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

"PENAL CODE (AMENDMENT) BILL"

SC SD No. 13/2023

Petitioners:

1. K. Athula H. De Silva, Brigadier (Retd.),
   No. 590/2, Ekamuthu Mawatha,
   Madiwela Road, Thalawathugoda.

2. Shenali D. Waduge,
   No. 27, Ratmal Mawatha,
   Sirimal Uyana, Ratmalana.

3. Jehan Hameed,
   No. 1, Manthri Road,
   Colombo 5.

Counsel:

Dharshana Weraduwage with Danushi Kalupahana and Ushani Atapattu

vs.

1) Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Counsel for the State:

Ms. Harippriya Jayasundara, PC, ASG with Yuresha De Silva, DSG, Sureka Ahmed Jayasinghe, SSC, Ishara Madarasinghe, SC and M.B.M. Sajith Bandara, SC for the Hon. Attorney General

2) Hon. Premanath C. Dolewatta, MP,
   No. 50, Ihala Bomiriya, Kaduwela.

Counsel for the 2nd Respondent:	Sanjeeva Jayawardena, PC with Lakmini Warusevitane and Rukshan Senadheera
Intervenient Petitioner:	Bandisattambige Primal Nilhan Paul Fernando, No. 288/8, Hokandara Road, Victory Garden Stage 2, Hokandara.
Counsel:	S. Vijith Singh
Intervenient Petitioner:	Marlon Dan Buultjens, RC Ceylon Pentecostal Mission, No. 3, Seethagama Stage 2, Avissawella.
Counsel:	Canishka Witharana
Intervenient Petitioners:	Women and Media Collective, No. 56/1, Sarasavi Lane, Castle Street, Colombo 8. Professor Savitri Goonesekere, No. 22/2, Obahena Road, Madiwela, Kotte. Radhika Coomaraswamy, No. 27 1/C, Pedris Road, Colombo 3. Natasha Thiruni Jayasekera Balendra, No. 168/1, Inner Flower Road, Colombo 3. Samanpriya Ramani Muttettuwegama, No. 7/12, Sulaiman Terrace, Colombo 5. Yamindra Watson Perera, No. 130, Reid Avenue, Colombo 4. Nirupa Irani Karunaratne, No. 32, Alfred Place, Colombo 3.

Counsel:	Sanjeeva Jayawardena, PC with Prashanthi Mahindaratne, Dilumi De Alwis, Lakmini Warusevitane and Rukshan Senadheera
Intervenient Petitioners:	Hewa Kaluwela Mullage Thushara Manoj Kumara, No. 27/2/34, Araliya Mawatha, Attygala, Hanwella. Nawagamuwa Bandaralage Adhil Suraj Vimukthi Bandara, No. 81/51, Meegoda Estate, Panaluwa, Watareka, Padukka. Equite Sri Lanka Trust, No. 29/1, Woodland Avenue, Kalubowila, Nugegoda.
Counsel:	Prasantha Lal De Alwis, PC with Dineth Kaushalya and Chamara Wannisekera
Intervenient Petitioner:	Visakesa Chandrasekeram, No. 62/3, Mayura Place, Colombo 6. Radika Guneratne, No. 136/1/1, Old Kesbewa Road, Delkanda, Nugegoda. Thenu Ranketh, No. 75/1, Pepiliyana Mawatha, Kohuwela.
Counsel:	Nilshantha Sirimanne with Deshara Goonetilleke
Intervenient Petitioners:	Chandana Kapila Ranasinghe, No. 54/14B, 2nd Lane, Santhanampitiya Road, Embuldeniya. Hettigoda Gamage Kanthilatha,

No. 1051/1, Ragamwatte, Ragama.

Gameela Samarasinghe,
No. 22, Albert Mawatha, Nugegoda.

Prabasiri Ginige,
No. 108, George E De Silva Mawatha, Kandy.

Ananda Galappatti,
No. 25/4, Barnes Place, Colombo 7.

Counsel: Ermiza Tegal

Intervenient Petitioner: A.P. Bhoomi Harendran,
No. 1D/2F/U23, Mihindusenpura, Colombo 8.

Counsel: Pulasthi Hewamanna

Intervenient Petitioner: Ambika Satkunanathan,
No. 27, Rudra Mawatha, Colombo 6.

Counsel: Pulasthi Hewamanna

Intervenient Petitioner: Tamara Andrea Flamer Caldera,
No. 119/16, Model Farm Road, Colombo 8.

Counsel: Thishya Weragoda with Stefania Perera and
Dilan Nalaka

Intervenient Petitioner: Koswattage Don Aritha Gishan Wickremasinghe,
No. 92, Templers Road, Mount Lavinia.

Counsel: Thishya Weragoda with Stefania Perera and
Dilan Nalaka

Intervenient Petitioners: Pasan Hasitha Jayasinghe,

	No. 62/3, Mayura Place, Colombo 5. Warahena Liyanage Damith Chandimal De Alwis Gunetilleke, No. 7, Wekanda Road, Jambugasmulla Mawatha, Nugegoda.
Counsel:	Lakshan Dias
Intervenient Petitioner:	Dr. Beddage Tushara Wickremanayake, 36/2, Kuruppu Road, Colombo 8.
Counsel:	Pulasthi Rupasinghe with Nilma Abeysuriya
Intervenient Petitioners:	Dr. Paikiasothy Saravanamuttu, No. 3, Ascot Mawatha, Colombo 5. Bhavani Fonseka, No. 294/1, Nawala Road, Rajagiriya. Mirak W. Raheem, No. 24/7, Dudley Senanayake Mawatha, Colombo 8.
Counsel:	Luwie Ganeshathasan with Khyati Wikramanayake and Bhagya Samarakoon
Intervenient Petitioners:	Sonali Therese Gunasekara, No. 410/24, Bauddhaloka Mawatha, Colombo 7. Jake Randle Oorloff, No. 12/A, 137, Rukmalgama, Pannipitiya.
Counsel:	N. K. Ashokbharan

Before: **Jayantha Jayasuriya, PC, CJ**
Vijith K. Malalgoda, PC, J
Arjuna Obeyesekere, J

The Court assembled at 10.00 a.m. on 20th April 2023 and at 11.30 a.m. on 21st April 2023 for the hearing of the petition.

A private member's Bill in its long title referred to as 'A Bill to amend the Penal Code,' and in its short title referred to as the 'Penal Code (Amendment) Bill' [*the Bill*] was published as a Supplement in Part II of the Government Gazette of 17th March 2023. It was presented in Parliament by Hon. Premanath C. Dolewatte, Member of Parliament, and was placed on the Order Paper of Parliament of 4th April 2023.

Three Petitioners have invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution by filing the above-numbered petition in the Registry of the Supreme Court on 17th April 2023. While the Hon. Attorney General has been named as the 1st Respondent, the proponent of the Bill has been named as the 2nd Respondent. The Petitioners have prayed *inter alia* that this Court declare that the Bill in its entirety is inconsistent with one or more Articles of the Constitution and a determination that, in addition to being passed with not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour [*the special majority*], the Bill must be approved by the People at a Referendum.

