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

"MICROFINANCE AND CREDIT REGULATORY AUTHORITY BILL"

S.C. (S.D.) No. 08/2024	Petitioner:	Rasenthram Aysha Begam, 4th Cross Street, Rathmalyaya, Puttalam.
	Counsel:	Pulasthi Hewamanna with Harini Jayawardhana, Fadhila Fairoze and Githmi Wijenarayana
S.C. (S.D.) No. 09/2024	Petitioners:	1. Dr. Amali Wedagedara, No. 2/6, Amunugama, Mahakumbura, Gunnepana, Kandy.
		2. Thirumadura Anuka Vimukthi de Silva, No. 104, Track 04, Rajanganaya.
	Counsel:	M.A. Sumanthiran, PC with Swasthika Arulingam, Jayantha Dehiatthage and Tharika Sivaraja
S.C. (S.D.) No. 11/2024	Petitioner:	Shyamala Gomez, No. 16/1, Maurice Place, Colombo 05.
	Counsel:	Pulasthi Hewamanna with Harini Jayawardhana, Fadhila Fairoze and Githmi Wijenarayana
S.C. (S.D.) No. 14/2024	Petitioner:	1. Transparency International Sri Lanka, No. 366, Nawala Road, Nawala, Rajagiriya.
		2.Ashala Nadishani Perera, No. 366, Nawala Road, Nawala, Rajagiriya.

	Counsel:	Senany Dayaratne with Lasanthika Hettiarachchi, Sankitha Gunaratne and Nishadi Wickramasinghe
S.C. (S.D.) No. 15/2024	**Petitioner:**	Thelikada Palliya Guruge Nirosha, No. 38, Convener of the National Movement of Microfinance Credit Victims, Uwa Jayagama, Bogahamadiththa, Hali Ela.
	Counsel:	Nuwan Bopage with Chathura Weththasinghe, Dinusha Thiranagama, Hansaka Chandrasiri and Ravihara Pinnaduwa
S.C. (S.D.) No. 16/2024	**Petitioner:**	R. P. Shiromi Sandamali, No. 28, Temple Road, Chandanapokuna, Unagalavehera, Polonnaruwa.
	Counsel:	Ermiza Tegal with Namashya Ratnayake and Taahira Lafir
S.C. (S.D.) No. 17/2024	**Petitioner:**	M. Renuka Badhrakanthi Gunawardana, Executive Director, Weligepola, Balangoda.
		Vs.
	Counsel:	Ermiza Tegal with Namashya Ratnayake and Taahira Lafir

Respondent: Hon. Attorney General, Attorney General's Department, Colombo 12.

Counsel for State : Amasara Gajadheera, SC with Tashya Gajanayake, SC and Rushani Abeykoon, SC

Before : **Murdu N.B. Fernando, PC, J**

Janak De Silva, J

K. Priyantha Fernando, J

The Court assembled for hearings at 10.00 a.m. on 24th and 26th of January 2024.

A Bill in its short title referred to as the "Microfinance and Credit Regulatory Authority Bill" [Bill] was published in the Government Gazette dated 27.10.2023 and issued on 30.10.2023. It was placed on the Order Paper of Parliament on 09.01.2024.

Seven (7) petitions bearing Nos. S.C.S.D. No. 08/2024, S.C.S.D. No. 09/2024, S.C.S.D. No. 11/2024, S.C.S.D. No. 14/2024, S.C.S.D. No. 15/2024, S.C.S.D. No. 16/2024 and S.C.S.D. No. 17/2024 were filed, challenging the constitutionality of the Bill.

Upon receipt of the said petitions, the Registrar of this Court issued notice on the Hon. Attorney General as required by Article 134(1) of the Constitution. The Petitioners and the Hon. Attorney General were heard extensively.

Jurisdiction of Court

The learned State Counsel submitted that several Committee Stage Amendments were to be moved to the Bill that was placed on the Order Paper of Parliament on 09.01.2024. Copies of the proposed Committee Stage Amendments were submitted to Court and parties.

However, Mr. Hewamanna submitted that the jurisdiction of Court is limited to examining the constitutionality of the Bill and not any Committee Stage Amendments.

This Court is exercising the jurisdiction vested in it in terms of Article 120 of the Constitution which reads:

> *"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..."***

This jurisdiction is invoked by any citizen pursuant to Article 121(1) of the Constitution within fourteen days of the Bill being placed on the Order Paper of the Parliament. Hence, the challenge by any citizen is to the Bill placed on the Order Paper of the Parliament or any provision thereof.

Moreover, in terms of Article 123(1) of the Constitution, the determination of Court must be accompanied by the reasons therefor which shall state ***whether the Bill or any provision thereof is inconsistent with the Constitution*** and if so, which provision or provisions of the Constitution. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads:

> *"(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –*
>
> *(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or*
>
> *(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or*

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent."

Therefore, the jurisdiction of the Supreme Court is limited to determining whether the ***Bill or any provision thereof is inconsistent with the Constitution.*** Court does not have jurisdiction to determine the constitutionality of any proposed Committee Stage Amendments without first determining whether the ***Bill or any provision thereof is inconsistent with the Constitution.***

Where the Court so determines and in *specifying the nature of the amendments which would make the Bill or such provision cease to be inconsistent,* it is possible for the Court to consider any changes proposed by the Hon. Attorney General or any party to the proceedings. In Ayurveda (Amendment) Bill [S.C.S.D. Nos. 22-24/2023, S.C.S.D. 34-35/2023, S.C.S.D. 52/2023, S.C.S.D. 55/2023 and S.C.S.D. 57/2023] the same position was upheld.

Hence, notwithstanding the proposed Committee Stage Amendments which the Hon. Attorney General submitted to this Court as amendments to be introduced during the Committee Stage debate in Parliament, this Court must first determine the constitutionality of the respective clauses of the Bill placed on the Order Paper of the Parliament.

Another jurisdictional issue arose in the context of Article 80(3) of the Constitution. The learned State Counsel submitted that Article 80(3) precludes Court from *'questioning the validity'* of any Act of Parliament or even a single provision in such Acts of Parliament once endorsed by the President or the Speaker as the case may be.

Article 80(3) of the Constitution reads as follows:

> *"Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever."*(emphasis added)

In **Active Liability Management Bill [Decisions of the Supreme Court on Parliamentary Bills, 2018, Vol. XIV, page 5 at 14]**, Court refused to hold that Clause 10(4) of the Active Liability Management Bill violated the Constitution as similar provisions were found in other Acts which had become the existing law of the country. It was held that Article 80(3) precluded such an examination and conclusion as it would amount to an indirect declaration of the constitutionality of existing law. A similar conclusion was arrived at in **Medical (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills, 2018, Vol. XIV, page 60 at 62]** and **Counter Terrorism Bill [Decisions of the Supreme Court on Parliamentary Bills, 2018, Vol. XIV, page 83 at 87].**

However, a different approach was adopted earlier in **Recovery of Loans by Banks (Special Provisions) (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 425 at 432]** where it was held that although Court does not have the jurisdiction to examine the constitutionality of an Act already in force, an amendment cannot be viewed in isolation and that it certainly cannot derive a stamp of constitutionality from the Act that is in force.

In New Wine Harvest Ministries (Incorporation) Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 361 at 365] Court 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."* (emphasis added)

In Special Goods and Services Tax Bill [S.C.S.D. Nos. 1/2022- 9/2022], Court adopted the approach taken in New Wine Harvest Ministries (Incorporation) Bill (supra.) and held:

> *"Thus, this Court will consider the constitutionality of the impugned clauses of the SGST Bill irrespective of the possible existence of similar or identical provisions of existing laws, while of course noting and taking cognizance of the existence of such provisions in laws previously enacted by Parliament."*

We are inclined to adopt the approach taken in New Wine Harvest Ministries (Incorporation) Bill (supra.) and Special Goods and Services Tax Bill (supra.). They reflect the correct interpretation of the jurisdiction of Court while giving due recognition to Article 80(3).

Scope of Examination

Mr. Hewamanna submitted that the intensity of review, in determining whether the Bill violates a constitutional provision, is to determine whether the effect of the clauses in the Bill *might* violate a fundamental right.

