

2023 Supreme Court Determination on the Penal Code (Amendment) Bill – Summary



Contents

This summary focuses on:

- The arguments presented by the Petitioners (those against the Bill) and the Court’s responses to the same.
- The rationale of the Bill and three principal arguments by (some of) those in favour of the Bill and the Court’s responses to the same.
- The Legislative Policy surrounding the Bill.
- The Court’s conclusion and determination.
- Annexures with selected additional information for further reference:
 - Annexure 1 outlines key points on ‘Buddhism & Culture’ that were presented in selected Written Submissions for the 2023 SC Determination on the Penal Code (Amendment) Bill.
 - Annexure 2 outlines key points on the ‘Public Health Rationale’ that were presented in selected Written Submissions for the 2023 SC Determination on the Penal Code (Amendment) Bill.
 - Annexure 3 outlines key arguments relating to decriminalisation and same-sex relationships in the 2024 Supreme Court Determination on the Gender Equality Bill.

Arguments of the Petitioners

“... 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.” (Page 17)

Argument 1 – Reduced Safeguards for Children

- **Petitioners' Argument:** The Petitioners argued that amending Sections 365 and 365A would strip away legal protections for children under sixteen, potentially leading to their exploitation. They argued that exposure to LGBT programs in schools might influence children towards transgender identities, and amending these sections could legally permit sexual activity between minors and adults.
- **Court's Response:** The Court found these concerns to be legally unfounded. Existing laws, specifically Section 365B of the Penal Code, already criminalise 'grave sexual abuse' with severe penalties for those under sixteen, regardless of consent. Additionally, Section 345 addresses sexual harassment, providing a comprehensive legal framework to protect children from exploitation. Therefore, there was no evidence to state that any legal protections for children would be lost due to the passing of this Bill.

Argument 2 – Dilution of the Rule of Law

- **Petitioners' Argument:** They claimed that decriminalising homosexual conduct would weaken legal protections and undermine the Rule of Law, thereby putting citizens' life and liberty at risk.
- **Court's Response:** The Court held that the Petitioners failed to establish any connections between the proposed amendments and any tangible threat to the Rule of Law. Therefore, the Court concluded that the argument was unsupported by credible evidence and dismissed this argument.

Argument 3 – Increased Spread of HIV/AIDS Weakening Public Health and National Security

“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.” (Page 15)

- **Petitioners' Argument:** The Petitioners argued that a majority of those with HIV and AIDS have a history of male or bisexual exposure and therefore, decriminalising same-sex relationships would lead to an increase in HIV and AIDS cases, negatively impacting public health and national security. They suggested this would harm individuals, families, communities, and key institutions like the military and police.
- **Court's Response:** The Court rejected this argument, (1) citing evidence by opposing Counsel from the 'National HIV/STI Strategic Plan for Sri Lanka' prepared by the Ministry of Health, and reports by the UNDP and the Commonwealth Eminent Persons Group showing that this narrative has no credible basis as it is not only homosexual males who contract HIV but female sex workers, returnee migrant workers and those who use or inject drugs. (2) They also highlighted that criminalising homosexual conduct marginalises those at risk, further hindering their access to healthcare and exacerbating the spread of HIV, thereby reinforcing such false narratives. (3) Decriminalisation homosexuality, on the other hand, would improve healthcare outreach and reduce infection rates among high-risk groups.

Argument 4 – Homosexuality is Contrary to Buddhist Principles

“Their argument lacks merit... 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 [Paraapika] 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.” (Page 16)

- **Petitioners' Argument:** The Petitioners claimed that homosexual activity is contrary to Buddhist principles, thus violating Article 9 of the Sri Lankan Constitution, which mandates the State to protect and foster Buddhism.
- **Court's Response:** The Court found this argument lacking merit. They noted opposing Counsel’s point that Buddhist monks (Bhikkus) and nuns (Bhikkunis) have a separate code of conduct (vinaya rules) that does not apply to laypersons. Moreover, that Buddhist scriptures do not condemn homosexuality among laypersons, and that the fundamental teachings of Buddhism advocate for fair and equal treatment of all individuals. Therefore, the Court held that decriminalising homosexuality does not undermine the protection of Buddhism.
- **Further Details in Annexures:** Some further details of Sri Lankan culture and Buddhist principles in relation to homosexuality can be found in *Annexure 1*.

Rationale of the Bill

“... 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.” (Page 24)

Key Points Presented by Mr. Jayawardena, PC

- **Objective:** The Bill aims to decriminalise homosexuality in Sri Lanka, aligning the country's laws with contemporary social values and 21st-century standards.
- **Key Provision:** Clause 2(iii) specifies that sexual orientation and consensual same-sex conduct between adults, whether in public or private, should no longer be criminal offenses.
- **Purpose:** The Bill seeks to modernise Sri Lanka's legal framework by moving away from outdated Victorian-era statutes and ensuring equality, liberty, and dignity for all citizens, regardless of their sexual orientation.
- **International Influence:** Following the UK's decriminalisation of homosexuality through the Sexual Offences Act, it called upon other members of the Commonwealth to follow suit.