Upon receipt of the said petition, the Registrar of this Court issued notice on the Hon. Attorney General as mandated by Article 134(1) of the Constitution. Fourteen petitions have been filed seeking to intervene in this application and to be heard in terms of Article 134(3) of the Constitution. All such applications were allowed. This Court heard extensive submissions from the learned Counsel for the Petitioners, the learned Additional Solicitor General, the learned President's Counsel for the 2nd Respondent and all learned Counsel for the Intervenient Petitioners, and afforded all parties the opportunity of filing written submissions.

Overview of the Bill

The Bill contains two clauses. While Clause 1 sets out the short title, paragraph (iii) of Clause 2 of the Bill sets out that, *"The intent of the legislature in enacting this legislation must be considered as amending the provisions that make sexual orientation a punishable offence."* Accordingly, Clause 2 of the Bill seeks to repeal and replace Section 365 of the Penal Code and repeal in its entirety Section 365A.

Section 365 of the Penal Code, prior to its expansion in 1995, was identical to Section 377 of the Penal Code of India. Indeed, our Penal Code, enacted by Ordinance No. 2 of 1883, corresponds to the Penal Code of India, which was drafted by the Macaulay Commission. Prof. G.L. Peiris in '**General Principles of Criminal Liability in Sri Lanka**' [2nd ed., 1980, Stamford Lake Publishers] states, *"The Penal Code, No. 2 of 1883, founded on the corresponding Indian Law drafted by the Macaulay Commissioners, frequently reflected the general approach and policy of English criminal law, appropriately modified and re-oriented."*

The following passage from the judgment of Justice Dr. D.Y. Chandrachud [as he then was] in **Navtej Singh Johar v Union of India** [AIR 2018 SC 4321], when the Supreme Court of India was called upon to strike down Section 377 of its Penal Code, briefly sets out the historical setting to the introduction of the Penal Code of India:

> *"Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India and principal architect of the Indian Penal Code, cited two main sources from which he drew in drafting the Code: the French (Napoleonic) Penal Code, 1810 and Edward Livingston's Louisiana Code. Lord Macaulay also drew inspiration from the English common law and the British Royal Commission's 1843 Draft Code. Tracing that origin, English jurist Fitzjames Stephen observes:*
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> > *'The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India.'"* [pages 4438 and 4439]

"The Indian Penal Code was the first codified Criminal Code in the British Empire. ..." [page 4442]

Section 365 of the Penal Code

Section 365 as it stood in 1883 read as follows:

> *"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 liable to fine.*
>
> *Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."*

The Penal Code (Amendment) Act, No. 22 of 1995 sought to amend Section 365 by the insertion of the following at the end of the Section:

> *"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."*

Subject to the above amendment, carnal intercourse "against the order of nature" with any man, woman or animal has remained an offence since the enactment of the Penal Code in 1883. The proposed amendment seeks to repeal Section 365 and replace it with the following:

> *"Whoever voluntarily has carnal intercourse against the order of nature with an animal, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also liable to fine.*

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Section 365A of the Penal Code

Section 365A was introduced in 1924 by the Penal Code (Amendment) Ordinance, No. 5 of 1924, and reads as follows:

"Any male 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 male person of, any act of gross indecency with another male person, shall be guilty of an offence, and shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both, and shall also be liable to be punished with whipping."

Section 365A was never a part of the Penal Code of India, and therefore it would be relevant to briefly set out the origins of Section 365A.

According to the website of the United Kingdom Parliament, by 1885, in England, homosexuality was only illegal with regard to the act of buggery [i.e., sodomy], for which the punishment was to be kept in penal servitude for life. This changed when the Liberal Member of Parliament for Northampton, Henry Labouchère, said to have been a strong opponent of homosexuality, introduced Section 11 of the 1885 Criminal Law Amendment Act which made all homosexual acts of 'gross indecency' illegal. The intention was to punish homosexuality where sodomy could not be established. Although the Amendment Act was primarily concerned with the protection of women and girls by increasing the age of consent, this small section in the said Amendment Act was a pivotal change in legislation on homosexual relations. Unusually, this Section had been passed during a late-night debate in the House of Commons with only a few Members of Parliament present, and came to be known as the Labouchère Amendment of 1885.

At the time Section 365A was introduced in 1924 in Sri Lanka, it was limited to acts of gross indecency that took place between two male persons, whether such acts took place in public or private, and was reflective of the law in England at the time. It criminalised

sexual conduct between two male persons, even if such conduct was between consenting adults and took place in the privacy of their homes.

The Penal Code (Amendment) Act, No. 22 of 1995 repealed Section 365A and replaced with the following new Section:

> *"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 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 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 the injuries caused to such person."*

The above amendment sought to extend the effect of Section 365A in two ways. The first was that an act of gross indecency was no longer limited to acts between two male persons. The use of the word 'persons' could be interpreted to extend to consensual acts between an adult male and adult female, as well as between two consenting adult females, even though such acts took place in the privacy of their homes, if the type of acts were considered "grossly indecent". The second was that there was an enhanced punishment where the act of gross indecency was inflicted by a person over eighteen years of age on a person under sixteen years of age. Section 365A was amended further by the Penal Code (Amendment) Act, No. 16 of 2006 by the insertion of an explanation to define *"injuries"* to include *"psychological or mental trauma"*. The present Bill proposes to delete Section 365A in its entirety.

It must be reiterated that the cumulative effect of the Bill, as captured in Clause 2(iii), is that the sexual orientation of a person shall no longer be a punishable offence, and any consensual sexual conduct between two adult persons of the same sex, irrespective of whether it takes place in public or private, shall no longer be an offence.

Evolution of homosexuality as a criminal offence

It would perhaps be relevant to refer to the following narrative from the judgment of Chandrachud, J in **Navtej Singh Johar v Union of India** [supra] where he briefly sets out the manner in which sexual conduct between two consenting adult males came to be an offence and was subsequently decriminalised in England:

> *"While ecclesiastical laws against homosexual intercourse were well established in England by the 1500s, England's first criminal (non-ecclesiastical) law was the Buggery Act of 1533, which condemned "the detestable and abominable vice of buggeri committed with mankind or beest." "Buggery" is derived from the old French word for heretic, "bougre", and was taken to mean anal intercourse.*
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> *The Buggery Act, 1533, which was enacted by Henry VIII, made the offence of buggery punishable by death, and continued to exist for nearly 300 years before it was repealed and replaced by the Offences against the Person Act, 1828. Buggery, however, remained a capital offence in England until 1861, one year after the enactment of the Indian Penal Code. The language of Section 377 has antecedents in the definition of buggery found in Sir Edward Coke's late 17th Century compilation of English law: "...Committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast."* [page 4440]
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> *"The Criminal Law Amendment Act, 1885 made "gross indecency" a crime in the United Kingdom, and was used to prosecute homosexuals where sodomy could not be proven.*
>
> *The Wolfenden Report of 1957, which was supported by the Church of England, proposed that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business' and recommended that homosexual acts between two consenting adults should no longer be a criminal offence.*