He relied on the following extract said to be from the determination in Sri Lanka Broadcasting Authority Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 79 at 89, 101]:

> *"The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. (...) These things may not happen, but they might happen because they are permitted. The evils to be prevented are those that might happen. Cf. Gros-jean."* (emphasis added)

Nevertheless, the extract quoted is not found in that form in the determination. For completeness, the relevant parts in the said determination are as follows:

> The purpose or object of the Sri Lanka Broadcasting Authority Bill is something we might legitimately consider in construing the Bill, for it may enable us to understand the mischief to which the proposed enactment is directed and its remedy. In the end, it is the legal meaning of the Bill that matters to this Court. The petitioners allege that the Bill as a whole, and its clauses, duly interpreted, are inconsistent with Article 10, Article 12 and Article 14 (1) (a) of the Constitution which, respectively, guarantee the fundamental rights of freedom of thought, equality before the law, and freedom of speech and expression. In determining whether the Sri Lanka Broadcasting Authority Bill or its clauses under consideration, are inconsistent with articles 10, 12 and 14(1) (a) of the constitution, we must consider the effect of that legislative instrument and its clauses. "The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the effect of the impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant. "Per Gubbay, CJ of Zimbabwe in Re Munhumeso and Others, [1994] 1 LRC 282 at p. 292.

The above extract is found at page 89. The next extract is found at page 101 and reads as:

Coke (I Co. Inst. 381) observed that is the most natural and genuine exposition of a legislative instrument to construe one part by another, "for that best expresseth the meaning of the makers ..... and this expression is *ex. visceribus act*-from the guts of the Act. In our opinion, the course of meaning that holds through the basic clauses of the Sri Lanka Broadcasting Authority Bill, namely clauses 3 (1), 3(4), 4(c) 4 (d), 4 (f), 4(g), 5(e), 5(f), 5(g), 7(1), 7 (2), 7 (5), 7(7), 10, 11, 22 and the First, Second and Third Schedules, their drift and effect, is that they have a real, as distinguished from a fanciful, capacity to accommodate, a propensity or likelihood to encourage or permit, the violation of the fundamental right of freedom of thought protected by Article 10 of the Constitution; These things may not happen, but they *might* happen because they are permitted. The evils to be prevented are those that might happen; Cf. *Gros-jean (supra.)* In our view the Sri Lanka Broadcasting Authority Bill as a whole is inconsistent with Article 10 of the Constitution. We determine that the Sri Lanka Broadcasting Authority Bill requires to be passed by not less than two-thirds of the whole number of Members of Parliament (including those not present), and approved by the People at a Referendum in accordance with Article 83 of the Constitution.

Accordingly, Court did not in Sri Lanka Broadcasting Authority Bill (ibid.) hold that the object of the Bill is irrelevant in determining whether it infringes a fundamental right. In fact, the object of the Bill is relevant in examining its consistency with Article 12(1) of the Constitution. This Court has adopted the interpretation given to Article 14 of the Indian Constitution, which is the corresponding provision to Article 12 of our Constitution, by the Supreme Court of India in ***Budhan Choudhry v. State of Bihar*** **[AIR 1955 SC 191 at 193]** where it was held:

> *"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the 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 (ii) that* ***differentia must have a rational relation to the objects sought to be achieved by the statute in question.*** *[...] What is necessary is that*

there must be a nexus between the basis of classification and the object of the Act." (emphasis added)

Moreover, when the Court opined in Sri Lanka Broadcasting Authority Bill (supra.) that *these things may not happen, but they might happen because they are permitted* it was referring to a situation where power is conferred on an entity or person in vague terms or without any guidelines as to its exercise thus making it arbitrary and inconsistent with Article 12(1).

In the Third Amendment to the Constitution Bill, [Decisions of the Supreme Court on Parliamentary Bills, 1978-1983, Vol. I, page 139 at 147] it was held:

> *"[A] clear distinction must be borne in mind between the law and the administration of the law. A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality."* (emphasis added)

A similar view was expressed in the Agrarian Services (Amendment) Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 9 at 12] where it was held:

> *"There is of course the possibility that an attempt might be made to implement the Bill, after enactment, in a manner inconsistent with the Constitution. Our jurisdiction does not extend, quia timet, to make pronouncements intended to prevent or restrain possible future violations, particularly by persons or bodies other than the legislature; our jurisdiction is confined to determining whether the Bill as it stands would constitute an infringement of the Constitution."* (emphasis added)

Again, in the Welfare Benefits Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 279 at 282] Court held:

> *"Counsel for the Petitioner submitted that recipients would be selected on the basis of political loyalty to the party in power and that there would be favouritism in the process. It is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme. The provisions of the Bill should be examined objectively to ascertain whether there are sufficient safeguards to prevent discrimination on any of the ground referred to in Article 12(2) of the Constitution and to prevent arbitrariness in the decision-making process."* (emphasis added)

The same position was adopted by Court recently in Colombo Port City Economic Commission Bill [Decisions of the Supreme Court on Parliamentary Bills, 2021, Vol. XVI, page 23].

This is the logical approach for even the most well drafted law can be abused and form the basis of arbitrary action in the hands of an autocrat who has utter disdain to the rule of law.

Outline of the Bill

The Bill consists of 86 clauses in 13 parts. The thirteen parts of the Bill may be summarized as follows:

Part I (Clauses 2 - 4) - This part sets out the establishment of the Microfinance and Credit Regulatory Authority (Authority), the objects, powers, duties and functions of the Authority.

Part II (Clauses 5 -16) - This part sets out the administration and management of the affairs of the Authority which include composition of the Board of Directors, appointment and removal of the members and the term.

Part III (Clauses 17 - 19) - This part sets out the office of the Director General of the Authority as the Chief Executive Officer and the staff of the Authority.

Part IV (Clauses 20 - 31) - This part sets out the acts that constitute offences under the Bill in relation to moneylenders, the institutions excluded from regulation by the Authority for Moneylending Business and the licensing procedure applicable to moneylenders.

Part V (Clauses 32 - 33) - This part sets out the acts that constitute offences under the Bill in relation to Microfinance Business, the institutions excluded from regulation by the Authority for Microfinance Business and the licensing procedure applicable to the same.

Part VI (Clauses 34 - 40) - This part deals with the manner in which the moneylenders and microfinance institutions are to be regulated, the power of the Authority to approve the business, directions to issue licenses and regulatory action to be taken by the Authority.

Part VII (Clauses 41 - 43) - This part provides for the Authority to examine the licenses issued to the moneylenders and microfinance institutions.

Part VIII (Clauses 44 - 53) - This part provides for customer protection.

Part IX (Clauses 54 - 58) - This part deals with the power of the Authority to investigate offences.

Part X (Clauses 59 - 60) - This part sets out the offences and penalties.

Part XI (Clauses 61 - 63) - This part sets out how the Authority will be funded and how its accounts will be audited.

Part XII (Clauses 64- 80) - This part sets out the general provisions.

Part XIII (Clauses 81 - 86) - This part deals with the transitional provisions.

Purpose and Object of the Bill

The Preamble to the Bill states that it is an Act to provide for the establishment of the Microfinance and Credit Regulatory Authority of Sri Lanka, to regulate the Moneylending Business and the Microfinance Business, to provide protection for the customers of the Moneylending Business and the Microfinance Business, to repeal the Microfinance Act No. 6 of 2016 and to provide for the matters connected therewith or incidental thereto.

The main objective of the Bill is the regulation and supervision of Moneylending Businesses and Microfinance Businesses in Sri Lanka with a view of customer protection and promoting prudent market conduct.

The need for the regulation of both the Moneylending Business and the Microfinance Business must be considered in the context of the existing law.

Regulation of Moneylending

The Money Lending Ordinance No. 2 of 1918 as amended (Money Lending Ordinance) specifically seeks to regulate money lending. It provides, *inter alia*, for the Court to re-open the money lending transaction, prohibits interest being recovered in excess of the sum then due as principal, and the protection for customers coming within its purview. Nevertheless, the Money Lending Ordinance did not establish a licensing scheme or a specific regulator. A customer seeking redress had to have recourse to legal proceedings which may involve considerable financial costs and human resources.

