

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

In the matter of an application to determine whether the Bill titled "Microfinance and Credit Regulatory Authority" or any part thereof is inconsistent with the Constitution in terms of Article 120 read with Articles 121 and 78 of the Constitution and/or Article 134.

1. Transparency International Sri Lanka
No. 366, Nawala Road,
Nawala, Rajagiriya.
2. Ashala Nadishani Perera
No. 366, Nawala Road,
Nawala, Rajagiriya.

SC (SD) Application No: 14 / 24

vs.

Petitioners

Hon. Attorney General
Attorney General's Department
Hulftsdorp
Colombo 12.

Respondent

On this 22nd day of January 2024

TO: HIS LORDSHIP THE CHIEF JUSTICE, AND THEIR LORDSHIPS AND LADYSHIPS;
THE OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Petition of the Petitioners above-named appearing by Thushari Jayawardena, their registered Attorney-at-Law, states as follows:

1. The Petitioners state that the 1st Petitioner is a juristic person represented by a membership of whom more than three-fourths are citizens of Sri Lanka, with primary objects, *inter alia*, of promoting and bringing about transparency and integrity in governance, and eradicating corruption. The 2nd Petitioner is a citizen of Sri Lanka and the Executive Director of the 1st Petitioner. The Petitioners are entitled to proffer this application under Article 121(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as 'the Constitution').

True copies of the Certificate of Incorporation and the notice of change of registered address of the 1st Petitioner are annexed hereto compendiously marked 'P1(a)' and are pleaded as part and parcel hereof.

True copies of the Memorandum and Articles of the 1st Petitioner are annexed hereto compendiously marked 'P1(b)' and are pleaded as part and parcel hereof.

2. The Petitioners state that the Respondent is the Hon. Attorney General and is made a party hereto in terms of the Law, and in particular Article 134(1) of the Constitution.
3. The Petitioners state that a Bill titled 'Microfinance and Credit Regulatory Authority' was placed on the Order Paper of the Parliament on 09th January 2024.

Copies of the said Bill in all three languages (Sinhala, Tamil and English) are annexed hereto marked 'P2(a)', 'P2(b)' and 'P2(c)' respectively and pleaded as part and parcel hereof.

A copy of the said Order Paper of Parliament is annexed hereto marked 'P3' and pleaded as part and parcel hereof.

4. In the instant application, the jurisdiction of Your Lordships' Court has been invoked in terms of Article 120 and 121 of the Constitution to determine whether any provisions of the Bill titled "Microfinance and Credit Regulatory Authority" (hereinafter referred to as "the Bill" or "the said Bill") are inconsistent with the Constitution.
5. The Petitioners state that during the course of the widespread awareness-raising and grievance redressal work that they engage in with victims and witnesses of corruption through the 1st Petitioner's Advocacy and Legal Advice Centre (ALAC), they have encountered numerous issues faced by victimized customers/borrowers of microfinance schemes island-wide, including, but not limited to;

- a. sextortion/soliciting of sexual bribes;
 - b. physical, mental, and emotional harassment and intimidation;
 - c. obtaining signatures on blank pages without legitimately entering into terms of the contract between the lender and borrower;
 - d. the entering into of microfinancing agreements with borrowers without having due regard to the language rights and competencies of the borrowers;
 - e. the entering into of microfinancing agreements with borrowers without due regard to their financial literacy, resulting in the imposition of extortive interest rates;
 - f. the acceptance of and/or encouraging the use of deceptive narratives of 'employment' as collateral to support the granting of extortive microfinancing loans to borrowers without the carrying out of reasonable due diligence;
 - g. the application of extortive interest rates in the granting of loans, preying upon the low financial literacy of citizens; and,
 - h. the use of debt collectors and debt collecting practices that perpetrate some or all of the above, while failing to exercise sufficient control over excesses committed in the process.
6. The Petitioners state that the Bill fails to sufficiently address or introduce a fit scheme to enable the regulation of the said extortive and predatory practices that microfinance lenders engage in at the grassroots levels.
7. The Petitioners respectfully state that the Bill does not conform to the principles of reasonableness, proportionality, natural justice, separation of powers and legal certainty as required by Your Lordships' Court and is thus violative of Article 83 of the Constitution as read with Article 3 and 4 of the Constitution.

8. The Preamble to the Bill reads as follows:

‘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 money lending business and the microfinance business; to repeal the Microfinance Act, No. 6 of 2016 and to provide for matters connected therewith or incidental thereto’.