The success of the report led England and Wales to enact The Sexual Offences Act, 1967, which decriminalized private homosexual sex between two men over the age of twenty-one. Britain continued to introduce and amend laws governing same-sex intercourse to make them more equal, including the lowering of the age of consent for gay/bisexual men to sixteen in 2001. In May 2007, in a statement to the UN Human Rights Council, the United Kingdom, which imposed criminal prohibitions against same-sex intercourse in its former colonies across the world, committed itself to the cause of worldwide decriminalization of homosexuality." [page 4441]

Justice Chandrachud has accordingly opined that in India, "*Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence.* ***The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the Constitution***." [emphasis added; page 4435]

The question whether criminalising homosexuality is a moral dilemma as opposed to a legal dilemma was addressed by Sachs, J in the South African case of **National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others** [1999 (1) SA 6 (CC)], when he stated that, "*It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalized. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.*" [paragraph 107]

Case of the Petitioners

Mr. Dharshana Weraduwage, the learned Counsel for the Petitioners and the learned Counsel for the Intervenient Petitioners who supported the Petitioners, Mr. S. Vijith Singh and Mr. Canishka Witharana presented four arguments in support of their position that the provisions of the Bill are violative of Articles 1, 3, 4(d), 9, 12(1), 13(4), 27(1), 27(2)[a] and 27(13) of the Constitution, and should thus be passed by the special majority of Parliament and be approved by the People at a Referendum. It must, perhaps, be stated at the outset that in our view, *ex facie,* none of the four arguments impinge upon the provisions of Articles 1, 3, 4(d) and 13(4) of the Constitution.

The first argument was that the safeguards provided in Sections 365 and 365A for the protection of children and those under sixteen years of age will be taken away by the aforementioned amendments proposed by the Bill, thereby creating space for the exploitation of children and leaving a lacuna in the enforcement of the law relating to offences against children.

In this connection it was further submitted that:

(a) exposure to lesbian, gay, bisexual and transgender [LGBT] programmes in schools could impact the free decision making power of children and give rise to transgender children;

(b) the enactment of the Bill would be contrary to the provisions of Article 27(13) which provides that, "*The State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination.*";

(c) the protection presently afforded to children would be removed if Sections 365 and 365A are amended as proposed by the Bill, and that even a person under sixteen years of age could engage in sexual activity with a person over eighteen years of age.

It is in this background that this Court was urged as the upper guardian of children, to act in the best interests of the child and declare that the Bill is violative of Article 12(1).

The learned Additional Solicitor General, Harippriya Jayasundara, PC, submitted that women and children were the focus of the amendments introduced to the Penal Code in 1995, and that while Sections 365 and 365A were amended by increasing the punishment where one party was a person below the age of sixteen, Section 365B introduced a new offence titled 'grave sexual abuse'. It was submitted further by the learned Additional Solicitor General that the amendment introduced to Section 365B by the Penal Code (Amendment) Act, No. 29 of 1998 specifically provides that consent with regard to any sexual conduct constituting 'grave sexual abuse' is immaterial when the offence has been committed in respect of a child below the age of 16 – *vide* Section 365B(1)(aa). It was her position that in the event the conduct of any person does not fall within the definition contained in Section 365B, Section 345 of the Penal Code which deals with sexual harassment could be resorted to in order to protect children against any unwelcome sexual advances by words or action. Thus, the contention of the Petitioners is unfounded and without any legal basis.

The second argument of the learned Counsel for the Petitioners was that the impugned amendments will dilute the Rule of Law and result in the life and liberty of the citizens being at risk. This argument is even more tenuous and the Petitioners have not been able to connect the passing of this Bill to any violation of the Rule of Law.

The third argument was that a majority of those with HIV and AIDS have a history of male or bisexual exposure and that decriminalisation of same-sex relationships will give rise to an increase in the number of persons infected with HIV and AIDS. It was further submitted that this would have an adverse impact on national security by destroying individuals, families, communities, economic and socio-political institutions, and the military and police forces, and that the protection granted by the Chapter on fundamental rights cannot be truly enjoyed without the provision of a safe, secure and protective environment in which a citizen of Sri Lanka may realise the full potential of his existence.

However, little to nothing has been submitted to this Court in support of this proposition other than a singular point that HIV and AIDS affect those engaging in same-sex intercourse more than those engaging in heterosexual intercourse. Hence, the material

that has been placed before this Court by the Petitioners does not support the position of the Petitioners that HIV and AIDS are only prevalent in homosexuals or that the proposed amendment will result in an increase in the number of those afflicted with HIV and AIDS.

Mr. Pulasthi Hewamanna, Ms. Ermiza Tegal and Mr. N. K. Ashokbharan, the learned Counsel for some of the Intervenient Petitioners relying on the 'National HIV/STI Strategic Plan for Sri Lanka' (2018-2022) prepared by the Ministry of Health and reports prepared by the United Nations Development Programme and the Commonwealth Eminent Persons Group presented three important arguments. The first was that it is not only homosexual males who contract HIV but female sex workers, returnee migrant workers and those who use or inject drugs. The second is that criminalisation of homosexual conduct between two consenting adult males has only resulted in such persons being marginalised from society and thereby being deprived of access to proper healthcare which if available would address the spread of HIV and AIDS among those persons. The third is that the amendment of laws such as Sections 365 and 365A would facilitate the outreach to individuals and groups at a heightened risk of infection.

There are two matters that must be emphasised at this stage. First, as would be obvious to any average observer, correlation (even if one assumes that it exists) does not equal causation. Second, the arguments taken up by the learned Counsel for the Intervenient Petitioners and the learned Additional Solicitor General on this point, all of whom argue in favour of the Bill, are *based on* the same factor that the Petitioners sought to place reliance upon. That is, the perception that HIV is disproportionately higher in homosexuals is *due to* the social stigma caused by the criminalisation of their relationships. This also does not mean, of course, that HIV and AIDS are not found amongst heterosexuals – they very well are.

It is the view of this Court that the argument that Sections 365 and 365A stand in the way of an HIV or AIDS pandemic and that the Sri Lankan Armed Forces and Police would be destroyed by HIV or AIDS if those Sections are repealed descends to the realm of the absurd, and it is unsurprising that the Petitioners did not adduce any scientifically acceptable evidence to support this line of argument.

The fourth and final argument of the learned Counsel for the Petitioners was that homosexual activity is contrary to the principles of Buddhism and therefore violates Article 9 which provides that, "*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 guaranteed by Articles 10 and 14(1)(e).*" The Petitioners did not explain the manner in which decriminalisation of one's sexual orientation derogates from the State's duty to protect and foster the Buddha Sasana nor the point of how the proposed amendments are prohibited by or are contrary to the Buddha Sasana, except to state that it is an offence [අාරාධිකා] for a Buddhist priest to have sexual relations with another, irrespective of whether the other person is of the same sex or of the opposite sex.