The Central Bank of Sri Lanka, in its Annual Report 2019, at page 311, identified the need to establish a prudential regulatory framework in the informal Moneylending Business in the country. Such need was amply justified by the amount of evidence collected through the field visits by the Central Bank, and complaints received in relation to various malpractices and customer harassment incidents by moneylenders.

The Annual Report goes on to identify the following features which necessitates regulating the informal Moneylending Business:

1) As informal moneylenders are not subject to any customer protection regulations, customers of such moneylenders are often subjected to unfair terms and conditions, as well as harassment.

2) At present, the informal moneylending businesses do not report information on their borrowers to the Credit Information Bureau of Sri Lanka (CRIB). Therefore, formal moneylending institutions tend to lack comprehensive information on their customers when assessing creditworthiness. Further, non-existence of CRIB reporting by informal moneylenders encourages some borrowers, particularly with a default history, to access the unregulated moneylenders for their financial requirements. The absence of a proper assessment of creditworthiness by unregulated moneylenders results in granting multiple-loans to the same customer, leading to over-indebtedness, which could lead to various socio-economic costs such as disruption of education of children, increase in malnutrition, loss of livelihood etc.

3) Existence of a large number of informal moneylenders in the country could sometimes lead to severe competition in the formal money lending businesses as well, resulting in unethical practices and harassment of customers.

4) Collecting information on the microfinance industry of Sri Lanka is a challenge when informal moneylenders are not required to report information to any formal authority.

5) Existence of a large number of unregulated money lending businesses could create issues in designing and implementing credit policies, particularly for small and medium scale enterprises.

The Annual Report goes on to state, at page 312, that these issues associated with the informal moneylenders such as the over-indebtedness of customers, lack of reporting of credit information to authorities, and lack of protection for customers, etc., could lead to significant socio-economic costs, unless appropriate measures are initiated on a priority basis.

These are compelling reasons necessitating an effective regulatory system for moneylending.

Regulation of Microfinance Business

According to the learned State Counsel, unregulated microfinance activities may lead to illegal deposit mobilisation, exploitation of customers through excessive interest rates, and unethical recovery methods. Furthermore, poor corporate governance in these institutions would lead to poor repayment rates, high transaction costs and recurring losses, leading the organizations to distress. Deposit-taking institutions, if not regulated or supervised, pose a threat to the financial system stability, as the safety of deposits mobilised are not ensured.

Exploitation of customers by these unregulated institutions would adversely affect the recipients of microfinance and keep the low income and poor segments within the 'cycle of poverty', affecting the economic development of the country. At the same time such practices would affect the consumer confidence in the financial sector, including confidence in the formal regulated sector. Low confidence in the financial sector would adversely affect the financial system stability.

The Microfinance Act No. 6 of 2016 ("Microfinance Act") was enacted to provide for the licensing, regulation and supervision of companies carrying on Microfinance Business, the registration of Non-Governmental Organisations accepting limited savings deposits as microfinance Non-Governmental Organisations, for the setting up of standards for the regulation and supervisions of Microfinance Non-Governmental Organisations and Micro credit Non-Governmental Organisations and to provide for matters connected therewith. The Monetary Board of the Central Bank (MBSL) was the designated regulator.

The Microfinance Act confers authority on the MBSL for the regulation of companies carrying on Microfinance Business and for the Registrar of Voluntary Social Service Organisations in terms of the Voluntary Social Service Organisations (Registration and Supervision) Act, No. 31 of 1980, for the registration of Non-Governmental Organisations.

At present, the MBSL has licensed 4 companies under the Microfinance Act and only 21 Microfinance NGOs have been registered with the Registrar of Voluntary Social Service Organisations. Considering the total number of entities operating in the microfinance industry, the number of licensed entities is extremely low. This is due to the lack of provisions for a comprehensive regulatory and institutional framework for the microfinance industry. The operation of the Microfinance Act is perceived to be ineffective as it is beset with crucial deficiencies that need to be addressed.

In terms of Section 32 of the Microfinance Act, no person other than a licensed microfinance company, a microfinance NGO or an institution exempted from the application of the provision of the Microfinance Act under Section 2, shall carry on Microfinance Business.

The term "Microfinance Business" in the Microfinance Act is defined under Section 37 which reads that the *"microfinance business means accepting deposits and providing financial accommodation in any form; other financial services; or financial*

accommodation in any form and other financial services, mainly to low-income persons and micro enterprises in conformity with the Schedule to this Act".

Thus "accepting deposits" is an integral part of the Microfinance Business as envisaged in the Microfinance Act and due to this requirement, the licensing requirement is mandatory only to institutions that accept deposits. Therefore, the Microfinance Businesses in the microfinance sector that do not mobilise deposits remain outside the purview of the Microfinance Act.

The learned State Counsel further submitted that this would mean that there could be microfinance businesses in the market that engage in the said business but do not require the license under the Microfinance Act for the mere reason that those businesses do not accept deposits. This inherent defect in the definition has rendered the regulatory regime ineffectual leading to operational failure.

These unregulated microfinance businesses engage in numerous illegal lending and recovery practices. The existence of unregulated money lending businesses has led to the exacerbation of over-indebtedness of the low income and marginalised groups.

Another major deficiency in the existing regime is that it has completely excluded the entities that engage in moneylending business. Thus, informal moneylenders, especially in large numbers, pose a serious threat to socio-economic stability. As the Microfinance Act regulatory regime focuses only on microfinance companies and non-governmental organisations that accept deposits, the unregulated category of moneylenders causes imbalances in the microfinance industry.

Under the Microfinance Act, two types of entities are regulated by two different regulators. The licensed Microfinance Companies are regulated by the MBSL while Microfinance Non-Governmental Organisations are regulated by the Registrar of Voluntary Social Service Organisations.

The learned State Counsel further submitted that in terms of Section 28(1) of Microfinance Act, the MBSL is empowered to issue guidelines to the Registrar of Voluntary Social Service Organisations. However, under Part VIII of the Microfinance Act, independent powers are conferred on the Registrar of Voluntary Social Service Organisations on licensing, rulemaking and canceling of the registration of Microfinance Non-Governmental Organisations. The absence of an autonomous authority regulating these two types of entities has resulted in ineffective regulation due to lack of cohesion.

Another deficiency in the existing regime is that the Microfinance Act does not make any provisions relating to collection of data on the microfinance industry. Currently, there is no regulatory mechanism that mandates informal moneylending businesses to report information on their borrowers to the CRIB. Therefore, formal moneylending institutions tend to lack comprehensive information on their customers when assessing creditworthiness.

Fair treatment and the safeguarding of customers' individual rights are a central feature of microfinance industry regulation as the regulatory regime seeks to ensure financial inclusion and foster economic justice for the vulnerable, impoverished and marginalised groups in society. The Microfinance Act does not provide for customer protection and the regulatory structure does not appear to be customer protection-oriented. This defeats the very purpose of prudential regulation of the licensed institutions. As a large number of informal businesses in the microfinance industry remain unregulated under the Microfinance Act, lack of accountability and sustainable lending practices lead to borrower indebtedness.

The need for regulating the Microfinance Business is as compelling as the need for regulating the Moneylending Business.

Regulation of Moneylending Business and the Microfinance Business

Regulating the Moneylending Business and the Microfinance Business with a view to providing protection to customers is constitutionally permissible. While Article 14(1)(g) of the Constitution recognises the fundamental right of every citizen to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise, it is subject to restrictions as provided by the Constitution.

These include licensing, restrictions in the interest of national economy, for the purpose of securing due recognition and respect for the rights and freedoms of others or meeting the just requirements of the general welfare of a democratic society. Customer protection is a just requirement for the general welfare of a democratic society.

Moreover, the legislative power of the people as well as all other components of the sovereignty of the people are held by different organs of government in trust for the people and must always be exercised for the benefit of the people. Where the State gives legal recognition for any trade or business, provision must be made to protect the interests of the consumers from that trade or business.

Some of the Petitioners contended that the Bill does not address all the issues in the Moneylending Business and the Microfinance Business.