Supporting Arguments by Mr. Luwie Ganeshathasan and Mr. Hewamanna

- **Current Legal Status:** Sri Lanka is one of the few countries that still criminalises consensual same-sex relationships between adults, and the only non-Muslim majority country in Asia doing so.
- **Population Impact:** Approximately 12% of Sri Lanka's population belongs to the homosexual community, living in fear of prosecution under Section 365A. This fear adversely affects their wellbeing and discourages

them from seeking legal redress for discrimination because any disclosure of such discrimination based on sexual orientation can result in prosecution.

- **Bill's Aim:** The Bill intends to eliminate the fear and stigma associated with sexual orientation, thereby protecting and enhancing the fundamental rights guaranteed by the Constitution.
- **Judicial Reference:** The determination cites the case of *Sanath Wimalasiri v The Attorney General*, highlighting the outdated nature of Section 365A and underscoring the need for reform to ensure all citizens can fully realise their constitutional rights without discrimination based on sexual orientation.

Arguments by (some of) those in favour of the Bill
(2nd Respondent and Interventient Petitioners who supported the 2nd Respondent)

Argument 1 – Human Dignity

“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.” (Page 31)

The determination highlights the positions of different international human rights frameworks as well as the Sri Lankan Constitution and judicial opinions regarding this point:

International Human Rights Frameworks

- **Universal Declaration of Human Rights (UDHR):** Adopted in 1948, it underscores human dignity as the foundation of freedom, justice, and peace. Sri Lanka, as a signatory, is bound by these principles. The UDHR's preamble asserts the inherent dignity and equal rights of all humans, and Article 1 states that "All human beings are born free and equal in dignity and rights."
- **European Union:** The Charter of Fundamental Rights of the European Union, Article 1, declares human dignity as inviolable, which must be respected and protected.

These international frameworks highlight the universal and fundamental nature of human dignity.

Sri Lankan Constitutional Guarantees and Supporting Judicial Opinions:

“...human dignity underpins the application of all fundamental rights. 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.” (Page 31)

- **Sri Lankan Constitution:** As per the ‘Svasti’ (similar to the preamble) to the Sri Lankan Constitution, the Constitution guarantees freedom, equality, justice, and fundamental human rights, all of which are integral to human dignity.
- **Sri Lankan Judicial Opinions:** Moreover, the determination cites several judicial opinions that reinforce the principle that equality and non-discrimination are essential to preserving human dignity:

- *Kirahandi Yeshin Nanduja De Silva and Another v Sumith Parakramawansa and Others*: Justice Priyantha Jayawardena, PC, emphasised that the right to equality is inherent to human dignity.
- *Kanapathipilli v Sri Lanka Broadcasting Corporation and Others*: Justice Shirani Bandaranayake noted that protecting the status and dignity of all persons is vital to preventing unfairness and arbitrariness.
- *Ajith C. S. Perera v. Daya Gamage and Others*: Justice Prasanna Jayawardena, PC, described human dignity as the core from which fundamental rights spring forth.
- *Kandawalage Don Samantha Perera v Officer in Charge, Hettipola Police Station and Others*: Justice Thurairaja, PC, underscored that human dignity is a normative value that guides fundamental rights decisions.

International Judicial Perspectives:

“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.” – Chief Justice Dipak Misra in Navtej Singh Johar (Page 28)

- *Navtej Singh Johar*: Chief Justice Dipak Misra emphasised that human dignity is essential for a complete life and without dignity, a person's existence lacks substance. Dignity encompasses identity and choice, and any legal impediment to personal expression, whether biological or by choice, infringes on natural and constitutional rights. Therefore, the Court's constitutional duty is to remove such impediments, ensuring individuals can freely express themselves and engage in consensual relationships without fear.
- *National Coalition for Gay and Lesbian Equality*: The Court noted that the criminalisation of sodomy stigmatises gay men as criminals regardless of circumstances. This criminalisation imposes real harm beyond symbolic stigma, exposing gay men to arrest and prosecution simply for engaging in consensual sexual conduct, thereby perpetuating insecurity and vulnerability. Such laws degrade and devalue gay men, constituting a clear invasion of their dignity and a breach of constitutional protections.

Court's Conclusion:

- **Constitutional Challenges**: Laws that impinge on human dignity, such as those criminalising consensual sexual activity between adults, face significant constitutional challenges. The Sri Lankan Constitution, alongside international legal principles, supports decriminalising such activities to uphold human dignity.
- **Court's Stance**: The Court concluded that maintaining Sections 365 and 365A, which criminalise consensual homosexual acts between adults, contradicts the fundamental virtue of human dignity. This stance is reinforced by broader human rights frameworks and the recognition that laws infringing on dignity cannot be sustained under constitutional scrutiny.

Argument 2 – Equality under Article 12(1) of the Constitution

“... 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.” (Page 36)

Constitutional Provision:

- **Article 12(1):** Ensures that "All persons are equal before the law and are entitled to the equal protection of the law." This aims to promote human dignity by eliminating arbitrary obstacles and ensuring no individual faces discrimination or unfair treatment based on arbitrary distinctions.