On the contrary, Mr. Sanjeeva Jayawardena, PC and Mr. Prashantha Lal De Alwis, PC appearing for some of the Intervenient Petitioners submitted that:

a) Bhikkus and Bhikkunis have a separate code of conduct (vinaya rules) and lay persons are not governed by the rules in the said code;

b) none of the *'sutras'* focused on the conduct of lay persons condemn homosexuality;

c) while the basic tenets of all religions are that all human beings should be treated fairly and equally irrespective of their circumstances, the fundamental teachings of Buddhism include tolerance towards and equal treatment of all human beings and that Buddhism does not discriminate persons whose sexual orientation is anything other than heterosexual;

d) from whatever parity of reasoning, it would be outrageous for the Petitioners to allege that a law which decriminalises homosexuality would result in undermining the protection of the Buddha Sasana.

Taking into consideration the submissions of the parties, we are of the view that the final argument of the Petitioners too lacks merit.

There is a common thread that runs through most of the arguments put forward by and in support of the Petitioners, which is that they are largely based on speculation and are tenuous at best, and may be disposed of summarily. For instance, the argument that children would be harmed by the passing of this Bill or the argument that there shall be an increase in the number of those afflicted by HIV and AIDS is specious. No reasonable connection has been drawn between the amendments sought to be introduced and the dangers the Petitioners complain will arise if the Bill is passed. This prompted all learned Counsel supportive of the proponent to submit with almost one voice that the purported grounds urged by the Petitioners are not only speculative, fanciful and palpably false, but have not been established in any manner by the Petitioners, and that by arguing so, the Petitioners are advocating that a segment of the society continue to be denied the equal protection of the law.

This is a matter that has been considered by this Court in several previous determinations.

In the **Twentieth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (2019-2020), Volume XV, 87 at pages 133-134] it was held that, *"We considered all these submissions in relation to the Clause under consideration and are of the view that a decision on the inconsistency or consistency with a Constitutional provision cannot be based on surmise and conjecture. When we exercise jurisdiction in relation to an amendment to the Constitution, it does not extend to consider desirability of a provision or to delve into policy matters. Sole consideration would be the Constitutionality of the provision."*

In the **Bureau of Rehabilitation Bill** [SC SD Nos. 54-61/2022; page 9] this Court, having considered several previous determinations, held as follows:

> *"In considering the application of a bill or its provisions, it is only plausible and real-world possibilities that would be entertained by this Court. The threat of potential abuse should not be based on fanciful hypotheses, and should always be guided by the perspective of the proverbial reasonable person. There should be a realistic possibility that the provisions of the Constitution would be abused through the provisions of the law. In such a situation, this Court undoubtedly possesses the*

jurisdiction to consider such possibilities, and would not have to wait for any actual or imminent infringement. The need for this Court to be proactive and vigilant is underscored by the absence of post-enactment review. "

The Jurisdiction of the Supreme Court

It would be important to set out at this stage the jurisdiction of this Court in applications of this nature. In terms of Article 120 of the Constitution, "*The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.*"

Article 121(1) goes on to stipulate that:

> "*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. ...*"

Article 123(1) provides that, "*The determination of the Supreme Court shall be accompanied by the reasons therefor and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.*" Where a primary determination is made as provided in Article 123(1) that any provision of the impugned bill is inconsistent with the Constitution, the consequential determinations that the Court is required to make are specified in Article 123(2). Accordingly, any amendment proposed by a bill [*which includes repeal, alteration and addition – vide Article 82(7)*], which seeks to amend, repeal or replace a provision of the Constitution requires to be passed by the special majority of Parliament; any amendment, repeal or replacement of any provisions set out in Article 83 of the Constitution or that which is inconsistent with any of the provisions set out in Article 83 of the Constitution requires, in addition, the approval by the People at a Referendum.

It was submitted by Mr. Jayawardena, PC that in examining the provisions of the Bill, there are two important matters that must be borne in mind.

The first was that while in terms of Article 3, "*In the Republic of Sri Lanka Sovereignty is in the People and is inalienable*," Article 4(a) provides that, "*The Sovereignty of the People shall be exercised and enjoyed in the following manner:– (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum.*" He submitted that the legislative power of the People, conferred by the People to be exercised by Parliament, is reflected in Article 75, in terms of which it is Parliament that "*shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution*," and accordingly, the making of whatever law or even the repeal of any law are within the exclusive domain of Parliament and within its legislative policy. This, he argued, was further reflected in Article 27(1) of the Constitution in terms of which, "*The 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 for the establishment of a just and free society.*"

The second was that in an application of this nature, the role of the Supreme Court is circumscribed by Articles 120 to 123 of the Constitution and accordingly the role of the Court is to examine if the Bill is in accordance with the Constitution, and where necessary, to act in terms of Article 123(2). It was submitted by Mr. Jayawardena, PC that the cumulative effect of these two provisions is that the Supreme Court cannot impose upon a law a moral standard or moral point of view or social morality, with regard to a bill that offends no provision of the Constitution. In other words, his position was that even if this Court was of the view that repealing Section 365A would encourage persons of whatever sexual orientation to behave in *an indecent manner in public* and whether such conduct is, in the view of this Court morally repugnant and against the social and cultural ethic of this Country, that would not be a matter for this Court but one that is left entirely at the doorstep of the legislature.

Mr. Nilshantha Sirimanne, the learned Counsel for some of the Intervenient Petitioners sought to draw a distinction between the role played by this Court in examining a bill that

seeks to repeal an offence relating to public order as opposed to an offence that is based on morality. He submitted that while in the former instance, the Court is entitled to consider the constitutionality as well as the constitutional ramifications of such amendment, in the latter case, the decision to repeal must be left to be determined solely by Parliament.

Mr. Thishya Weragoda, the learned Counsel for some other Intervenient Petitioners cited the following passage by Reid, LJ in **Shaw v Director of Public Prosecutions** [(1962) AC 220] - *"Notoriously there are wide differences of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. Some think that the law already has gone too far, some that it does not go far enough. Parliament is the proper place, and I am firmly of opinion the only proper place to settle that."*

What precisely this Court can do when called upon to decide on the constitutionality of a bill has been considered in several previous determinations. In the **New Wine Harvest Ministries (Incorporation) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Volume VII, 361 at page 365], it was held that:

> *"In exercising jurisdiction under Article 123 of the Constitution we cannot examine the validity of past legislation. Nor can we take their content as a standard of consistency with the provisions of the Constitution. Our task is to examine the provisions of the bill challenged by the Petitioner and to determine whether they are inconsistent or not with the provisions of the Constitution."*

In the **Nation Building Tax (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills (2016-2017), Volume XIII, 65 at page 66], it was stated that, *"... the Court should not substitute its own opinion for the opinion of the legislature."* This position was reiterated in the **Special Goods and Services Tax Bill** [SC SD Nos. 1-9/2022; page 10], where this Court stated as follows:

> *"Following on with the comment made by the Supreme Court in the Nation Building Tax (Amendment) Bill, [SC SD 34/2016], it is necessary for this Court to observe that this Court is devoid of jurisdiction to comment on the prudence or otherwise of a*

particular policy formulated by the Executive and sought to be converted into legislation by the enactment of a law by Parliament. Thus, this Court will refrain from doing so, even in instances where there appears to be compelling public and national interest considerations which may warrant an adverse comment being made."