However, some of the perceived lack of regulation is in fact addressed by other existing law while some issues are common to all borrowers.

For example, the Petitioner in S.C.S.D. No. 8/2024 contended that Microfinance lenders charge up to 220% interest rates for their loans and apply compound interest. In ***Harankaha Arachchige Menaka Jayasankha and another v. Standard Credit Lanka Limited*** **[S.C.(CHC) Appeal No. 72/2013, S.C.M. 23.11.2023]** Court held that compound interest is not prohibited in Sri Lanka and the rule in Section 5 of the Civil Law Ordinance

prevents the recovery on account of interest a sum exceeding the principal as at the date of the institution of the action even where interest has been paid from time to time provided that the interest so paid has not reached the principal sum.

Nevertheless, we observe that Clause 76 of the Bill states that the provisions of the Money Lending Ordinance shall not apply to any licensee who, according to Clause 34(1) of the Bill, means a person carrying on a Moneylending Business or Microfinance Business. Hence, the Bill while having the object of providing protection for the customers of the Moneylending Business and Microfinance Business, is seeking to repeal Section 5 of the Moneylending Ordinance which places a limit on the amount of interest recoverable which is arbitrary. Therefore, Clause 76 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

We are mindful that in ***Harankaha Arachchige Menaka Jayasankha and another v. Standard Credit Lanka Limited*** (ibid.) it was held that the rule in Section 5 of the Civil Law Ordinance is a restatement of the Roman-Dutch law rule. Accordingly, notwithstanding the exemption of the licensees from the provisions of the Money Lending Ordinance, the limit on the amount of interest recoverable will apply to all licensees as part of the Roman-Dutch Law.

Nevertheless, for the avoidance of doubt we are of the view that Clause 76 of the Bill should be amended as follows:

> *"Provisions of the Money Lending Ordinance (Chapter 80), except Section 5, shall not apply to any Licensee."*

The Petitioner in S.C.S.D. No. 8/2024 further contended that women are required to exchange 'sexual favours' for outstanding loan instalments and that it is a serious concern being directly related to corruption.

However, we observe that in terms of Section 162 of the Anti-Corruption Act No. 9 of 2023, "bribery" means the offer, solicitation or acceptance of any gratification in contravention of any provision of Part III of this Act and includes sexual favour. This Act applies to the private sector as well. Hence, the issue identified as "corruption" by the Petitioner in S.C.S.D. No. 8/2024 is covered under "bribery" in the Anti-Corruption Act No. 9 of 2023.

In any event, the perceived lack of all-encompassing regulation of issues faced by the Moneylending Business and the Microfinance Business does not by itself make the Bill inconsistent with the Constitution.

Jayampathy Wickremaratne [*Fundamental Rights in Sri Lanka*, Third edition (2021), page 459] states:

> *"The legislature is free to recognise degrees of harm and it may confine its restrictions to those cases where the need is deemed to be the clearest. The American Supreme Court has consistently held that the legislature is competent to reform gradually and that it is not bound to extend a regulation to all cases."*

The main complaint of the Petitioners is that the Bill has essentially adopted a classification in violation of the right to equality enshrined in Article 12(1) of the Constitution. In particular, they assert that some entities involved in Moneylending Business and Microfinance Business are sought to be excluded from the regulatory mechanism of the Bill whilst bringing all other entities involved in Moneylending Business and Microfinance Business within the scope of the Bill.

Hence, we must at the outset examine the scope of Article 12(1) of the Constitution on classification. This Court has adopted the interpretation given to Article 14 of the Indian Constitution, which is the corresponding provision to Article 12 of our Constitution, by the Supreme Court of India in ***Budhan Choudhry v. State of Bihar*** (supra.).

Intelligible differentia means the ability to clearly distinguish between entities grouped together and those left out by the classification. The intelligible differentia and the object are different so that the object by itself cannot be the basis of the classification. In determining whether there is an intelligible differentia in the classification adopted, Court must be guided by the provisions of the Bill or where it is silent, attempt to infer from the surrounding circumstances or matters of common knowledge. In this context, it is incumbent on the State to submit the basis of the classification adopted.

Intelligible Differentia and Rational Relation of Moneylending Business Exemptions

Clause 20(3) of the Bill exempts the following entities from the regulatory scheme sought to be established for Moneylending Business:

(a) Government of Sri Lanka, a Provincial Council or a local authority;
(b) the Central Bank;
(c) a licensed commercial bank or a licensed specialised bank within the meaning of the Banking Act, No. 30 of 1988;
(d) a licensed finance company within the meaning of the Finance Business Act, No. 42 of 2011;
(e) any registered leasing establishment registered under the Finance Leasing Act, No. 56 of 2000;
(f) a co-operative society registered under the Co-operative Societies Law, No. 5 of 1972 and a co-operative society registered under a statute of a Provincial Council;
(g) a Samurdhi Community based bank or a Samurdhi Community based banking Society established under the Samurdhi Act, No. 1 of 2013;
(h) an entity formed in terms of the Agrarian Development Act, No. 46 of 2000;
(i) any insurance company registered under the Regulation of Insurance Industry Act, No. 43 of 2000;
(j) any pawnbroker licensed under the Pawnbrokers Ordinance, (Chapter 90);

(k) any body corporate incorporated by a special enactment empowered to lend money in accordance with such special enactment;

(l) any company lending money to related companies;

(m) any company which lends money to its directors, officers or employees as a benefit accorded to such persons;

(n) a foreign Government or any agency or institution acting on behalf of a foreign government;

(o) the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Asian Development Bank, or any other multilateral lending institution;

(p) any stock broker registered under the Securities and Exchange Commission of Sri Lanka; and

(q) any person specified for the purposes of this subsection by the Minister by Order published in the Gazette.

Prior to justifying the reasonable basis for the exclusions enumerated in Clause 20(3), the learned State Counsel urged us to take judicial cognizance of the exclusions in the existing regime under the Microfinance Act, which has been determined by Court as being consistent with the provisions of the Constitution in Microfinance Bill [Decisions of the Supreme Court on Parliamentary Bills, 2016-2017, Vol. XIII, page 20].

Nevertheless, as pointed out earlier, we cannot take the content of existing law as a standard of consistency with the provisions of the Constitution. Our jurisdiction is to examine the provisions of the Bill for its constitutionality.

Mr. Sumanthiran, PC appearing for the Petitioner in S.C.S.D. No. 9/2024 submitted that all these exemptions are inconsistent with Article 12(1). Hence, we must examine the validity of each of the exemptions.

(a) Government of Sri Lanka, a Provincial Council or a Local Authority

The learned State Counsel sought to justify the exclusion of the Government of Sri Lanka, Provincial Councils and Local Authorities, since by their very character and status, it would not be possible or appropriate to subject such institutions to a licensing requirement under Clause 20(1) of the Bill.

It was further submitted that, in the event such institutions wish to engage in the Moneylending Business, they would be subject to stringent budgetary controls, parliamentary and ministerial oversight and financial and administrative regulations with regard to the manner in which such activities are conducted. Such activities would be liable for audit by the Auditor General. Hence, it was submitted that the Government, Provincial Councils and Local Authorities would also be subject to an effective and stringent set of controls if they engage in Moneylending Business.

These three entities are clearly distinguishable from the other Moneylenders who will be regulated by the Bill. In ***Katra Education Society v. State of U.P.*** **[(1966) 3 S.C.R. 328, ('66) A.SC. 1307]** a classification between privately managed educational institutions and those maintained by State Government, Central Government and local bodies was held to be permissible.

Moreover, the exclusion of State entities from a regulatory scheme can be justified having regard to the welfare measures inherent in the activities of the State entity.

Thus, in Private Medical Institutions (Registration) Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 189], it was contended that the entirety of that bill is inconsistent with the right to equality enshrined in Article 12(1), since it singles out the operators of Private Medical Institutions for discriminatory treatment by subjecting them to a legal regime, which provides for regulation, monitoring, supervisions and inspection of their Institutions, whereas those in the State sector who render parallel

services are not subject to similar regime of controls. It was held that Article 12 of the Constitution, permits legislation based on reasonable classification where criteria for such classification advances its objectives.