Equality and Sexual Orientation:

The Court considered a number of foreign judgments in relation to equality and sexual orientation:

- *Lawrence v Texas* (U.S. Supreme Court): This case linked equality of treatment to the respect for conduct protected by the guarantee of liberty, addressing the issue of equality and sexual orientation. It held that when homosexual conduct is made criminal by the law of the State, it is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.
- *Navtej Singh Johar* (Indian Supreme Court): Held that Section 377 of the Indian Penal Code, which criminalised homosexual conduct between adults, was unconstitutional as it discriminated against the LGBT community, violating their rights under Article 14 of the Indian Constitution, which guarantees equal protection under law.
- *Bostock v Clayton County* (U.S. Supreme Court): Ruled that Title VII of the Civil Rights Act, which prohibits job discrimination based on sex, applies to sexual orientation.

Sri Lankan Context:

- **Advocacy for Decriminalisation:** The late Dr. Neelan Tiruchelvam advocated for the decriminalisation of consensual homosexual acts between adults during a 1995 Parliamentary debate on amending Section 365A. This highlights that such advocacy has existed in Sri Lanka for decades.
- **Judicial Rulings:** The Court stated that it has repeatedly ruled that any classification of people or things must be based on clear and logical differences that separate those in the group from those outside of it. These differences must also have a reasonable connection to the goals intended to be achieved by the classification. The Court held that therefore, discrimination based on moral judgments of private actions between consenting adults violates Article 12(1) of the Constitution, as it lacks clear and logical differences and undermines human dignity, which is central to all fundamental rights.

Court's Conclusion:

“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.”
(Page 36)

- **Alignment with Article 12(1):** The Court concluded that removing outdated Victorian-era laws that criminalise consensual homosexual acts between adults is consistent with Article 12(1) and upholds human dignity. The Court held that decriminalising these acts aligns with the principles of equality and human dignity enshrined in the Constitution.

Argument 3 – Privacy of the Individual

“Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy.” (Page 38)

Fundamental Right to Privacy:

The determination emphasises both local and international judicial perspectives on the right to individual privacy:

Sri Lankan Judicial Perspectives:

- *Ratnatunga v. The State*: The Court of Appeal recognised privacy as intrinsic to human dignity and individual integrity, implying its inclusion in the Constitution's guarantees of basic human rights. Invading privacy is seen as an assault on integrity and dignity, denying individuals their right to remain in society with dignity.

International Judicial Perspectives:

• **South African Constitutional Court:**

- *National Coalition for Gay and Lesbian Equality*: Recognised privacy as encompassing private intimacy and autonomy, allowing individuals to nurture relationships without external interference. Laws regulating consensual sexual conduct between adults improperly invade this intimate sphere, breaching privacy and dignity. Justice Ackermann emphasised the egregious nature of privacy invasions due to discriminatory laws. Justice Sachs stated that equality and privacy are intertwined, and anti-sodomy laws violate both.

• **Indian Supreme Court:**

- *Navtej Singh Johar*: Justice Indu Malhotra held that privacy is an intrinsic part of life and personal liberty under Article 21 of the Indian Constitution. Sexual orientation is an essential attribute of privacy, protected by fundamental rights. Privacy includes decisional autonomy and the right to make fundamental personal choices without state interference.
- *Justice K.S. Puttaswamy (Retd.) v. Union of India*: Justice Chandrachud, emphasised that privacy is integral to human dignity and essential for protecting life and liberty.

• **European Court of Human Rights:**

- *A.D.T. v. The United Kingdom*: Found that laws criminalising consensual homosexual acts between adults in private continuously affect a person's private life without sufficient justification. Criminalising consensual acts between adults does not warrant penal sanctions when conducted privately.

• **United States Supreme Court:**

- *Lawrence v. Texas*: Held that adults have the right to engage in consensual sexual activities in private without state interference. Such relationships, conducted privately and consensually, deserve respect and protection from criminalisation, underscoring the right to dignity and privacy.

Court's Conclusion:

“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.” (Page 40)

- **Right to Privacy and Dignity:** The Court reiterated that the right to privacy is a part of the right to live with dignity. Therefore, there is no constitutional basis for criminalising homosexual activities engaged in private by consenting adults in Sri Lanka.
- **Authority of the Legislature:** The Court stated that if Parliament chooses to decriminalise such activities, Courts cannot obstruct this decision. These matters are inherently private and intimate, and respecting individuals' privacy ensures their dignity and fundamental human rights.

Legislative Policy

The Court asked Mr. Jayawardena, PC, on whether completely removing Section 365A or merely deleting the word 'private' would suffice, considering the intent to amend laws criminalising sexual orientation. The responses from Counsel were as follows:

- Mr. Jayawardena, PC, responded that this decision is for Parliament, arguing that without a clear definition of 'any act of gross indecency,' Section 365A is vague, overbroad, and subjective, which may lead to arbitrary enforcement and violating Article 12(1).
- Mr. Hewamanna supported this by presenting affidavits from three individuals showing harassment and degrading treatment at the hands of their own families as well as by law enforcement authorities due to their sexual orientation, demonstrating the arbitrary nature of the provision.
- The Additional Solicitor General noted that even without Section 365A, public indecency could still be addressed under other laws, such as Section 7(1)(b) of the Vagrants Ordinance (acts of indecency in public spaces) and Section 261 of the Penal Code (public nuisance), avoiding the criminalisation of sexual orientation.