We too are of the view that when the constitutionality of a bill is challenged, the task of the Court is to examine the clauses of the bill, determine whether or not they are consistent with the provisions of the Constitution and stay within the limits circumscribed by the Constitution. We are mindful that what is sought to be done by way of this Bill is to repeal two provisions of an existing law and replace one provision in the manner set out in the Bill.

Parliament's power to criminalise / de-criminalise human conduct

Taking into consideration Clause 2(iii) of the Bill and the submissions made during the hearing, the real issue before this Court in connection with this Bill may be articulated as follows – i.e. *Whether there exists any constitutional impediment to the repeal of the identified criminal offences?*

The starting point for the discussion of such question would be Parliament's power to criminalise (or decriminalise) human activity. What are the limits of Parliamentary power in this regard? Our Constitution and jurisprudence have set out several guidelines, of which a non-exhaustive list is set out below:

1. Article 13(6) of the Constitution bars the creation of offences that are retrospective in its application, unless it falls within the proviso to the said Article – Offences against Aircraft Bill [Decisions of the Supreme Court on Parliamentary Bills (1978-1983), Volume I, 135], Surcharge Tax Bill [SC SD Nos. 19-29/2022] and Code of Criminal Procedure (Special Provisions) Bill [Decisions of the Supreme Court on Parliamentary Bills (2010-2012), Volume X, 117].

2. Article 12(1) mandates that an offence should not be vague and overbroad – Bureau of Rehabilitation Bill [SC SD Nos. 54-61/2022].

3. Article 15 governs the creation of offences that restrict a fundamental right – Parliament (Powers and Privileges) (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills (1978-1983), Volume I, 89].

4. Article 4(c) and creation of offences that specify the imposition of a minimum mandatory sentence – Prohibition of Ragging and Other Forms of Violence in Educational Institutions Bill [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Volume VII, 135] and the Prevention of Organised Crime Bill [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Volume VII, 367].

It could thus be seen that Parliament's power to impose criminal sanctions on the acts of persons must be viewed in the context of the extent to which it restricts, and the necessity for so restricting the fundamental rights of persons. Viewed from the said perspective, Parliament's power to decriminalise activities is significantly broader as restriction or abridgment of fundamental rights are less likely to occur in such instances.

Thus, a petitioner who seeks to claim that decriminalisation of an act violates the Constitution must demonstrate that the Constitution imposes a requirement for the act to continue to be criminalised. This is a high burden. To take an extreme example, if Parliament were to repeal the entire Penal Code without replacing it, it may be possible to argue that life and property of other citizens are placed in jeopardy, and that the repeal is violative of their rights. In this determination, we are tasked with the question of whether the repeal of laws which criminalise intimate acts between consenting adults is unconstitutional. Naturally, the burden is even higher for the Petitioners, as the original law had been introduced to further certain "moral" norms as opposed to protecting the life, limb or property of persons. This leads us to consider the question of whether there is any constitutional prohibition on decriminalising an offence that seeks to impose moral standards.

In answering the question before us, we shall first examine the rationale for the Bill and thereafter three principal arguments made on behalf of the 2nd Respondent and the Intervenient Petitioners who supported the 2nd Respondent.

Case of the 2nd Respondent and the Intervenient Petitioners

It is in the above legal and factual background that Mr. Jayawardena, PC submitted that:

(a) the cumulative effect of the Bill, as captured in Clause 2(iii), is that sexual orientation of a person shall no longer be a punishable offence, and consensual sexual conduct between two persons of the same sex, whether it takes place in public or private, shall no longer be an offence;

(b) the Bill seeks to catapult Sri Lanka from the latter part of the anachronistic 19th century Victorian era firmly into the 21st Century with contemporary social mores, and thereby restore the Rule of Law which facilitates equality, liberty and dignity in all its facets for those whose sexual orientation is different from the majority;

(c) pursuant to decriminalising homosexuality by way of the Sexual Offences Act, the United Kingdom has called upon other members of the Commonwealth to follow suit.

Mr. Luwie Ganeshathasan, the learned Counsel for some of the Intervenient Petitioners submitted that Sri Lanka is one of the few countries in the world that still criminalises sex between consenting adults of the same sex, and that it is the only non-Muslim majority country in Asia that criminalises these Acts. It was submitted by Mr. Hewamanna that approximately 12% of the citizens of this Country belong to the homosexual community and that they live with the constant fear of the possible use of Section 365A against them, purely based on their sexual orientation. He submitted further that the mere existence of Section 365A has a 'chilling effect' on an individual's wellbeing, and even though such individual is subject to discrimination, seeking redress is nearly impossible because any disclosure of such discrimination based on sexual orientation can result in prosecution.

He therefore submitted that the decriminalisation of one's sexual orientation would remove the spectre of a sword of prosecution hanging over their heads and that this is what the Bill seeks to achieve. It was his position that contrary to what the Petitioners claim, the Bill seeks to remove the discrimination and stigma attached to the sexual

orientation of a group of persons and restore, enhance and protect the fundamental rights guaranteed to such group by the Constitution

Sanath Wimalasiri v The Attorney General [SC Appeal No. 32/2011; SC Minutes of 30th November 2016] involved a case where the appellant had engaged in oral sex with another male in the rear seat of a vehicle and had been charged with an act of gross indecency in public. Aluwihare, PC, J having analysed the developments that have taken place with regard to Section 365A observed as follows:

> *"There is no question that the individuals involved in the case are adults and the impugned act, 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 buggery in 2004 and is 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."*

It was therefore submitted that the rationale for the proposed amendments is to afford all citizens the full realisation of their fundamental rights guaranteed by our Constitution, irrespective of their sexual orientation.

Human dignity

The preamble to the Universal Declaration of Human Rights (1948) to which Sri Lanka is a signatory stipulates that, *"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"* and goes onto provide in Article 1 that, *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."* Article 1 of the Charter of Fundamental Rights of the European Union provides that, *"Human Dignity is inviolable. It must be respected and protected."* Thus, human dignity is the foundational concept of the global human rights regime and is the 'ultimate value' that gives coherence to human rights.