Court held that although the bill subjects Private Medical Institutions to a different legal regime than the one applicable to State sector Institutions, there is a reasonable basis for such classification. The State sector health services are carried out largely as a welfare measure for the People, whereas Private Medical Institutions are commercial ventures. On this basis it was held that the classification was permissible.

This rationale applies equally where the Government of Sri Lanka, a Provincial Council or a Local Authority provides different types of loans to public servants at low interest rates such as distress loans, festival advances, etc. In these circumstances, exempting the Government of Sri Lanka, a Provincial Council or a Local Authority from the regulatory scheme for Moneylending Business when it provides such loans to public servants is permissible.

Moreover, even if any of these entities are empowered to be involved in Moneylending Business, it will be guided by welfare reasons compared to Moneylenders in general who will be guided by commercial reasons.

We are inclined to agree that the exclusion of the Government of Sri Lanka, a Provincial Council or a Local Authority from the regulatory scheme envisaged in the Bill is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(b) The Central Bank

The learned State Counsel submitted that similar considerations as would apply to the exclusion of the Government of Sri Lanka, a Provincial Council or a Local Authority will

apply in the case of the Central Bank as well, in view of its status, functions and powers within the financial system.

In terms of Section 6 of the Central Bank Act No. 16 of 2023, the primary object of the Central Bank is to achieve and maintain domestic price stability. The other object of the Central Bank is to secure the financial system stability. The Central Bank must also support the general economic policy framework of the Government as provided for in any law. Section 7 spells out the specific powers, functions and duties of the Central Bank. Moreover, the Central Bank is not involved in Moneylending Business to the public at large.

We are inclined to agree that the exclusion of the Central Bank from the regulatory scheme envisaged in the Bill is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(c) Licensed Commercial Bank or Licensed Specialised Bank

Licensed Commercial Banks and Licensed Specialised Banks are licensed in terms of the Banking Act No. 30 of 1988.

The learned State Counsel submitted that although these entities are excluded from the scope of the Bill, it does not by any means denote or imply that these institutions are not subject to any regulatory regime when they engage in the Moneylending Business. Neither does it permit such institutions to engage in the Moneylending Business in any manner that they please.

It was submitted that the object of the Bill is to regulate entities involved in the Moneylending Businesses that are not currently subject to any regulation under any regulatory regime or are not adequately regulated under the existing regime due to its inherent systemic deficiencies.

According to the learned State Counsel, the purpose of the Bill and the establishment of an autonomous regulatory body is specific, to focus on businesses that engage in informal Moneylending Businesses and to adopt a cohesive approach and bring about a regulatory mechanism to address socio-political issues stemming therefrom.

The learned State Counsel submitted that subjecting these entities to another regulatory scheme in so far as their Moneylending Business is concerned will lead to administrative chaos and cause such entities, which are already regulated by specific laws, to be subjected to regulation by another statute.

We observe that classifications based on administrative convenience have been upheld in ***State of Bombay v. United Motors*** **[(1953) S.C.R. 1069, 1096-7, ('53) A. SC. 252]** and ***Bishwambhar Singh v. State of Orissa*** **[(1954) S.C.R. 842, 855, ('54) A.SC. 139]**.

Mr. Dayaratne appearing for the Petitioner in S.C.S.D. No. 14/2024 countered that this submission is utterly devoid of merit. He drew our attention to the fact that Licensed Commercial Banks which are engaged in financial leasing business are brought within the purview of the Finance Leasing Act No. 56 of 2000 although they have been licensed under the Banking Act No. 30 of 1988.

Similarly, Licensed Commercial Banks and Licensed Specialised Banks although licensed by the Central Bank to act as authorised dealers in foreign exchange are brought within the scope of the Foreign Exchange Act No. 12 of 2017 which has been promulgated for *"...promotion and regulation of foreign exchange..."*.

Accordingly, we agree with Mr. Dayaratne that it is wholly untenable for the State to contend that entities should be exempted from the scope of the Bill *merely* because they are regulated by other laws and bringing them under one law will result in administrative chaos.

To the extent that these entities are regulated by another regime and the other entities brought within the scope of the Bill are not, there is an intelligible differentia. Nevertheless, the other requirement of the intelligible differentia, namely having a rational relation to the object of the Bill must also be satisfied to make the classification permissible. One of the primary objects of the Bill is to provide protection for the customers of the Moneylending Business.

In Sri Lanka Broadcasting Authority Bill [Decisions of the Supreme Court on Parliamentary Bills, 1991-2003, Vol. VII, page 79 at 88] Court held that there is nothing intrinsically wrong with distinguishing between one class of persons and others. However, there must be rational basis for doing so. Court held that no reasons were suggested why the Sri Lanka Broadcasting Corporation or the Sri Lanka Rupavahini Corporation should be treated differently with regard to the expected standards and accountability.

Section 10(c) of the Monetary Law No. 58 of 1949 (Monetary Law) states that the MBSL may make such rules and regulations as it may consider necessary in relation to any matter affecting or connected with or incidental to the exercise, discharge, or performance of the powers, functions, and duties of the Central Bank.

The learned State Counsel drew our attention to the Financial Consumer Protection Regulations No. 01 of 2023 ("Regulations") made thereunder and published in the Gazette Extraordinary No. 2344/17 dated 09.08.2023.

According to Regulation 1.2, they apply to Financial Service Providers. Regulation 54 defines Financial Service Provider to include a Licensed Commercial Bank, a Licensed Specialised Bank, a Licensed Finance Company and a Specialised Leasing Company.

The areas covered by this Regulation includes market conduct supervision with a view to safeguard rights and interests of the financial consumers, governance by the financial service providers, fair treatment and responsible business conduct, complaint handling and redress mechanism and protection of financial consumers' assets and information.

It is thus seen that the Regulations address one of the primary objects of the Bill, namely providing protection to the customers of the Moneylending Business.

Moreover, according to Section 122 of the Monetary Law, any person who contravenes or fails to comply with any provisions of a regulation made or given thereunder shall be guilty of an offence.

Although the Monetary Law was repealed by the Central Bank of Sri Lanka Act, No. 16 of 2023, these Regulations are kept in force pursuant to Section 134(g) of this Act.

Furthermore, a classification between banking companies and private money-lenders was held to be permissible in ***Catholic Bank of India v. George Jacob*** **[(1967) 1 Ker. 567, ('68) A. Ker. 3 (F.B.)]**. Moreover, in ***Chandmal Ratichand Jhabua v. State of M.P.*** **[('67) A.M.P. 52]**, a classification between claims of banks and claims of private money-lenders was held to be permissible.

Furthermore, Clause 3(c) of the Bill states that one of the objects of the Authority is to coordinate with the Central Bank. This provides for the uniform application of regulatory measures on Moneylending Business.

We are, therefore, of the view that the exemption of Licensed Commercial Banks and Licensed Specialised Banks from the scope of the Bill is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(d) Licensed Finance Company

The reasons more fully elaborated above, equally apply to Licensed Finance Companies within the meaning of the Finance Business Act, No. 42 of 2011.

Moreover, Clause 3(c) of the Bill states that one of the objects of the Authority is to coordinate with the Central Bank. This provides for the uniform application of regulatory measures on Moneylending Business.

We are, therefore, of the view that the exemption of Licensed Finance Companies from the scope of the Bill is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(e) Registered Leasing establishment

The reasons more fully elaborated above, equally apply to Registered Leasing establishments registered under the Finance Leasing Act, No. 56 of 2000.

Moreover, Clause 3(c) of the Bill states that one of the objects of the Authority is to coordinate with the Central Bank. This provides for the uniform application of regulatory measures on Moneylending Business.

We are, therefore, of the view that the exemption of Registered Leasing establishments from the scope of the Bill is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(f) Co-operative Society

A co-operative society registered under the Co-operative Societies Law, No. 5 of 1972 and a co-operative society registered under a statute of a Provincial Council are excluded from the scope of the Bill.