Further discussion by the Court:

- The Court, referring to the Botswana High Court's ruling in *Letsweletse Motshidiemang v Attorney General*, which allowed only the deletion of 'private' from a similar law, emphasised that private consensual acts between adults should not be legally regulated as they do not harm public decency or morality. This supports the legislative intent to repeal laws criminalising sexual orientation, affirming that regulating private consensual behaviour between adults infringes on constitutional rights to privacy and liberty.
- The Court reiterated that the legislative aim is not to approve public nuisance or illegal acts but to ensure laws reflect principles of privacy and personal freedom, which is within Parliament's policy and power, guided by Articles 27 and 75 of the Constitution.

Conclusion and Determination by the Court

To sum up, the Supreme Court in their 2023 determination on the Penal Code Amendment Bill concluded that the Bill ensures equality before the law and equal protection for all, regardless of sexual orientation, enhancing fundamental rights and allowing individuals to live with dignity. The Court dismissed the Petitioners' arguments as baseless and held that they failed to prove that repealing Sections 365 and 365A, which criminalise intimate acts between consenting adults, is unconstitutional or that any part of the Bill contradicts the Constitution:

“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.” (Page 42)

And finally determined that:

*“We are of the opinion that the Bill as a whole or any provision thereof is not inconsistent with the Constitution.”
(Page 43)*



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ANNEXURE 1

Points on ‘Buddhism & Culture’ that were Presented in Selected Written Submissions for the 2023 Supreme Court Determination on the Penal Code (Amendment) Bill.

Written Submissions of the Interventient-Petitioners Ambika Satkunanathan and Bhoomi Harendra

Sri Lanka as a Secular State: It is argued that Sri Lanka’s legal system is fundamentally secular. This is confirmed by the Supreme Court in the landmark case *Ashik v Bandula & Others* (2007). As such, in a secular state, laws should be based on principles that apply to all citizens equally, without being influenced by any specific religious doctrines. (Page 38)

Invalidity of Cultural Arguments and Prioritisation of Constitutional Morality: They argue that cultural or traditional values cannot justify restrictions on fundamental rights under Article 15 of the Constitution, which only permits limitations for reasons like national security, public health, and public morality. As society continuously evolves, cultural values should not justify discriminatory laws; instead, constitutional morality, rooted in equality and dignity, should guide the law to ensure equal protection for all citizens, regardless of sexual orientation or gender identity. This is supported by General Comment 22 from the Office of the High Commissioner for Human Rights.

“The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition” General Comment 22 (30.07.1993)–Office of the High Commissioner for Human Rights (Page 39)

Learning from Indian Legal Precedents: The Interventient-Petitioners cite key Indian court rulings, such as *NAZ Foundation v NCT Delhi and Navtej Singh Johar*, where the Indian Supreme Court emphasised the importance of constitutional morality that protects individual rights and dignity over prevailing public morality.

“We are aware of the perils of allowing morality to dictate the terms of criminal law. ... The LGBTQ community has been a victim of the predominant (Victorian) morality which prevailed at the time when the Indian Penal Code was drafted and enacted. Therefore, we are inclined to observe that it is constitutional morality, and not mainstream views about sexual morality, which should be the driving factor in determining the validity of Section 277.” – Chandrachud J. (Page 39-40)

Written Submissions of Interventient-Petitioners H. K. M. Thushara Manoj Kumara, N. B Adhil Suraj Vimukthi Bandara and Équité Sri Lanka Trust

Impact on Sri Lankan Culture and the Buddha Sasana: The Interventient-Petitioners argue that culture is dynamic and evolves over time, acknowledging Buddhism's significant influence in Sri Lanka due to its Buddhist majority. However, they hold that Buddhism should be interpreted based on the Buddha's teachings rather than individual interpretations, noting that the Buddha emphasised the Dhamma should guide the Buddha Sasana after his death. (*Maha Parinibbana Sutta – Buddha’s last sermon, Diga Nikaya, 16 PTS D ii 72*).

Based on this premise, they presented the following facts for the Court’s consideration:

Composition of the Buddha Sasana (Page 5):

- The Buddha Sasana is composed of four groups: monks (Bhikkus and Bhikkunis) and laypeople (Upasaka and Upasika). Monks are bound by the Vinaya rules, while laypeople follow a set of discretionary precepts (‘Sil’) guided by the ‘Sutras’ (discretionary formulas stated by the Buddha for ethical guidance in decision-

making). Generally, the 5 precepts ('Pansil'/ පන්සිල්) are taken by laypersons, the Eight Precepts ('Atasil'/ අටසිල්) are taken on Poya days, the Ten Precepts ('Dasa Sil'/ දස සිල්) are taken when on a higher plane, and the 'Arya Silaya'/ආර්ය සිලය is taken when one is on the Meditative Path.

- The third precept (of the 'Atasil') involves abstaining from all sexual conduct and/or refraining from sexual misconduct (කාමයෙහි වරදවා හැසිරීම). This abstinence is not mandatory and sexual misconduct does not explicitly prohibit same-sex relations, including those involving gay, lesbian, or transgender individuals. This precept focuses on avoiding sexual misconduct, which traditionally covers acts like adultery, but does not extend to a blanket prohibition on same-sex relationships.