Mr. Ganeshathasan submitted that Sections 365 and 365A are antithetical to any conception of human dignity and that by criminalising sexual orientation, the State has denied citizens of this Country the freedom to express themselves in private with another consenting adult. He submitted further that ***dignity*** as a constitutional value finds specific mention in the **Svasti** to the Constitution of Sri Lanka, which reads as follows:

> "The PEOPLE OF SRI LANKA having, by their Mandate freely expressed and granted on the Sixth day of the waxing moon in the month of Adhi Nikini in the year two thousand five hundred and twenty one of the Buddhist Era (being Thursday the twenty-first day of the month of July in the year one thousand nine hundred and seventy seven), entrusted to and empowered their Representatives elected on that day to draft, adopt and operate a new Republican Constitution in order to achieve the goals of a DEMOCRATIC SOCIALIST REPUBLIC, and having solemnly resolved by the grant of such Mandate and the confidence reposed in their said Representatives who were elected by an overwhelming majority, to constitute SRI LANKA into a DEMOCRATIC SOCIALIST REPUBLIC whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY and **assuring to all People FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS** and the INDEPENDENCE OF THE JUDICIARY **as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA** and of all the People

of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY:" [emphasis added]

Thus, the Constitution has assured to all our People, freedom, equality, justice and fundamental human rights as their intangible heritage that guarantees the dignity and well-being of the People. This is buttressed in Article 27 (2)(a) which provides that, "*The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include the full realisation of the fundamental rights and freedoms of all persons.*"

In **Kirahandi Yeshin Nanduja De Silva and Another v Sumith Parakramawansha and Others** [SC FR Application No. 50/2015; SC Minutes of 2nd August 2017] Priyantha Jayawardena, PC, J observed that, "*The right to equality which is recognized in our Constitution is inherent to human dignity.*"

In **Kanapathipilli v Sri Lanka Broadcasting Corporation and Others** [(2009) 1 Sri LR 406 at page 412], Shirani Bandaranayake, J (as she then was) held that, "*The concept of equality, which is a dynamic concept, is based on the principle that the status and dignity of all persons should be protected whilst preventing inequalities, unfairness and arbitrariness....*" Reference was thereafter made to the following paragraph of Baroness Hale in Ghaidan v Godin-Mendoza [2004 3 All ER 411 at page 458], where referring to the principle of equality, it was stated that, "*Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others, not only causes pain and distress to that person, but also* ***violates his or her dignity as a human being***." [emphasis added]

In **Ajith C. S. Perera v. Daya Gamage and Others** [SC FR Application No. 273/2018; S.C. Minutes of 18th April 2019] Prasanna Jayawardena, PC, J stated that:

> "*...I would like to mention in passing, that it seems to me that* ***the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution.*** *It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country. As Aharon Barak, former Chief Justice*

of Israel has commented [Human Dignity – The Constitutional Value and the Constitutional Right (2015)]:

> *"Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights." and "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that united the human rights into one whole. It ensures the normative unity of human rights."*

In **Kandawalage Don Samantha Perera v Officer in Charge, Hettipola Police Station and Others** [SC (FR) Application No. 296/2014; SC Minutes of 16th June 2020] Thurairaja, PC, J referring to the above passage stated that, "*I am in respectful agreement with his Lordship that 'Human Dignity' is a constitutional value that underpins the Fundamental Rights jurisdiction of the Supreme Court. I am of the view that 'Human Dignity' as a normative value should buttress and inform our decisions on Fundamental Rights*."

In **Navtej Singh Johar v Union of India** [supra] Chief Justice Dipak Misra of the Indian Supreme Court has stated as follows:

> *"...In Common Cause (A Regd. Society) (AIR 2018 SC 1665), one of us has observed that human dignity is beyond definition and it may, at times, defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism,* ***but what really matters is that life without dignity is like a sound that is not heard.*** *Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling."* [emphasis added; page 4366]
>
> *"Dignity is that component of one's being without which sustenance of his/her being to the fullest or completest is inconceivable. In the theatre of life, without possession of the attribute of identity with dignity, the entity may be allowed entry to the centre stage but would be characterized as a spineless entity or, for that matter, projected as a ruling king without the sceptre. The purpose of saying so is that the identity of*

every individual attains the quality of an "individual being" only if he/she has the dignity. Dignity while expressive of choice is averse to creation of any dent. ***When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented****. Such a situation urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals.* ***This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other.*** *That is the right to choose without fear. It has to be ingrained as a necessary pre-requisite that consent is the real fulcrum of any sexual relationship*. [emphasis added; page 4367]

In his separate judgment, Chandrachud, J goes on to state as follows:

"Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. ***The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.***" [emphasis added; page 4436]

Section 377 of the Penal Code is unconstitutional in so far as it penalises a consensual relationship between adults of the same gender. ***The constitutional values of liberty and dignity can accept nothing less***." [emphasis added; page 4437]

Mr. Hewamanna referred to a message delivered by the then Secretary General to the United Nations, Ban Ki-moon to the Oslo International Conference on Human Rights, Sexual Orientation and Gender Identity where he has stated that, "*Some will oppose*

change. ***They may invoke culture, tradition or religion to defend the status quo****. Such arguments have been used to try to justify slavery, child marriage, rape in marriage and female genital mutilation.* ***I respect culture, tradition and religion - but they can never justify the denial of basic rights****."* [emphasis added]

It is in the above circumstances that Mr. Hewamanna and Mr. Pulasthi Rupasinghe, the learned Counsel for some of the Intervenient Petitioners drew our attention to certain documented incidents of harassment and humiliation that members of the LGBT community have had to undergo due to the presence of Sections 365 and 365A simply due to their sexual orientation. It is perhaps relevant to state that as provided in the Code of Criminal Procedure Act, a person suspected of an offence under Section 365 and 365A can be arrested without a warrant, and that both offences are non-bailable.

The continued maltreatment of individuals on the basis of their sexual orientation, including unnecessary and forced anal and vaginal examinations and arrests made based merely on appearance constitute an assault to the dignity of these individuals who undergo severe mental/psychological suffering as a result, thus attracting the provisions of Article 11, a non-derogable and entrenched provision. Article 11 of the Constitution, which echoes Article 9 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, guarantees that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment and thereby recognises the right to live with dignity.

It would perhaps be relevant to refer to three Sections of the Constitution of South Africa which specifically refer to and recognise human dignity:

Section 1(a)

"The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

Section 10

"Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 39(1)

"When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;"

It is in the above constitutional setting that in **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** [supra], the South African Constitutional Court unanimously held that criminalisation of sodomy was discriminatory. Ackermann J, held thus:

> *"The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection."* [paragraph 25]
>
> *"Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as*

apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution." [paragraph 28]

It is clear that human dignity underpins the application of all fundamental rights. In other words, human dignity is the fundamental virtue sought to be protected through the securement of fundamental rights and the Rule of Law. The Svasti demonstrates that our Constitution recognises and upholds human dignity.

The importance of the above analysis is that a law will face a stiff burden if it were to impinge upon human dignity of a person in criminalising offences to safeguard morality. It would be even more difficult to argue that such a law must be maintained and cannot be repealed. We are of the view that the decriminalisation of sexual activity amongst consenting adults irrespective of their sexual orientation only furthers human dignity and as such this cannot be considered as being an offence that must be maintained in the statute book.

Article 12(1)

The Rule of Law is assured through Article 12(1) of the Constitution and provides that, *"All persons are equal before the law and are entitled to the equal protection of the law."* Thus, human dignity is the hallowed goal towards which Article 12(1) seeks to carve out a path, hewing down arbitrary obstacles.