The Concept Paper on Proposed Regulatory Framework for Moneylending and Microfinance Businesses in Sri Lanka presented to the MBSL with Board Paper dated 08.02.2019 did not specifically recommend the exclusion of these institutions. Instead, it was proposed that a decision be taken on whether they should be brought within the regulatory scheme or excluded.

The learned State Counsel submitted that these entities are excluded since they are already regulated. In terms of Section 39(1) of the Co-operative Societies Law, No. 5 of 1972 as amended, a registered society can grant loans only to its members. It is possible to grant loans to another registered society or supply goods on credit to an associate member with the approval of the general body. Hence, these entities are member driven and cannot offer loans to the public at large.

Moreover, in ***C.P. Khanna v. V.K. Kalghatgi*** **[('70) A.B. 201, 202-3]** it was held that co-operative societies could be treated as a class by themselves. A classification between a co-operative society which runs a transport service and a private operator running such service was held to be permissible in ***Brahm Dutt v. People's Co-op. Transport Society Ltd.*** **[(1961) 1 Punj. 283, ('61) A. Punj. 283]**.

Furthermore, Clause 3(c) of the Bill states that one of the objects of the Authority is to coordinate with the relevant regulatory authorities that regulate and supervise registered co-operative societies. This provides for the uniform application of regulatory measures on Moneylending Business.

Accordingly, we are of the view that the exclusion of co-operative societies is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(g) Samurdhi Community based Bank or Banking Society

These entities are established under the Samurdhi Act, No. 1 of 2013 (Samurdhi Act). The provisions of the Banking Act, No.30 of 1988 and the Finance Business Act, No.42 of 2011 do not apply to banks and banking societies established under the provisions of this Act. They are not regulated by the Central Bank.

However, in terms of Section 42(2)(f) of the Samurdhi Act, the Minister has been vested with the power to make regulations in respect of matters such as criteria in respect of supervision, regulation and evaluation of samurdhi community-based organisations, samurdhi community-based banks and samurdhi community-based banking societies. Moreover, in terms of Section 28(c) of the Samurdhi Act, one function of a samurdhi community-based bank is to ensure welfare of the depositors and members of their families.

Hence, these entities are also guided by welfare matters and subject to regulation. Its membership is based on economic considerations.

Furthermore, Clause 3(c) of the Bill states that one of the objects of the Authority is to coordinate with the relevant regulatory authorities that regulate and supervise samurdhi community-based banks and samurdhi community-based banking societies. This provides for the uniform application of regulatory measures on Moneylending Business.

Accordingly, we are of the view that the exclusion of samurdhi community-based bank or banking society is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(h) An entity formed in terms of the Agrarian Development Act, No. 46 of 2000

The Concept Paper on Proposed Regulatory Framework for Moneylending and Microfinance Businesses in Sri Lanka presented to the MBSL did not specifically

recommend the exclusions of these institutions. Instead, it was proposed that a decision be taken on whether they should be brought within the regulatory scheme or excluded.

The functions of the entities formed under the Agrarian Development Act, No. 46 of 2000 is also driven by welfare considerations.

Moreover, Clause 3(c) of the Bill states that one of the objects of the Authority is to coordinate with the relevant regulatory authorities that regulate and supervise Farmer's Organisations. This provides for the uniform application of regulatory measures on the Moneylending Business.

Accordingly, we are of the view that the exclusion of an entity formed in terms of the Agrarian Development Act, No. 46 of 2000 is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(i) Any insurance company registered under the Regulation of Insurance Industry Act, No. 43 of 2000

These entities are regulated by the Insurance Board of Sri Lanka. One of the objects and responsibility of the Board is to ensure that insurance business in Sri Lanka is carried on in a professional and prudent manner with a view to safeguarding the interests of the policy-holders and potential policy holders.

In terms of Section 18(1) of Act No. 43 of 2000, the Board may cancel or suspend the registration of an insurer, either wholly or in respect of a particular class or sub-class of insurance business, where the insurer is carrying on its business in a manner likely to be detrimental to the interests of its policy holders.

Accordingly, the insurance industry is regulated, *inter alia*, with a view to protecting the interests of its policy holders.

However, we observe that Clause 3(c) of the Bill does not require the Authority to co-ordinate with the Insurance Board of Sri Lanka. This exclusion is arbitrary as it, as presently constituted, requires coordination between the Authority and the other regulators of the entities exempted from the scope of the Bill.

Accordingly, Clause 20(3)(i) read together with Clause 3(c) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 3(c) of the Bill is amended by adding the words "insurance business" after the words "...Farmers' Organisations'".

(j) any pawnbroker licensed under the Pawnbrokers Ordinance

We have examined the provisions of the Pawnbrokers Ordinance. The regulatory focus there does not sufficiently address the object of the Bill in providing protection to the customers of the Moneylending Business. Furthermore, the coordination sought to be established by Clause 3(c) of the Bill is not possible as the regulation is being done by the respective Divisional Secretary.

Moreover, in view of Clause 70 of the Bill, the provisions of the Pawnbrokers Ordnance do not apply to a licensee under the Bill and such licensee is empowered to carry on the business of a pawnbroker subject to such directions issued by the Authority. Hence the pawnbrokers business is now regulated under two different regimes. This runs contrary to the position taken up by the State on the regulation of Moneylending Businesses of existing entities which are regulated by other regulators.

The classification does not have any rational relation to the object sought to be achieved by the Bill.

Accordingly, Clause 20(3)(j) read together with Clause 70 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 20(3)(j) and Clause 70 are deleted.

(k) Any body corporate incorporated by a special enactment empowered to lend money in accordance with such enactment

We are of the view that this provision is vague and arbitrary. There are no guidelines for the establishment of a special body as contemplated herein. Any entity can be created as an exemption to the regulatory regime established by the Bill with no consideration of the objects of creating such entity and its nexus to the objects of the Bill. One of the stated objects of the Bill is to provide protection to the customers of Moneylending Business. This exemption and its classification do not provide any rational relation to the object sought to be achieved by the Bill.

Accordingly, Clause 20(3)(k) is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 20(3)(k) is deleted.

(l) Any company lending money to related companies

These entities are not similarly circumstanced as the other entities sought to be regulated by the Bill. The lending takes place between related companies which is not in the same class as an ordinary customer of Moneylending Business.

We are of the view that this exemption is not inconsistent with Article 12(1) of the Constitution.

(m) Any company which lends money to its directors, officers or employees as a benefit accorded to such persons

These entities and transactions are not similarly circumstanced as the other entities and transactions sought to be regulated by the Bill.

We are of the view that this exemption is based on intelligible differentia which has a rational relation to the objects of the Bill and thus not inconsistent with Article 12(1) of the Constitution.

(n) Foreign Government or any agency or institution acting on behalf of a Foreign Government

These entities do not lend directly to the public. Moreover, these entities and transactions are not similarly circumstanced as the other entities and transactions sought to be regulated by the Bill.

We are of the view that this exemption is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(o) International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Asian Development Bank, or any other multilateral lending institution

These entities do not lend directly to the public. Moreover, entities and transactions are not similarly circumstanced as the other entities and transactions sought to be regulated by the Bill.

We are of the view that this exemption is based on intelligible differentia which has a rational relation to the objects of the Bill and thus, not inconsistent with Article 12(1) of the Constitution.

(p) stock broker registered under the Securities and Exchange Commission of Sri Lanka

These entities and transactions are not similarly circumstanced as the other entities and transactions sought to be regulated by the Bill. Moreover, stockbrokers are regulated by the Securities and Exchange Commission of Sri Lanka.

However, we observe that Clause 3(c) of the Bill does not require the Authority to co-ordinate with the Securities and Exchange Commission of Sri Lanka. This exclusion is arbitrary as it, as presently constituted, requires coordination between the Authority and the other regulators of the entities exempted from the scope of the Bill.

Accordingly, Clause 20(3)(p) read together with Clause 3(c) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 3(c) of the Bill is amended by adding the words "stock brokers" after the words "...Farmers' Organisations'".

(q) any person specified for the purposes of this subsection by the Minister

Several Petitioners submitted that the power of the Minister has not been subjected to any guidelines and hence is arbitrary.

