and pansexual). During the hearing, learned counsel submitted that, these identities are continuing to evolve, and newer identities are emerging. Therefore, it is necessary to recognise that the term 'sex' found in Article 12(2) of the Constitution, cannot by any interpretation be recognised in the eyes of the law, as now meaning both the conventional term 'sex' and the term 'gender' which is of more recent origin.

Ensuring equal protection of the law to persons of all genders and gender identities is in consonance with Article 12(1) of the Constitution which reflects a core value contained in the Constitution of the Democratic Socialist Republic of Sri Lanka. All persons are equal before the law and are entitled to the equal protection of the law. By no stretch of argument can one advance the proposition that 'persons' as contained in Article 12(1) of the Constitution would mean only the male and the female sexes. Indeed, irrespective of a person's gender identity, every human being must be recognised as a 'person'. Therefore, there is nothing inconsistent in the afore-stated underlying policy *vis a vis* Article 12(1) of the Constitution. In fact, given matters on public record, it is necessary for me to observe that, indeed, developing a legislative framework to give effect to gender equality and women's empowerment in public affairs is salutary and is in furtherance of the core values contained in the Constitution.

However, in my view, what the Bill indirectly seeks to do is to amend Article 12(2) of the Constitution by ensuring that no citizen shall be discriminated against on the ground of 'gender' or 'gender identity'. That is with the view to prevent even a reasonable classification on the ground of gender or gender identity to justify differential treatment. As pointed out by Mr. Manohara De Silva, PC who appeared for the Petitioners in SC SD 54/2024, what the Bill as a whole proposes to do, is to elevate the protection given to persons of different gender identities to protection beyond what is provided by Article 12(1) of the Constitution, and provide protection accorded under Article 12(2) of the Constitution. While it is not the role of this Court to comment on the merits or otherwise of that policy of elevating the degree of protection, it is necessary to point out that realisation of that policy through the enactment of the Bill amounts to an amendment to Article 12(2) of the Constitution. The proposed Bill is an attempt to amend Article 12(2) of the Constitution by substituting the term 'sex' with the term 'sex and gender'. This may be due to well-founded reasons pertaining to the need to respect equality independent of or notwithstanding the gender or gender identity of a person. However, that is not a process that can be given effect to by an ordinary Bill. The desired result can only be achieved by enacting an 'Amendment to the Constitution' which amends Article 12(2) of the Constitution in the afore-stated manner. That therefore is one objectionable feature in the Bill.

Another objectionable feature is the desire on the part of the drafters of the Bill to provide for a legislative framework that would empower the Gender Equality Council (to be established in terms of clause 5 of the Bill) to regulate and thereby interfere with the functioning of 'private institutions' (which would include sole proprietorships which comes within the corresponding definition of the Bill) in the realm of gender equality and empowerment of women. Justice Surasena in his draft Determination has explained in detail as to how that proposed mechanism would have an impact on private religious and educational institutions. I need to add that the same mechanism can have an adverse impact on the exercise of fundamental rights recognised under Article 10 of the Constitution. If for instance, through the legislative mechanism encapsulated in the Bill, the Gender Equality Council directs a person running a private institution to select for employment a particular number of individuals who are of a particular gender identity, that direction may be an infringement of that person's right to freedom of thought, conscience and religion. This same principle would apply to religious institutions including but not limited to those of the Buddha Sasana (which has the protection afforded by Article 9 of the Constitution). If a particular religious institution which is managed with private resources which nevertheless comes within the definition of a 'private institution' is inclined to accept to its fold, only persons of a particular sex or a particular gender identity, directing such an institution to admit to its fold persons belonging to the other sex or other gender identities would infringe Article 10 read with Articles 14(1)(b), (c) and (e) of the Constitution.