Guidance from Sutras (Page 5-6): Several Sutras are relevant to the discussion on LGBTQ+ individuals:

- **Mangala Sutta** (මංගල සූත්‍රය): This Sutta outlines a path to prosperity that does not exclude LGBTQ+ individuals (Khundaka Nipatha – Khp 5).
- **Parabhava Sutta** (පරාභව සූත්‍රය): This Sutta discusses factors that lead to decline, such as habitually gambling or drinking alcohol, but does not list homosexuality or gender diversity as factors leading to moral or spiritual decline (Sn 1.6 PTS S.n 91-115).
- **Wasala Sutta** (වසල සූත්‍රය): This Sutta defines the concept of the "outcast" or "wasala." The Buddha stated that it is the conduct of a person, not their birth that determines whether they are a Brahman or an outcast (S.n 1.7 – PTS S.n 116-142).
- **Sigalovada Sutta** (සීගලොවාද සූත්‍රය): This Sutta, which outlines the mutual duties within society, makes no discriminatory remarks about homosexual individuals or transgender persons. (Deega Nikaya (DN 31) PTS D iii 180).

Furthermore, the core Buddhist virtues are viewed as universal. They are:

- Metta (loving-kindness) is extended to all living beings, including those who are not visible or evident (දිට්ඨිමාන සේව අද්දිට්ඨිමා - Karaniya Metta Suthra).
- Karuna (compassion) is meant to alleviate the suffering of all beings, without any distinction.
- Mudita (altruistic joy) encourages rejoicing in the success of others.
- Upekkha (equanimity) promotes patience and non-discrimination.

These virtues collectively call for a compassionate and inclusive attitude toward the LGBTQ+ community, who often face significant challenges and suffer in silence due to societal stigma.

Buddhist Path to Enlightenment (Page 6):

- The Eightfold Path (ආර්ය අෂ්ටාංගික මාර්ගය) and the Middle Way (මධ්‍යම ප්‍රතිපදාව), essential to alleviating suffering in Buddhism, are accessible to all, including LGBTQ+ individuals, as affirmed by renowned Buddhist monks such as the late Venerable Dr. Kirinde Dhammananda Thero and Ajahn Brahmavamso Thero, who state that homosexuality is not contrary to Buddhist teachings and that LGBTQ+ individuals can achieve Nirvana by following the Dhamma (Annexures 'A' and 'B').

- The following are excerpts from the document titled “A Buddhist view of homosexuality” by the late Ven. Dr. K. Sri Dhammananda, published on the Buddhist Channel on June 30th, 2015:

“In Asia, especially India and China, sex was never seen as something dirty only to be indulged in surreptitiously and only for the purposes of breeding. Stone sculptures on the Hindu temples of India amply testify to the fact that all kinds of sexual behavior (including masturbation) was an expression of KAMA, of sensual pleasure which could be indulged in within the limits of Dharma, which in this case meant virtue.”
(Page 1)

“There is nothing intrinsically wrong with sex. What is wrong is attachment and slavery to it, on believing that indulgence in sex can bring ultimate happiness.” (Page 1)

“The third of the Five Precepts we recite in daily Buddhist practice is: undertake the training rule to refrain from sexual misconduct. First we note that there is no compulsion, no fear of punishment for infringement of any divine law, but when we recognize the danger of attachment to sex, we freely take the steps (training rule) to grow out of it, i.e. “I undertake”.” (Page 1)

“One may see from this that Buddhism does not see HOMOSEXUALITY as WRONG and HETROSEXUALITY as RIGHT. Both are sexual activity using the body, both are strong expressions of lust which increase desire for life and therefore trap us longer in Samsara. Whether two men or a couple fall in love, it arises out of the same human limitation that is, of not seeing the body as empty of any ultimate reality.” (Page 2)

“Our duty is to help others see that they are acting out of ignorance, to show how real happiness can be gained. We have no right to condemn those who think or act differently from us especially when we ourselves are slaves of sensual pleasure in other forms. We know that when we point one finger at others, three fingers are pointing at us.” (Page 2)

LGBTQ+ Presence in Sri Lankan History and Culture:

- The argument that homosexuality and LGBTQ+ identities are foreign imports to Sri Lankan culture is refuted by historical evidence and scholarly research (Annexure ‘D’). The Nachchi community, a grassroots transgender group in Sri Lanka, has long been a part of the country’s Buddhist and Hindu culture and has naturally engaged in same-sex activities.
- The following excerpts from various Journals, Reviews, books, and academic documents have been taken from the aforementioned Annexure ‘D.’

“Nachchi community in Sri Lanka – a particular transgender community in Sri Lanka has their own histories of dancing, everyday practices, language and cultural rituals historically... Since 1950’s and 60’s Nachchi persons involved in Buddhist and Hindu temple processions as well as in public performances during the Christmas. (Ariyaratne, Kaushalya (2020) “Gaze of the Kajal Painted Eyes: Sri Lankan Jogi dance as a Subaltern Political Expression, Patitha: Socio-Political Review, Vol. 11, 13-37)” (Page 1)

“There are Nachchi priests (gurunnanse) who are involved in Gammaduwa and Pattini rituals, which is a part of Buddhist culture in Sri Lanka... These festivals are an integral part of Sri Lankan Buddhist and Hindu cultures and contributed much to Sri Lankan Sociology, Anthropology and Cultural literature in Sri Lanka. (Ariyaratne, Kaushalya (2022), Priest, Woman and Mother: Broadening the Horizons through Transgender/Nachchi identities in Sri Lanka, Sri Lanka Journal of Humanities, Vol. 43(2), 19-39)” (Page 1)