Former Chief Justice S. Sharvananda in his book, **Fundamental Rights in Sri Lanka – A Commentary** (1993), has stated that, *"Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the law; ... The guiding principle is that all persons and things similarly circumstanced shall be treated alike. 'Equality before the law' means that among equals the law should be equal and should be equally administered and that the like should be*

treated alike. What it forbids is discrimination between persons who are substantially in similar circumstances or conditions... It is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same." [page 81]

In **Karunathilaka and Another v Jayalath de Silva and Others** [2003 (1) Sri LR 35 at pages 41 and 42], Shirani Bandaranayake, J (as she then was) held that, "*The basic principle governing the concept of equality is to* ***remove unfairness and arbitrariness****. It* ***profoundly forbids actions, which deny equality and thereby become discriminative****. The hallmark of the concept of equality is to ensure that fairness is meted out.*" [emphasis added]

The learned Additional Solicitor General submitted that it is indeed ironic for the Petitioners to claim that the provisions of the Bill are violative of Article 12(1) when the very essence of the Bill is to ensure that all persons are equal before the law and are afforded the equal protection of the law. The learned Additional Solicitor General drew the attention of this Court to the separate concurring opinion in the **Nineteenth Amendment to the Constitution Bill** (2004) [Decisions of the Supreme Court on Parliamentary Bills (2004-2006), Volume VIII, 58 at pages 64 and 65], where, in the context of the freedom to choose a religion of one's choice, Tilakawardane, J quoted the following passage from T.M.A. Pai Foundation and Others v State of Karnataka and Others [(2002) 8 SCC 481]:

> *"The one billion population of India consists of six main ethnic groups and fifty-two major tribes, six major religions and 6,400 castes. The essence of secularism in India can best be depicted if a relief map of India is made in mosaic, where the aforesaid one billion people are the small pieces of marble that go into the making of a map. Each person whatever his/her caste, religion has his/her individual identity, which has to be preserved, so that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces of marble in the form of human beings, which may individually be dissimilar to each other, when placed together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen of India, plays an important part in making of the whole. The variations of the colours as well as different shades of the same colour in a map is the result of*

these small pieces of different shades and colours of marble, but when one small piece of marble is removed, the whole map of India would be scarred, and the beauty would be lost."

Justice Tilakawardane went on to state:

"Our Constitution also recognises the difference among the people of Sri Lanka, including minority religions but it gives equal importance to each of them, their difference notwithstanding, for only then can there be a true and unified secular nation within the framework of a free and just Democracy especially as each of the people of a nation has an important place in the formation of a nation State.

[...]

The essence of being a secular State, as Sri Lanka is the recognition and preservation of the different types of people, with diverse language and different belief, and placing them together so as to form a whole and united nation.

[...]

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one, which aims at equality with respect to the enjoyment of fundamental freedoms, and such freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person." [emphasis added]

The issue of equality and sexual orientation was considered in **Lawrence v Texas** [539 US 558 (2003)], where the Supreme Court of the United States held as follows:

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal

protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. ..." [page 575]

Whether the provisions of Section 377 of the Penal Code of India are violative of Article 14 of the Indian Constitution which provides that, "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India,*" was considered by the Indian Supreme Court in **Navtej Singh Johar v Union of India** [supra] where Dipak Misra, Chief Justice, held as follows:

"The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged... [page 4388]

We, first, must test the validity of Section 377 of IPC on the anvil of Article 14 of the Constitution. What Article 14 propounds is that 'all like should be treated alike.' In other words, it implies equal treatment for all equals. Though the legislature is fully empowered to enact laws applicable to a particular class, as in the case at hand in which Section 377 applies to citizens who indulge in carnal intercourse, yet the classification, including the one made under Section 377 IPC, has to satisfy the twin conditions to the effect that the classification must be founded on an intelligible differentia and the said differentia must have a rational nexus with the object sought to be achieved by the provision, that is, Section 377 IPC. [page 4389]

A perusal of Section 377 IPC reveals that it classifies and penalises persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. That being so, now it is to be ascertained

whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in the negative as the non-consensual acts which have been criminalised by virtue of Section 377 IPC have already been designated as penal offences under Section 375 IPC and under the POCSO Act. Per contra, the presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even 'consensual acts,' which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution." [page 4390]

In the same case, Indu Malhotra, J pointed out that, "*Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality.*" [page 4521]

In **Fundamental Rights in Sri Lanka** [3rd ed., 2021, Stamford Lake Publishers] by Dr. Jayampathy Wickramaratne, the author points out [at page 592] that, "*The denial of equal protection for lesbian, gay, bisexual, transsexual, and intersex (LGBTI) persons can happen at least in two ways. The first is when they are discriminated against because of their sexual orientation. The second is criminalizing a sexual conduct.*" He thereafter refers to the case of **Bostock v Clayton County** [140 S Ct 1731 (2020)] where the Supreme Court of the United States of America held that a key provision of the Civil Rights Act 1964, also known as Title VII, that prohibits job discrimination because of sex, applies to discrimination on the basis of sexual orientation. In delivering the majority judgment Gorsuch J, had stated that:

"Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an employee for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." [page 1737]

It is of interest to note that when the bill relating to the amendment to Section 365A was being debated in Parliament on 19th September 1995, the late Hon. Dr. Neelan Tiruchelvam, Member of Parliament, stated that, *"It is unfortunate that this provision still renders homosexual acts between consenting adults unlawful. The law should not seek to penalise persons for their sexual preferences. And I would strongly urge that that provision, with regard to consenting adults engaging in acts of homosexuality in private, should be rendered lawful as it has been in so many jurisdictions."*

It has been held time and again by this Court that classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and that the differentia must have a rational relation to the objects sought to be achieved. The essence of the submission of the learned Counsel who support the Bill is that discrimination on the basis of moral judgment of private acts between consenting adults is violative of Article 12(1) as it is not based on intelligible differentia. They argue that the aim of enforcing morality in respect of private acts offends human dignity which is at the heart of all fundamental rights and as such can never pass muster.

Having carefully considered the submissions of the learned Counsel, we are of the view that the removal of criminalisation of intimate acts between consenting adults, which crime was based on moral imperatives of a bygone Victorian era, would be in conformity with Article 12(1) and would uphold the dignity of human beings. This Court has no mandate to interfere with such a decision, which is the prerogative of Parliament.

Privacy of the individual

The Bill brings into focus a fundamental facet of our lives, namely the right to privacy and the right to live a private life. Although privacy has not been expressly recognised as a fundamental right by our Constitution, the Court of Appeal in **Ratnatunga v The State** [(2001) 2 Sri LR 172] stated that, *"... to appreciate the value of privacy in the life of an individual, it is well to remember the importance which our constitution attaches to the man's autonomous nature, through the guarantees of basic human rights. And these human rights are aimed at securing the integrity of the individual and his moral worth.*

Therefore to invade his privacy is to assail his integrity as a human being and thereby deny him his right to remain in society as a human being with human dignity."