9. The Petitioners state that, notwithstanding the stated purpose in its Preamble and Clause 3, the Bill as a whole, fails to provide for a scheme that would regulate the moneylending and microfinance business, or protect borrowers/customers adequately, as will be more fully demonstrated at the hearing of this application.

Exclusion of Certain Companies that Operate Microfinance Businesses

10. The Petitioners state that Clause 32(1) read with Clauses 20(3)(c), (d), (e), (f) and (g) of the Bill (erroneously referred to as Clause 20(2), in Clause 32(1) of the Bill), excludes certain entities that dominate the microfinance industry by carrying out microfinance business, such as:

(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 Cooperative Societies Law, No. 5 of 1972 and a cooperative 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;

11. The Petitioners state that Clause 32(1) and Clauses 20(3)(c), (d), (e), (f) and (g) of the Bill sets out as follows:

32(1) No person, other than a person licensed to carry on the microfinance business under this Act or a person exempted under paragraphs (c), (d), (e), (f) and (g) of subsection (2) of section 20 shall carry on the microfinance business.

20(3) Without prejudice to subsection (1), the provisions of subsection (1) shall not apply to the following institutions: -

(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 Cooperative Societies Law, No. 5 of 1972 and a cooperative 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;

12. The Petitioners respectfully state that the experiences of borrowers as referred to in paragraph (5) above, have encompassed several entities who are excluded from regulation by Clause 32(1) read with Clauses 20(3)(c), (d), (e), (f) and (g) of the Bill.

13. The Petitioners specifically state that the arbitrary exclusion of such entities from the ambit of the Bill, while they manifestly operate in microfinance business, violates Article 12(1) of the Constitution and other provisions which will be adverted to at an appropriate stage of these proceedings, by providing a favourable exception to such entities.

In this regard, a copy of the research report titled 'Burden Upon Burden: Report on Socio-Economic Impact of Micro Finance and COVID-19 on Women Affected by War and Political Violence and their Access to Reparations' and a newspaper article entitled, 'Microfinance and Credit Regulatory Authority – A fatal flaw' and dated 14th November 2023 are annexed hereto compendiously marked 'P4(a)' and 'P4(b)', and are pleaded as part and parcel hereof. Available online at <https://www.ft.lk/columns/Microfinance-and-Credit-Regulatory-Authority-A-fatal-flaw/4-765159>

Sextortion/Sexual Bribery

14. The Petitioners respectfully state that sextortion of or the solicitation of sexual bribes from borrowers/customers has been a widespread practice in the administering of microfinance loans, by the lending entities or their debt collectors. Women, who often resort to microfinance loans to support their small businesses and other livelihoods, are disproportionately affected by the extortionary practices of entities that offer microfinance loans.

15. The Petitioners state that the Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Sri Lanka (A/HRC/40/57/Add.2) para 79, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Tomoya Obokata, (A/HRC/51/26/Add.1) para 46, and several newspaper articles covering such practice and the impact of the same as canvassed in this application, bears out the lived realities of microfinance customers/borrowers.

Copies of reports A/HRC/40/57/Add.2 and A/HRC/51/26/Add.1 and newspaper articles dated 20th January 2024 'Will the Microfinance Regulatory Bill save victims or benefit big corporations?' and 'Microfinance still forcing women to provide sexual bribes' dated 28th June, 2022 are annexed hereto compendiously marked 'P5(a)', 'P5(b)', 'P5(c)' and 'P5(d)' and are pleaded as part and parcel hereof. Available online at <https://ceylontoday.lk/2024/01/20/will-the-microfinance-regulatory-bill-save-victims-or-benefit-big-corporations/#:~:text=Manohari%20is%20one%20of%20the,these%20loans%20with%20high%20interests> and <https://www.themorning.lk/articles/208796>.

16. The Petitioners state that the failure of the Bill to specifically address the issue of such sextortion/sexual bribery violates Articles 3, 4(a), 4(b), 12(1), 12(2), 12(4), 14(1)(f) and 14(1)(g) of the Constitution, and, moreover, frustrates the stated purpose of the Bill, to '*provide protection for the customers of the money lending business and the microfinance business*'.