“During the 60’s and 70’s, the Nachchi community in Sri Lanka (both in the South and the North) had lived together as ‘families’... They also had certain rituals and practices such as “Dehi Mangalyaya” that have been gradually disappearing due to the oppression and discrimination from the majority communities. (Dr. Kaushalya Ariyaratne, University of Colombo, 2021, (Un)Framing the Self: Negotiating Transgender Identities in Contemporary Sri Lanka, Unpublished PhD thesis)” (Page 1)

“Gender non-conforming identities are depicted in several religious and artistic expressions in Asia and Sri Lanka. For example, historical deities such as ‘Ardhanāri Natēshwara’ (‘the dancing Lord who is a half man – half woman’)—a statue from the period of the Anuradhapura kingdom (377 BC-1017 AD) found in the Abhayagiri Stupa, which could have been influenced by the Hindu God ‘Ardhanārishwara’ in India.”

*“Reflections on gender non-conforming characters are visible in Sri Lankan literature. Many authors have contributed a great deal to expanding the dimensions of literature on sexuality in Sri Lanka. Shyam Selvadurai’s writings—*Funny Boy* (1994), *Cinnamon Gardens* (1998) *Swimming in the Monsoon Sea* (2008) and *The Hungry Ghosts* (2013) introduced non-normative sexual orientations and identities into Sri Lankan English fiction.*

*Meanwhile, stories specifically built around transgender or gender non-conforming characters are also becoming visible in the sphere of recent Sinhala fiction. *Anganā* (2016) by Shanthi Dissanayake, *Ardhanāri* (2017) by K. K. Saman Kumara, *Monara Biththara* (2017) by Nadeeka Bandara and *Pandaka Puthra Vasthuva* (2016) by Anurasiri Hettige are all recent books in which one of the principal protagonists is a transgender character. (Page 2)*

ANNEXURE 2

Points on ‘Public Health Rationale’ that were Presented in Selected Written Submissions for the 2023 Supreme Court Determination on the Penal Code (Amendment) Bill.

Written Submissions of the Interventient–Petitioners Ambika Satkunanathan and Bhoomi Harendra

Challenging Harmful Stereotypes on HIV/AIDS:

- The Interventient-Petitioners rejected the harmful misconception that same-sex couples are primarily responsible for the spread of HIV/AIDS, stating that it is rooted in homophobia and lacking factual support. They cited data from the 2020 Annual Report of Sri Lanka’s National STD/AIDS Control Programme (Page 12), which showed that 41% of newly diagnosed HIV cases were among heterosexual individuals (Annexures ‘X9’ and ‘X9(a)’). Additionally, global guidelines, such as those from UNAIDS, caution against the broad application of criminal law to HIV transmission, stating that it could undermine public health efforts and human rights rather than prevent the spread of the virus (Annexure ‘A1’).

“In some countries, criminal law is being applied to those who transmit or expose others to HIV infection. There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights.”–UNAIDS Policy Document titled “Criminalization of HIV Transmission.”(Page 37)

Expanding the Scope of Equal Protection:

- The Interventient-Petitioners emphasised that protection under the Constitution’s Article 12(2) is not limited to the listed categories such as race, religion, or sex. The phrase "or any one of such grounds" in Article 12(2) allows for the inclusion of additional categories, including sexual orientation and gender identity (SOGI). This interpretation aligns with the Supreme Court's previous judgments in *Manuwel Dura Chandani v. Akila Viraj Kariyawasam* and *Dr. Ajith C.S Perera vs. Minister of Social Services and Social Welfare*, which have extended protection to other groups, such as people living with HIV/AIDS and those with disabilities.

*“placed on record that the state should ensure that the human rights of people living with HIV/AIDs are promoted and respected and measures taken to eliminate discrimination against them –
Manuwel Dura Chandani v. Akila Viraj Kariyawasam (Page 33)*

Written Submissions of the Interventient–Petitioners Sonali Gunasekera & Jake Oorloff

Decriminalisation of Homosexuality and HIV/AIDS Prevention:

The Interventient-Petitioners refuted claims that decriminalising homosexuality would worsen the spread of HIV/AIDS, arguing that this misconception is both false and harmful. They emphasised that global and local health experts, as well as studies, consistently agree that decriminalisation is crucial for effective HIV control, as criminalising same-sex relations hinders access to HIV prevention, testing, and treatment services, thereby increasing the risk of transmission.

Scientific Evidence from International Organisations:

- Research from the UNAIDS–Lancet Commission on Defeating AIDS—Advancing Global Health (2015) reveals that in countries where same-sex activity is criminalised, there is increased fear and hiding among MSM (men who have sex with men), leading to decreased uptake of HIV prevention and treatment services.
- In the Asia-Pacific region, more than 90% of MSM do not have access to HIV prevention and treatment services. Similarly, in the Caribbean, 25% of MSM are reported to be infected with HIV, compared with much lower rates in countries that do not criminalise same-sex relations (Annexure ‘X1’).