In the Energy Supply (Special Provisions) Bill, [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, page 259 at 262] it was held:

> *"Clause 5(g) empowers the Committee to "supervise and regulate" the activities of persons engaged in certain lines of business. They are not Public Corporations of*

statutory bodies, but persons engaged in private business. It would be inconsistent with Article 12(1) of the Constitution to vest power in the Committee to supervise such persons without laying down adequate guidelines for its exercise in the law itself."

In order to overcome this inconsistency, the learned State Counsel submitted a proposed Committee Stage Amendment to Clause 20 by addition of a new Sub-Clause which reads as follows:

> "20(5) The Order published in the *Gazette* under paragraph (q) of subsection (3) and paragraph (c) of subsection (4) shall be brought before Parliament for its approval and shall come into effect after such approval.";

However, a Clause of a Bill which does not lay down adequate guidelines on the exercise of discretionary power and hence inconsistent with Article 12(1), cannot be made consistent with the Constitution by obtaining approval of Parliament for specific instances of the exercise of such power.

Accordingly, Clause 20(3)(q) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease only if Clause 20(3)(q) of the Bill is deleted.

Clause 20(4)(c)

The Petitioners further submitted that Clause 20(4)(c) of the Bill is also an exemption. There the Minister is given the power to exempt from the application of Clause 20(1) of the Bill, a class or a category of transactions. However, no guidelines have been laid down for the exercise of such power.

In order to overcome this inconsistency, the learned State Counsel submitted the same Committee Stage Amendment to Clause 20(4)(c) which reads as follows:

> "20(5) The Order published in the *Gazette* under paragraph (q) of subsection (3) and paragraph (c) of subsection (4) shall be brought before Parliament for its approval and shall come into effect after such approval.";

However, a Clause of a Bill which does not lay down adequate guidelines on the exercise of discretionary power and hence inconsistent with Article 12(1) cannot be made consistent with the Constitution by obtaining approval of Parliament for specific instances of the exercise of such power.

Accordingly, Clause 20(4)(c) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease only if Clause 20(4)(c) of the Bill is deleted.

Intelligible Differentia of Microfinance Business

In terms of Clause 32(3) of the Bill, a person shall not be eligible to be licensed as a microfinance institution unless such person is a ***licensed moneylender***. Hence, in order for a person to be eligible to be licensed as a Microfinance Institution, that person must be a Licensed Moneylender.

According to Clause 84 of the Bill, a *microfinance institution* means an institution *licensed* by the Authority under Part V of the Bill to carry on the Microfinance Business. Hence, a person or entity ***exempted*** or ***prohibited*** from obtaining a license to carry on Moneylending Business by the Bill *ipso facto* cannot carry on Microfinance Business.

Clause 84 of the Bill defines *"Microfinance Business"* to mean business of lending money at interest or in consideration of profit or loss arising from the proceeds of lending being shared between the lender and the borrower with or without a security and provision of other financial services in conformity with the Schedule to this Act, **mainly** to low income persons and micro enterprises with the primary objective of social empowerment while maintaining sustainability of the lender and the borrower (emphasis added).

Accordingly, the Bill does not seek to regulate the whole of the Microfinance Business. Regulation is directed only at entities which *mainly* lend to low-income persons and micro enterprises with the primary objective of social empowerment while maintaining sustainability of the lender and the borrower.

One of the primary objects of the Bill is to provide protection to customers of the Microfinance Business. However, the definition of Microfinance Business brings only a part of that business within the scope of the Bill. Low-income persons and micro enterprises who do business with other entities who provide Microfinance but does not *mainly* lend to low-income persons and micro enterprises with the primary objective of social empowerment while maintaining sustainability of the lender and the borrower do not get the protection from the proposed regulatory regime.

The differentia does not have a reasonable relation to the object of the Bill.

Accordingly, the definition of "Microfinance Business" in Clause 84 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if the word "mainly" is deleted from the definition of "Microfinance Business" in Clause 84 of the Bill.

Clauses 32(1) of the Bill excludes a person exempted under paragraphs (c), (d), (e), (f) and (g) of Clause 20(3) of the Bill, namely a licensed commercial bank or a licensed specialised bank within the meaning of the Banking Act, No. 30 of 1988, a licensed finance company within the meaning of the Finance Business Act, No. 42 of 2011, any registered leasing establishment registered under the Finance Leasing Act, No. 56 of 2000, a co-operative society registered under the Cooperative Societies Law, No. 5 of 1972 and a cooperative society registered under a statute of a Provincial Council and a Samurdhi Community based bank or a Samurdhi Community based banking Society established under the Samurdhi Act, No. 1 of 2013 from the regulation of Microfinance Business.

We have held that their exemption from the regulation of Moneylending is justified as more fully discussed above. That conclusion is based *inter alia* on the fact that such part of the Moneylending Business is already under regulation.

However, the Microfinance Business, which is a sub-species of the Moneylending Business is not specifically regulated with a view to protect the customer. The need to regulate the Microfinance Business is clear due to the diverse issues arising due to lack of regulation as more fully discussed above. Once such a regulatory regime is introduced by the Bill, it is unreasonable to split such businesses to two regulatory regimes. This is one of the main complaints of several Petitioners.

As Mr. Hewamanna correctly submitted, the customers of an institution providing microfinance are essentially those who are poverty stricken and mostly women. All such institutions are within one pool, and any "genetic blemishes", disappear once they are integrated into a common class [***Ramupillai v. Festus Perera, Minister of Public Administration*** **[1991] 1 SLR 11 at 26].**

Accordingly, we are of the view that Clause 32(1) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 32(1) of the Bill is amended by deleting the words "or a person exempted under paragraphs (c), (d), (e), (f) and (g) of subsection (2) of section 20".

We will now examine the other provisions of the Bill which were challenged for their constitutionality by the Petitioners.

Clause 5(3)(b)

The administration, management and control of the affairs of the Microfinance and Credit Regulatory Authority to be established by the Bill is to be vested in a Board of Directors. Clause 5(3) of the Bill provides for the appointment of members to the Board.

Clause 5(3)(b) of the Bill enables the Minister to appoint four members, who shall possess academic or professional qualifications and have experience in the fields of banking, finance, microfinance, accounting, law, administration or any other relevant discipline.

In the Engineering Council Bill [Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, page 69 at 70], Court found that there must be a reasonable representation in the body. In the Petroleum Products (Special Provisions) Amendment Bill [SC SD 50-52/2022 at page 17] the Court held that composition must be such that all relevant criteria must be considered.

Furthermore, in the Anti-Corruption Bill SC SD 16/23 – 21/23, at page 24 Court held that:

> *"It was further submitted that the major responsibility of the Commission is carrying out inquiries and investigations. However, Clause 4(1)(b) of the Bill does*

not provide for the appointment of a person experienced in investigation of crime and law enforcement. The manner in which the relevant provision in the Bill is couched, it excludes the possibility of appointing a person with skills, competencies and expertise in investigation of crime and law enforcement, as a member of the Commission. This is not a mere draw back, but defeats the objectives of the Bill."

There is no compulsion on the Minister to appoint at least one member who has academic or professional qualifications in the field of Microfinance. This is arbitrary and capricious and hence Clause 5(3)(b) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned State Counsel has submitted that the following amendment will be moved at the Committee Stage:

Page 5, Clause 5 : Delete lines 23 to 27 (both inclusive) and substitute the following: -

"(i) a member who has expertise, reached eminence and has experience in microfinance or finance;

(ii) a member who has expertise, reached eminence and has experience in one or more of the following fields:-

(A) banking;

(B) accounting;

(C) law;

(D) administration; or

(E) any other relevant field; and";

We are of the view that at least one member must have experience in microfinance. Hence, there cannot be an alternative of appointing a member who has experience in microfinance or finance. Therefore, the proposed amendment should suitably be amended by removing the words *"or finance"*.

The inconsistency identified above will cease if the above Committee Stage Amendment is made subject to the modification we have pointed out above.

Clause 39

Clause 39(2) of the Bill states that any person who fails to comply with an order or direction issued or pay any penalty imposed under subsection (1) commits an offence. However, orders or directions made under Clause 39(2) are not placed before Parliament for approval.