Undue Discretion Granted to the Minister

17. The Petitioners submit that the following clauses provide for undue sole discretion to be granted to the Minister:

- a. Clause 20(3)(q) which allows the Minister to specify persons who may carry out moneylending without a license from the Microfinance and Credit Authority; and,
- b. Clause 20(4)(c) which allows the Minister to grant exemptions to a class or category of transactions from the application of the provisions of the Bill.

18. The Petitioners respectfully state that, for a Bill whose stated purpose is, *inter alia*, to '*to regulate the moneylending business and the microfinance business*', to allow the Minister the sole discretion to exempt certain persons or categories of persons and transactions from its regulatory remit, violates Article 3, 4(a), 4(b), 12(1) of the Constitution.

19. The Petitioners state that the Bill sets out a scheme in which there is no sufficient redress for customers/borrowers to avail of, in the instance of dissatisfaction with the acts/omissions of the Authority.

20. The Petitioners state that Part VII of the Bill entitled '*Customer Protection*' is woefully inadequate to address the extortive practices set out in paragraph 5 of this Petition, and therefore violates Articles 3, 4(a), 4(b) and 12(1) of the Constitution.

21. The Petitioners respectfully state that the Bill fails to adequately regulate all entities that engage in microfinance activities in a manner that would address the pervasive issues that have adversely plagued the sector, and therefore, fails in its stated intention to protect customers/borrowers adequately, and as such constitutes a violation of Article 3 of the Constitution read with Articles 3, 4(a), 4(b) and 12(1).

Disclosure of Information

22. The Petitioners state that Clause 65 of the Bill attempts to create an information-concealing regime that is in complete violation of Article 14A of the Constitution from which the Right to Information Act No. 12 of 2016 flows.

23. Being ardent advocates for and continued promoters of the Right to Information, the Petitioners state that to create a regime that would derogate from Article 14A of the Constitution and the RTI Act No. 12 of 2016, would lead to a fractured information-disclosure regime that no longer espouses the principle of maximum disclosure as captured in the RTI Act, which has resulted in Sri Lanka's ranking as 4th among the world's Freedom of Information laws.

General

24. The Petitioners respectfully state that clauses 5(3)(b), 20(3)(q), 20(4)(c), 51(3), 61(6), and Part VII, Clause 32(1) read with Clauses 20(3)(c), (d), (e), (f) and (g) of the Bill, and other provisions that will be adverted to at an appropriate stage of these proceedings, or the Bill as a whole, are/is inconsistent with the rights guaranteed under the Constitution and the law, and violative of Article 12 of the Constitution as read with Article 3 & 4(d) and other provisions of the Constitution. The Petitioners state that they have taken steps to furnish a copy of this Petition to the Honourable Speaker in compliance with Article 121(1) of the Constitution.

25. The Petitioners state that in the aforesaid circumstances they are entitled to invoke the jurisdiction of Your Lordships' Court for the reliefs prayed for herein.

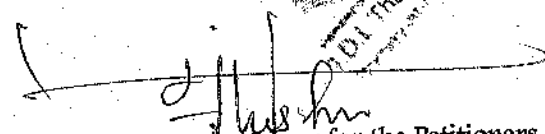
26. The Petitioners have not previously invoked the jurisdiction of Your Lordships' Court in respect of this matter.

27. The Petitioners respectfully reserve the right to furnish such further facts and documents in support of the matters set out herein at the hearing of this Application should the Petitioners become possessed of any such material and/or should it become necessary or expedient.

28. An affidavit of the 2nd Petitioner is appended hereto in support of the averments contained herein.

WHEREFORE the Petitioners pray that Your Lordships' Court be pleased to:

- a) Declare and determine that clauses 3, 4, 5, 20, 32, 51, 61, 65, 51(3), 61(6), and Part VII of the Bill titled '*Microfinance and Credit Regulatory Authority*' and/or the Bill in totality, are inconsistent with Articles 3 & 4 and fundamental rights enshrined in Chapter III of the Constitution, including but not limited to Articles 3, 4, 12 and 14A of the Constitution, and therefore require the following of the appropriate procedure laid down in Articles 83 &/or Article 84, as read with Article 80 of the Constitution, for enactment into law, and cannot be enacted into law except unless approved by the People at a Referendum and/or by a two-thirds vote of the whole number of the members of Parliament in favour;
- b) Communicate the said determination made under (a) to the Honourable Speaker of Parliament; and,
- c) Grant such further and other relief as to Your Lordships' Court shall seem meet.


Attorney-at-Law for the Petitioners

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