“...same-sex activity is a criminal offence in 78 countries, with penalties ranging from whipping to execution. In these countries, there is increased fear and hiding, decreased provision and uptake of HIV prevention services, and decreased uptake of HIV care and treatment services. According to estimations, more than 90% of MSM [Men who have Sex with Men] in the Asia-Pacific region do not have access to HIV prevention and treatment services. Figure 6 highlights how criminalisation can negatively affect HIV transmission. In Caribbean countries where homosexuality is criminalised, 25% of MSM are reported to be infected with HIV, whereas the rates are much lower in countries that do not criminalise homosexuality. In many countries, even ones that do not criminalise homosexuality, stigma and discrimination restrict MSM’s access to services.” [vide. Page 178] UNAIDS–Lancet Commission on Defeating AIDS—Advancing Global Health, in their Report (2015) (Page 5-6).

The Impact of Criminalisation on Public Health:

- Criminalisation of homosexuality creates significant barriers to HIV prevention. The stigma and fear associated with criminalisation discourage individuals from seeking necessary health services, reducing awareness and uptake of HIV prevention measures. This leads to higher HIV transmission rates among MSM (Annexure ‘X2’).
- For instance, marginalisation, together with aspects of physiology, circumstance and sexual behaviour, make MSM 19 times more likely to be infected with HIV compared to other adult men. Criminalisation not only endangers MSM but also poses a serious public health risk by contributing to the spread of HIV among the broader population.

“Criminalisation both causes and boosts those numbers. For example, UNAIDS reports that in the Caribbean countries where homosexuality is criminalised, almost 1 in 4 MSM is infected with HIV. In the absence of such criminal law the prevalence is only 1 in 15 among MSM... criminalisation of same-sex relations endangers not just MSM, but women too. By contrast, evidence shows that in a range of epidemic settings, universal access to HIV services for MSM together with anti-discrimination efforts can significantly reduce infections both among those men and the wider community.” [vide. Page 45].–UNDP’s Global Commission on HIV and the Law, in their Final Report of the Global Commission on HIV and the Law (2012) (Page 6-7)

The Commonwealth’s Call for Decriminalisation:

- The Commonwealth Eminent Persons Group (EPG), in their 2011 report, recommended the repeal of laws criminalising homosexuality as a critical step in the fight against HIV. This recommendation was based on the alarming statistic that Commonwealth countries, which make up over 30% of the world’s population, account for more than 60% of people living with HIV globally (Annexure ‘X3’).

““Commonwealth countries comprise over 30% of the world’s population and over 60% of people living with HIV reside in Commonwealth states...” We have also received submissions concerning criminal laws in many

Commonwealth countries that penalise adult consensual private sexual conduct including between people of the same sex. These laws are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection.”–Commonwealth Eminent Persons Group (EPG) Report (2011). (Page 8)

Sri Lanka’s National Strategy on HIV/STI Prevention:

- Sri Lanka’s National HIV/STI Strategic Plan (2018-2022) (Annexure ‘X4’) acknowledges that laws criminalising same-sex relations, like sections 365 and 365A of the Penal Code, hinder access to HIV services for key populations, including MSM and transgender individuals. The plan emphasises the need to revisit these laws to improve the uptake of HIV prevention services, reflecting the Government’s alignment with the global consensus that decriminalisation is essential for effective HIV control.

“Although the numbers of laws that may make it difficult for KPs [Key Populations, i.e. persons who are most in need of HIV/STI services] to access services are limited to a few, they are severe and include the Vagrancy Ordinance, the Brothels Ordinance and the Penal Code Sections 365 and 365a. The Vagrancy and Brothels Ordinances are used against FSWs [Female Sex Workers] while the two Penal Code Sections criminalize same sex relations and create a barrier to MSM [Men who have Sex with Men] and TG [Transgender People] accessing HIV/STI services. In order to prevent HIV among these groups it will be important to advocate for revisiting laws that impede service uptake by KPs.” [vide. Pages 22-23]–National HIV/STI Strategic Plan 2018-2022, titled “Towards Ending AIDS”, published by the National HIV/STI Strategic Plan of the Ministry of Health (Page 9)

ANNEXURE 3

Arguments Relating to Decriminalisation and Same-Sex Relationships in the 2024 Supreme Court Determination on the Gender Equality Bill.

Potential Impact of the Gender Equality Bill

The Supreme Court of Sri Lanka examined the Gender Equality Bill's (GE Bill) potential implications, particularly regarding the legal recognition of same-sex relationships and marriages, in the context of the nation's existing marriage laws, cultural norms, and constitutional framework. This summary first discusses the opinion of Justice Surasena, followed by the opinion of Justice Kodagoda, PC.

Opinion of Justice Padman Surasena

Justice Surasena argues that several provisions within the Bill are contrary to Sri Lanka's Constitution and could significantly alter the country's legal landscape:

Gender Identity and Equality: The GE Bill introduces the concept of "gender identity." Justice Surasena notes that "sex" and "gender" are separate, and argues that the concepts of "gender", "gender identity" and "gender equality" have not been recognised by the Constitution under Article 12(2).