In terms of the core values contained in the Constitution of this country, there is limited opportunity afforded to the state to interfere with the functioning of private institutions which may include sole proprietorships and religious institutions. While the state is entitled in terms of the Constitution to entertain a policy for the protection of gender equality and women's empowerment, and give effect to such policy through organs of the state, the state cannot compel private institutions to adhere to such policy, unless they on their own volition opt to adopt such policy. That would be an infringement of the fundamental rights recognised by the Constitution.

Article 3 of the Constitution provides that in the Republic of Sri Lanka sovereignty is in the People and is inalienable. Furthermore, it provides that Sovereignty includes the powers of government, fundamental rights and the franchise. Read with Articles 10 and 14 of the Constitution, the component of sovereignty referred to as fundamental rights as contained in Article 4(d) of the Constitution would include the fundamental right to engage in religious activities and lawful private businesses or entrepreneurial activities. Therefore, an intrusion into the exercise of such rights which is not within the scope of Article 15 would amount to an intrusion into the Sovereignty of the People. It is on that premise that I subscribe to the view of Justice Surasena that the enactment of this Bill would require not only approval by Parliament by a simple majority or by a special majority, but approval by the People at a Referendum as provided by Article 83 of the Constitution as well.

I must mention that, a consideration of the totality of the clauses of the Bill discloses the fact that, in its present form of formulation, the provisions of the Bill relating to 'gender equality'

are inseparable from the provisions relating to 'women's empowerment'. Therefore, it is not possible to permit only the enactment of the provisions of the Bill pertaining to the empowerment of women.

In the circumstances, subject to the foregoing, I find myself in agreement with the draft Determination of Justice Padman Surasena.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE J.

I have had the opportunity to peruse the determinations of Justice P. Padman Surasena and Justice Yasantha Kodagoda, PC, above. For the reasons set out therein, I am in agreement with the determinations that the Bill as a whole cannot be enacted into law, unless the appropriate procedure laid down in Articles 83 and/or Article 84 read with Article 80 of the Constitution which requires that the number of votes cast in favour thereof must amount to not less than two-thirds of the whole number of Members of Parliament (including those not present), and is approved by the People at a Referendum.

JUDGE OF THE SUPREME COURT

II

ව්‍යවස්ථාදායක ස්ථාවර කාරක සභාව: අතිරේක සාමාජිකයන්

சட்டவாக்க நிலையியற் குழு: மேலதிக உறுப்பினர்கள்

LEGISLATIVE STANDING COMMITTEE: ADDITIONAL MEMBERS

ගරු කථානායකතුමා
(மாண்புமிகு சபாநாயகர் அவர்கள்)
(The Hon. Speaker)

"ශ්‍රී ලංකා ගොඩනැඟිලි සේවා ඉංජිනේරු සහ තාක්ෂණ ආයතනය (සංස්ථාගත කිරීමේ)" පනත් කෙටුම්පත සලකා බැලීම පිණිස පාර්ලිමේන්තුවේ ස්ථාවර නියෝග 113(2) ප්‍රකාරව, ව්‍යවස්ථාදායක ස්ථාවර කාරක සභාවට මතු පළ වන මන්ත්‍රීවරයන් අතිරේක සාමාජිකයන් වශයෙන් මවිසින් නම් කරන ලද බව දන්වනු කැමැත්තෙමි.

ගරු උදය ගම්මන්පිල මහතා

ගරු නාලක බණ්ඩාර කෝට්ටේගොඩ මහතා

ගරු මිලාන් ජයතිලක මහතා

ගරු (මේජර්) සුදර්ශන දෙනිපිටිය මහතා

ගරු ඉසුරු දොඩන්ගොඩ මහතා

ගරු කුමාරසිරි රත්නායක මහතා

ගරු ගාමිණී වලේබොඩ මහතා

ගරු වීරසුමන වීරසිංහ මහතා

ගරු කථානායකතුමා
(மாண்புமிகு சபாநாயகர் அவர்கள்)
(The Hon. Speaker)

"දණ්ඩ නීති සංග්‍රහය (සංශෝධන)" පනත් කෙටුම්පත සලකා බැලීම පිණිස පාර්ලිමේන්තුවේ ස්ථාවර නියෝග 113(2) ප්‍රකාරව, ව්‍යවස්ථාදායක ස්ථාවර කාරක සභාවට ගරු ජගත් සමරවික්‍රම මහතා අතිරේක සාමාජිකයෙකු වශයෙන් මවිසින් නම් කරන ලද බව දන්වනු කැමැත්තෙමි.