The right to privacy in the context of expressing one's sexual orientation was considered by the Constitutional Court of South Africa in **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** [supra] where it was held by Ackermann, J that:

> *"Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. Our society has a poor record of seeking to regulate the sexual expression of South Africans. In some cases, as in this one, the reason for the regulation was discriminatory; our law, for example, outlawed sexual relationships among people of different races. The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in section 14. We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasizing the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair."* [paragraph 32]

Sachs, J went onto state as follows:

> *"I will deal first with the question of inappropriate separation of rights and sequential ordering, that is with the assumption that, in a case like the present, rights have to be compartmentalised and then ranked in descending order of value. The*

fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the State of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly." [paragraph 112]

In **Navtej Singh Johar v Union of India** [supra] Indu Malhotra, J held that:

"The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty under Article 21. ... Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15, and 21." [page 4522]

The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual. ... The right to privacy is not simply the "right to be let alone," and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference." [page 4523]

The learned Additional Solicitor General, while submitting that consensual sexual conduct of adults should not be policed by the State, drew our attention to the judgment of the European Court of Human Rights in **A.D.T. v The United Kingdom** [Application No. 35765/97; 31st July 2000]. In that case, the applicant was a practicing homosexual.

Pursuant to a search of his home, the Police found videotapes containing footage of the applicant and up to four other adult men, engaging in acts, mainly of oral sex, in the applicant's home. The applicant was charged with gross indecency between men under Section 13 of the Sexual Offences Act 1956 and was convicted.

The European Court of Human Rights arrived at the following findings in the context of Article 8 of the European Convention on Human Rights, which specifically recognises that due respect be shown to the private life of an individual:

a) The mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life;

b) In its judgment in Dudgeon v the United Kingdom [22 October 1981, Series A no. 45, p. 19, § 43 (1981) ECHR/7525/76], it found no "pressing social need" for the criminalisation of homosexual acts between two consenting male adults over the age of 21, and that such justifications as there were for retaining the law were outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved;

c) The reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and *a fortiori* the prosecution and conviction are not sufficient to justify the legislation and the prosecution;

d) The Applicant's right to respect for his private life enshrined in Article 8 of the Convention has been interfered with, both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private and as regards the conviction for gross indecency.

The right of two persons to engage in sexual activity in private was considered in **Lawrence v Texas** [supra], where it was held that, "*It suffices for us to acknowledge that*

adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."

In **Justice K S Puttaswamy (Retd.) v Union of India** [AIR 2017 SC 4161], it was held by Chandrachud, J that:

> *"To live is to live with dignity. The draftsman of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance.* ***Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.***" [emphasis added; page 4231]

Given that the right to privacy is a facet of the right to live with dignity, there is simply no basis for this Court to come to the conclusion that there is a constitutional obligation to criminalise homosexual activities engaged in private by consenting adults, as that is a matter that is inherently private and intimate. If Parliament wishes to decriminalise such activities this Court cannot stand in its way.

Legislative Policy

There is one other matter that we must advert to. This Court inquired from Mr. Jayawardena, PC the necessity to delete Section 365A in its entirety and whether it would suffice if the word, 'private' is deleted, given that paragraph (iii) of Clause 2 specifically states that "*The intent of the legislature in enacting this legislation must be considered as*

amending the provisions that makes sexual orientation a punishable offence". His response was twofold. The first was that this is a matter that is entirely for Parliament to decide. The second was that in the absence of a definition of 'any act of gross indecency' in Section 365A, the said provision is not only vague, overbroad and subjective but can be arbitrary in its implementation, thus violating Article 12(1). Mr. Hewamanna has in fact presented affidavits of three persons who have been subjected to harassment, humiliation and degrading treatment at the hands of their own families as well as by law enforcement authorities due to their sexual orientation, in order to support the position that due to its vague and overbroad nature, Section 365A can be arbitrary in its implementation.

The learned Additional Solicitor General submitted further that even if Section 365A is deleted in its entirety, behaving indecently in public can still be addressed under Section 7(1)(b) of the Vagrants Ordinance as well as Section 261 of the Penal Code, without having to criminalise one's sexual orientation.

It is of interest to note that Section 167 of the Penal Code of Botswana is identical to Section 365A of our Penal Code and that in **Letsweletse Motshidiemang v Attorney General** [MAHGB-000591-16; 11th June 2019], the Botswana High Court, while holding that the section in its Penal Code similar to Section 365 was ultra vires sections 3, 9 and 15 of its Constitution, only permitted the deletion of the word, 'private' from Section 167 for the following reasons:

> *"As long as the applicant displayed affection, in private and consensually with another man, such conduct is not injurious to public decency and morality."* [paragraph 213]
>
> *"Consensual, adult, sexual intercourse, between homosexuals, lesbians, transgender's, etc. do not trigger any erosion of public morality for such acts are done in private. The Wolfenden Report demystifies any lingering question by postulating that there must remain a realm of private morality, and immorality, which is not the laws' business. No solace and joy is thus derived from retaining such impugned penal provisions."* [paragraph 214]

"We have determined that it is not the business of the law to regulate private consensual sexual encounters between adults. The same applies to issues of private decency, and/or indecency between consenting adults. Any regulation of conduct deemed indecent done in private between consenting adults is a violation of the constitutional right to privacy and liberty. By invoking textual surgery, any reference to private indecency ought to be severed and excised from Section 167, so that its umbrage and coverage is only public indecency. Even after such severance, Section 167 thereof remains intelligible, coherent and valid." [paragraph 223]

It must perhaps be reiterated that the intent of the legislature in enacting the Bill is to repeal the laws that make sexual orientation a punishable offence. That does not mean that men or women or for that matter transgender persons can frequent public places in a manner that creates a nuisance to others using such public places, or that they can engage in any other illegal acts or behave in a manner that affects the rights, health or property of others. However, we must reiterate that this is a matter that comes within the legislative policy of the State which shall be guided by the provisions of Articles 27 and 75. It is a matter that is within the legislative power of the People which shall be exercised by Parliament in trust for the People.

Conclusion

We have already referred to in detail the submissions of the learned President's Counsel for the proponent of the Bill and the learned Counsel for the Intervenient Petitioners in support of the Bill that the provisions of the Bill would in fact ensure that all persons shall be equal before the law and be entitled to the equal protection of the law, irrespective of their sexual orientation, and that the Bill would, in fact, enhance their fundamental rights guaranteed to them under the Constitution and enable them to live in society with dignity. We are of the view that the submissions of the Petitioners are in fact fanciful hypotheses, and have no merit.

In the above circumstances, we are of the view that the Petitioners have failed to establish that:

(a) the repeal [in the manner proposed in the Bill] of Sections 365 and 365A of the Penal Code which criminalise intimate acts between consenting adults is unconstitutional;

(b) the Bill as a whole or any clause therein is inconsistent with any provision of the Constitution.

Determination

We are of the opinion that the Bill as a whole or any provision thereof is not inconsistent with the Constitution.

We place on record our appreciation of the assistance given by the learned Additional Solicitor General who represented the Hon. Attorney General, the learned Counsel for the Petitioners, the learned President's Counsel for the proponent of the Bill and the learned President's Counsel and all other learned Counsel for the Intervenient Petitioners.

JAYANTHA JAYASURIYA, PC
CHIEF JUSTICE

VIJITH K. MALALGODA, PC
JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE
JUDGE OF THE SUPREME COURT