"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." (Page 17)

"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 any provision of the Constitution. In those circumstances, I cannot conclude that Clause 2 of the Bill is consistent with Article 12 of the Constitution." (Page 21-22)

Cultural and Religious Practices: Clause 28 of the Bill states that its provisions will supersede any contradictory law. Justice Surasena argues that this provision alongside the recognition of "gender identity" may contravene Article 9 of the Constitution (the obligation to protect and foster Buddhism) and the fundamental rights of private and/or religious institutions.

"Therefore, the institutions such as Buddhist Universities, Pirivenas which are recognized under legislation 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" (Page 22)

"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." (Page 22)

Legal Definition of Marriage in Sri Lanka: Justice Surasena notes that Sri Lankan law currently recognises marriage only between a man and a woman. His Lordship argues that the Marriage Registration Ordinance No. 19 of 1907 (Section 16), Kandyan Marriage and Divorce Act No. 44 of 1952 (Section 5(1)), Muslim Marriages and Divorce Act No. 13 of 1951 (Section 80), and Matrimonial Rights and Inheritance (Jaffna) Ordinance 01 of 1911 (marriage under Tesawalamai law) (Section 3), all "presuppose that parties to any marriage must be male and female". (Page 24-26)

“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.” (Page 24)

Criminalisation of Same-Sex Activities: His Lordship also holds that same-sex activities are criminalised under Sections 365 and 365A of the Penal Code, citing the case of Galabada Payalage Sanath Wimalasiri v. Officer-in-Charge, Police Station, Maradana, in which the Court upheld the offense under Section 365A while recognising contemporary views that consensual sex between adults should not be policed by the state.

Private and Family Life: In this connection, Justice Surasena argues that the GE Bill could enable legal recognition of same-sex relationships and marriages by extending the right to "private and family life" to individuals of varying genders and including "marital status" as a protected category, which would be reinforced by the superseding powers of Clause 28, despite these rights not being recognised and such relationships currently being classified as criminal offenses.

“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.” (Page 28)

Interpretation of Article 12(1) and Public Morality under Article 15(7): Justice Surasena emphasised that Article 12(1) of the Constitution guarantees equal protection under the law, with deviations allowed only to safeguard public morality, health, national security, or public order under Article 15(7). His Lordship opined that the GE Bill, by potentially decriminalising homosexual acts and recognising same-sex marriages, would conflict with current moral and cultural standards in Sri Lanka.

“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.” (Page 31)

Analysis of the GE Bill in Light of Article 27(1)(g): Justice Surasena examined the GE Bill in light of Article 27(1)(g) of the Constitution, which directs the state to elevate moral and cultural standards. He argued that the potential decriminalising of homosexual acts and recognition of same-sex marriages could undermine these standards. Additionally, he argued that enforcing gender equality in religious practices might conflict with religious freedoms, possibly compelling institutions to adopt practices that contradict their beliefs, such as ordaining individuals with non-traditional gender identities or sexual orientations.

“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... (Page 32)

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.”(Page 33)

His Lordship argues that for and including the reasons above, this Bill as a whole is inconsistent with the Constitution and seeks to indirectly amend Article 12(2) of the same which cannot be done without the approval of 2/3 of the Members of Parliament and of the People at a Referendum.

“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.” (Page 41)

Opinion of Justice Yasantha Kodagoda, PC

While Justice Kodagoda, PC, agreed with Justice Surasena’s finding that this Bill as a whole is inconsistent with the Constitution, specifically Articles 12, 3 and 4, and cannot be enacted without approval by two-thirds of Parliament and a subsequent referendum, his Lordship emphasised the need to provide his own reasoning for this conclusion, noting that his agreement with Justice Surasena’s findings is limited to certain aspects.

Primary Objective of the GE Bill: His Lordship notes that the primary objective of the Bill is to ensure and provide for gender equality and women’s empowerment across various spheres of public and private life, acknowledging evolving societal norms and the recognition by policymakers of the necessity to treat all citizens equally under the law, irrespective of their sex or gender.

“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.” (Page 43).

Recognition of Gender: His Lordship goes on to acknowledge the spectrum of identities under the term “gender” recognised and accepted in contemporary use:

“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 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.” (Page 43).

Equal Protection for All: Further, Justice Kodagoda, PC, holds that Article 12(1) of the Constitution, which ensures equal protection under the law for all persons, inherently applies to individuals of all gender identities. He affirms that the term "persons" in this Article should be interpreted to include everyone, stating that the Bill’s goal to protect all genders is consistent with the core values of the Constitution.

“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. All persons are equal before the law and are entitled to 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 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-à-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.” (Page 43-44).

Agreement with Justice Surasena: Having recognised the above, Justice Kodagoda, PC, agrees with the unconstitutionality of this Bill due to the fact that:

1. The Bill indirectly aims to amend Article 12(2) of the Constitution by broadening the term "sex" to include "sex and gender," which cannot be done through an ordinary Bill but requires a Constitutional amendment. This can only be done via approval from 2/3 majority of Parliament and a referendum.
2. The powers granted to a Gender Equality Council by this Bill may infringe on the fundamental rights of private and religious institutions, specifically the freedom of religion and the right to manage private businesses according to their beliefs.

“However, in my view, what the Bill seeks to do is indirectly amend Article 12(2) of the Constitution by ensuring that no citizen shall be discriminated against on the ground of ‘gender’ or ‘gender identity’... 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.’” (Page 44)