III

වරප්‍රසාද: නොගෙවූ විදුලි බිල්පත් පිළිබඳ රංජන් ජයලාල් මහතා කළ අසත්‍ය ප්‍රකාශය

சிறப்புரிமை: செலுத்தப்படாத மின் கட்டணப் பட்டியல் தொடர்பான திரு. ரஞ்சன் ஜயலாலினது தவறான கூற்று

PRIVILEGE: FALSE STATEMENT MADE BY MR. RANJAN JAYALAL REGARDING UNPAID ELECTRICITY BILLS

ගරු කථානායකතුමා
(மாண்புமிகு சபாநாயகர் அவர்கள்)
(The Hon. Speaker)

පාර්ලිමේන්තු මන්ත්‍රී ගරු ඩබ්ලිව්.ඩී.ජේ. සෙනෙවිරත්න මහතා විසින් 2024 මාර්තු 21 දින වරප්‍රසාද ප්‍රශ්න යටතේ පාර්ලිමේන්තුවේදී මතු කරන ලද කරුණු ආචාර ධර්ම සහ වරප්‍රසාද පිළිබඳ කාරක සභාවට යොමු කරනු ලැබේ.

IV

වරප්‍රසාද: ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කර ඇති SC/FRA/131/23 දරන පෙත්සම

சிறப்புரிமை: உயர் நீதிமன்றுக்குச் சமர்ப்பிக்கப்பட்ட SC/FRA/131/23ஆம் மனு

PRIVILEGE: PETITION SUBMITTED TO SUPREME COURT UNDER SC/FRA/131/23

ගරු කථානායකතුමා
(மாண்புமிகு சபாநாயகர் அவர்கள்)
(The Hon. Speaker)

පාර්ලිමේන්තු මන්ත්‍රී ගරු ලලිත් වර්ණ කුමාර මහතා විසින් 2024 අප්‍රේල් 01 දින වරප්‍රසාද ප්‍රශ්න යටතේ පාර්ලිමේන්තුවේදී මතු කරන ලද කරුණු ආචාර ධර්ම සහ වරප්‍රසාද පිළිබඳ කාරක සභාවට යොමු කරනු ලැබේ.

ලිපි ලේඛනාදිය පිළිගැන්වීම

சமர்ப்பிக்கப்பட்ட பத்திரங்கள்

PAPERS PRESENTED

ගරු නීතිඥ (ආචාර්ය) සුසිල් ප්‍රේමජයන්ත මහතා (අධ්‍යාපන අමාත්‍ය සහ පාර්ලිමේන්තුවේ සභානායකතුමා)
(மாண்புமிகு சட்டத்தரணி (கலாநிதி) சுசில் பிரேமஜயந்த - கல்வி அமைச்சரும் பாராளுமன்றச் சபை முதல்வரும்)
(The Hon. (Dr.) Susil Premajayantha, Attorney-at-Law - Minister of Education and the Leader of the House of Parliament)

ගරු කථානායකතුමනි, අග්‍රාමාත්‍ය සහ රාජ්‍ය පරිපාලන, ස්වදේශ කටයුතු, පළාත් සභා හා පළාත් පාලන අමාත්‍යතුමා වෙනුවෙන් මම 2024 අංක 01 දරන පරිපූරක ඇස්තමේන්තුව ඉදිරිපත් කරමි.