In Colombo Port City Economic Commission Bill [Decisions of the Supreme Court on Parliamentary Bills, 2021, Vol. XVI, page 23 at 47] it was held that;

> *"... [T]he Commission is conferred with the power to make rules, codes, directions or guidelines without Parliamentary control and hence such rules, codes, directions or guidelines cannot then be the basis of any criminal sanction [...] Court is inclined to agree with the said submission."*

Accordingly, we determine that Clause 39(2) of the Bill is inconsistent with Article 76 read with Articles 3 and 4 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83.

This inconsistency will cease if Clause 39(2) of the Bill is deleted.

Clauses 60 and 38

According to Clause 60 of the Bill, any person who contravenes or fails to comply with any provision of this Act, any *rule, direction, order or requirement issued or imposed, or fails to pay any administrative charge* imposed thereunder commits an offence under the Act. This includes customers on whom Clause 53 of the Bill imposes certain responsibilities.

Mr. Hewamanna submitted that these responsibilities include, exercising reasonable due care in every transaction with a licensee, reporting forgeries or unauthorised transactions, take reasonable measures to identify the purpose of the loan and obtain a sum of money to serve such purpose which can be serviced without any default and inform the licensee of any financial difficulty that may hinder repayment.

It was further submitted that by the very nature of the type of customers who obtain microfinance loans, i.e. women living in poverty, with little to no financial literacy, it is likely that customers will be unable to fully comply with such responsibilities which then is made a criminal offence. It was submitted this facilitates the criminalisation of poverty.

We see much merit in this contention. All men and women are not equal. They are disparate for a number of reasons. The right to equality in Article 12(1) does not mean the application of the same law for all men and women. Equal protection of the law means the protection of equal laws for all persons similarly placed. The customers of microfinance businesses and microfinance institutions are not similarly placed. Hence, these two groups cannot be lumped together to impose penal sanctions on their actions or omissions.

However, Clause 60 of the Bill criminalises the actions or omissions of the customers of the Microfinance Business and is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

Moreover, Clause 60 of the Bill covers directions and rules made by the Authority.

Clause 37 of the Bill enables the Authority to issue directions to licensees. However, there is no need to place such directions for approval before Parliament.

In Colombo Port City Economic Commission Bill [Decisions of the Supreme Court on Parliamentary Bills, 2021, Vol. XVI, page 23 at 47] it was held that;

> *"...[T]he Commission is conferred with the power to make rules, codes, directions or guidelines without Parliamentary control and hence such rules, codes, directions or guidelines cannot then be the basis of any criminal sanction [...] Court is inclined to agree with the said submission."*

Clause 38 of the Bill enables the Authority to make rules. However, there is no need to place such rules for approval before Parliament.

Accordingly, we determine that Clause 60 of the Bill is inconsistent with Article 76 read with Articles 3 and 4 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83.

However, the said inconsistencies will cease if Clauses 60 and 38 of the Bill are amended as follows:

Page 33, Clause 38	:	delete lines 1 and 4 (both inclusive) and substitute the following:-
		"Every direction or rule made by the Authority under This Act shall be approved by the Minister and published in the *Gazette*, and shall be brought before Parliament for its approval and shall come into effect after such approval.";
Page 49, Clause 60	:	delete lines 6 to 8 (both inclusive) and substitute the following:-
		"with any provision of this Act, other than section 53, any direction or rule made thereunder commits an offence";

Clause 65

This deals with secrecy of information. Mr. Hewamanna submitted that it is a constitutionally overbroad secrecy clause. It was contended that if the purposes of the Bill, i.e. regulating the Moneylending Business and the Microfinance Business and providing protection for the customers thereof are to be achieved, access to information should be not merely permitted, but actively facilitated.

We are in agreement with this position. In our view, Clause 65 of the Bill is inconsistent with Article 14A of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

However, the said inconsistencies will cease if Clause 65 of the Bill is amended as follows:

Page 52, Clause 65 : (1) delete line 19 and substitute the following -

"65. (1) Except in the performance of his duties under this Act";

Page 53, : (2) Immediately after line 15, Insert the following -

" (2) The Provisions of the Right to Information Act, No.12 of 2016 shall have the effect not withstanding anything to the contrary in this Act, and accordingly in the event of any inconsistency or conflict between the provisions of the Right to Information Act and this Act, the provisions of the Right to Information Act shall prevail in relation to any information of the Authority. "; and

The Determination of the Court

The determination of the Court as to the constitutionality of the Bill titled "Microfinance and Credit Regulatory Authority Bill" is as follows:

1. Clause 5(3)(b) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if the following Committee Stage Amendment is moved.

   Page 5, Clause 5 : Delete lines 23 to 27 (both inclusive) and substitute the following: -

   "(i) a member who has expertise, reached eminence and has experience in microfinance;

   (ii) a member who has expertise, reached eminence and has experience in one or more of the following fields:-

   (A) banking;
   (B) accounting;
   (C) law;
   (D) administration; or
   (E) any other relevant field; and";

2. Clause 20(3)(i) read together with Clause 3(c) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if Clause 3(c) of the Bill is amended by adding the words "insurance business" after the words "...Farmers' Organisations'".

3. Clause 20(3)(j) read together with Clause 70 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if Clause 20(3)(j) and Clause 70 are deleted.

4. Clause 20(3)(k) is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if Clause 20(3)(k) is deleted.

5. Clause 20(3)(p) read together with Clause 3(c) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if Clause 3(c) of the Bill is amended by adding the words "stock brokers" after the words "...Farmers' Organisations'".

6. Clause 20(3)(q) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if Clause 20(3)(q) of the Bill is deleted.

7. Clause 20(4)(c) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The inconsistency will cease if Clause 20(4)(c) of the Bill is deleted.

8. Clause 32(1) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. **The inconsistency will cease if Clause 32(1) of the Bill is amended by deleting the words "or a person exempted under paragraphs (c), (d), (e), (f) and (g) of subsection (2) of section 20".**

9. Clause 39(2) of the Bill in inconsistent with Article 76 read with Articles 3 and 4 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83.
The inconsistency will cease if Clause 39(2) of the Bill is deleted.

10. Clause 60 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

Moreover, Clause 60 of the Bill is also inconsistent with Article 76 read with Articles 3 and 4 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83.
Both the said inconsistencies will cease only if Clauses 38 and 60 of the Bill are amended as follows:

Page 33, Clause 38 : delete lines 1 and 4 (both inclusive) and substitute the following:-

"Every direction or rule made by the Authority under This Act shall be approved by the Minister and published in the *Gazette*, and shall be brought before Parliament for its approval and shall come into effect after such approval.";

Page 49, Clause 60 delete lines 6 to 8 (both inclusive) and substitute the following:-

"with any provision of this Act, other than section 53, any direction or rule made thereunder commits an offence";

11. Clause 65 of the Bill is inconsistent with Article 14A of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if Clause 65 of the Bill is amended as follows:

Page 52, Clause 65 : (1) delete line 19 and substitute the following -

"65. (1) Except in the performance of his duties under this Act";

Page 53, Clause 65 : (2) Immediately after line 15, Insert the following -

" (2) The Provisions of the Right to Information Act, No.12 of 2016 shall have the effect not withstanding anything to the contrary in this Act, and accordingly in the event of any inconsistency or conflict between the provisions of the Right to Information Act and this Act, the provisions of the Right to Information Act shall prevail in relation to any information of the Authority. ";

12. Clause 76 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. **The inconsistency will cease if Clause 76 of the Bill is amended as follows:** *"Provisions of the Money Lending Ordinance (Chapter 80), except section 5, shall not apply to any Licensee."*

13. Clause 84 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. **The inconsistency will cease if the word "mainly" is deleted from the definition of "microfinance business" in Clause 84 of the Bill.**

We wish to place on record our deep appreciation of the assistance given by the learned President's Counsel and other Counsel who appeared for the Petitioners and the learned State Counsel who represented the Hon. Attorney General in these proceedings.

Murdu N. B. Fernando, PC,

Judge of the Supreme Court

Janak De Silva

Judge of the Supreme Court

K. Priyantha Fernando

Judge of the Supreme Court