SPECIAL CONTRIBUTIONS

RIGHT TO INFORMATION ACT: AN OVERVIEW

Dilini Nilanga Wilathgamuwa

LL.M (Colombo), MA (Kelaniya), BA (Colombo)
Attorney – at – Law,
Intl. Diploma in Compliance (UK)
Intl. Diploma in Money Laundering (UK)

1. Introduction

Right to information became a legally accepted fundamental right by virtue of 14(a) of the Constitution which was newly introduced by the 19th Amendment to the Constitution[1]. Under the said Article 14(a) the right of every citizen to access information has been established, subject to certain conditions. In line with this amendment, Sri Lanka has taken a liberal step forward when the Right to Information Act No.12 of 2016 was passed by passed by the Parliament of Sri Lanka on 04th August 2016, legal provisions were laid down by this legislature for the access to information required for the exercise or defending of the right of a citizen, and for the use of information in a transparent manner. The primary purpose of the Right to Information Act is to provide for the right of access to information, to specify grounds on which access to information may be denied, to establish the right to information commission, to appoint information officers, to set out the procedure for obtaining information and to provide for matters connected therewith or incidental thereto[2].

The Act prescribes that its provisions shall prevail over any other written law, and that in the event of any inconsistency or conflict between the provisions of this Act and any other written law, the provisions of this Act shall prevail[3].

2. Access to information under the Right to Information Act

Subject to the limitations set out in the Act, every citizen shall have a right of

[1] 19th Amendment to the Constitution, Article 2
[2] Right to Information Act No.12 of 2016, Preamble
[3] Right to Information Act No.12 of 2016, s 4

access to information which is in the possession, custody or control of a public authority[4]. The term "citizen" includes a body either incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens. The term "Information" has also been given a wider interpretation. Generally a "public authority" may include all Ministries, departments, public corporation, companies in which the State or a public corporation hold 25 percent or more of the shares, local authorities, private entities linked with the government, institutions connected to Provincial Councils, non-governmental organizations that are connected to the government, private universities, institutions offering vocational training and institutions offering technical education having some form of connection to the state or in some way funded by the state, courts and tribunals[5].

For the purpose of giving effect to the provisions of this Act, every public authority shall appoint, within three months of the date of coming into operation of the Act, one or more officers as information officers and a designated officer to hear appeals[6]. The primary duty of these officers is to ensure providing information to citizens, as such citizens may request, subject to the provisions.

2.1. Procedure to obtain information

Any citizen who expects to receive information under the Right to Information Act should make a request in writing using the application form published as 'Form 01' under the regulations pertaining to the Act which have been published on the Government Gazette dated 03.02.2017. However, where such application could not be made in writing, such citizen shall have the right to make the request verbally as well. The Act has also made provisions to make information requests by e-mail , from any public authority[7].

Any such citizen requesting for information should ensure that the information officer is provided with sufficient details to identify the required information.

A decision has to be made either to provide the information requested for, subject to the payment of any fee, or to reject the request on any one or more of the grounds referred to in section 5 of the Act, and such decision shall

[4] Right to Information Act No.12 of 2016, s 3A
[5] Right to Information Act No.12 of 2016, s 43
[6] Right to Information Act No.12 of 2016, s 23
[7] Right to Information Act No.12 of 2016, s 26 (6) read with Regulation 4(4) of the Gazette Notification dated 03.02.2017

forthwith be communicated to the citizen who made the request within 14 working days. Where a decision is made to provide the information, it should be provided within 14 days of arriving at such decision. Where the request for information concerns the life and personal liberty of any citizen, the response to such request should be made within 48 hours of the receipt of the request[8].

The period may be extended for a further period up to 21 days where the request is for a large number of records and if the relevant information does not exist at the office of the information officer but at some other distant location, and therefore it is difficult for the Information officer to collect such information within 14 days, and such extension should be communicated to the relevant citizen.

In providing information, such information should be provided using Form 04 published in the said Gazette, and if the Information Officer is of the view that using the said Form is prejudicial to the safety or security of particulars , such information may be provided in any other appropriate manner.

Where information requested by any citizen relates to, or has been supplied by a third party, subject to the time period prescribed in Section 29(1), the third party must be inquired if they are willing or unwilling to disclose such information[9]. The information Officer should give due consideration to the opinion of such third party, in making a decision regarding provision of the requested information.

2.2. Denial of access to information

The Information officers are permitted to reject any application for information by a citizen, in following circumstances[10].

(i) Where the requested information is personal information, and disclosure of the same would cause unwarranted invasion of the privacy of the individual, and where such disclosure does not promote public interest,

(ii) Where such disclosure would undermine the national security or territorial integrity or defense of the state,

[8] Right to Information Act No.12 of 2016, s 25
[9] Right to Information Act No.12 of 2016, s 29
[10] Right to Information Act No.12 of 2016, s 5

(iii) Where such disclosure may be prejudicial to international relations,

(iv) Where the disclosure of the relevant information would cause serious prejudice to the economy by disclosing government economic or financial policies relating to exchange rates or the control of overseas exchange transactions, regulation of banking or credit, taxation, maintenance of stability of prices of goods and services, and entering into of overseas trade agreements

(v) If the information relates to trade secrets or intellectual property, and the disclosure of the same would harm the competitive position of a third party,

(vi) If the information could lead to the disclosure of any medical records relating to any person, when he/she has not consented to such disclosure,

(vii) Where the information is required to be kept confidential due to existence of a fiduciary relationship

(viii) Where the disclosure of such information would cause prejudice to the detection of any crime or the apprehension of offenders; interrupt enforcement of law, or cause contempt of court, or breach parliamentary privileges, or if it is pertaining to revelation of an information of an examination which needs to be kept confidential, or pertaining to an information of an election which needs to be kept confidential, or pertaining to a cabinet memorandum in relation to which a decision has not been taken.

The fact that should be emphasised here is, that authorities should ensure not to refuse disclosure of information on any of above reasons, where the public interest in disclosing the information outweighs the harm that would result from its disclosure.

Where a request for information is refused on any of the grounds referred to above, access could nevertheless be given to the citizen who made the request, to any part of information contained that does not fall under those reasons, and which can be severed from the information record[11].

Where a request for information is refused by an information officer, such officer should notify to the

[11] Right to Information Act No.12 of 2016, s 6

relevant citizen who made the request, using the Form 05 published in the Gazette, the grounds on which such request is refused and the person to whom an appeal should be made.

2.3. Appeals

2.3.1. Appeals to the Designated Officer

If the citizen who made request for information is not satisfied with the response of the information officer, an appeal may be made to the Designated Officer within 14 days of the response. The designated officer should issue a notice of the acceptance of the appeal, to the citizen making the appeal within 3 working days of receipt of the appeal, and the decision of the appeal should be made within a period of 3 weeks from the date of receipt of the appeal.

2.3.2. Appeals to the Right to Information Commission

The Right to Information Commission is the main supervisory and enforcement institution established in terms of Section 11 of the Right to Information Act No.12 of 2016[12]. It is an independent statutory body, and it is vested with powers to conduct inquiries into denials of information, recommending disciplinary action against officers with wrongful conduct, and to institute criminal prosecutions under the Act.

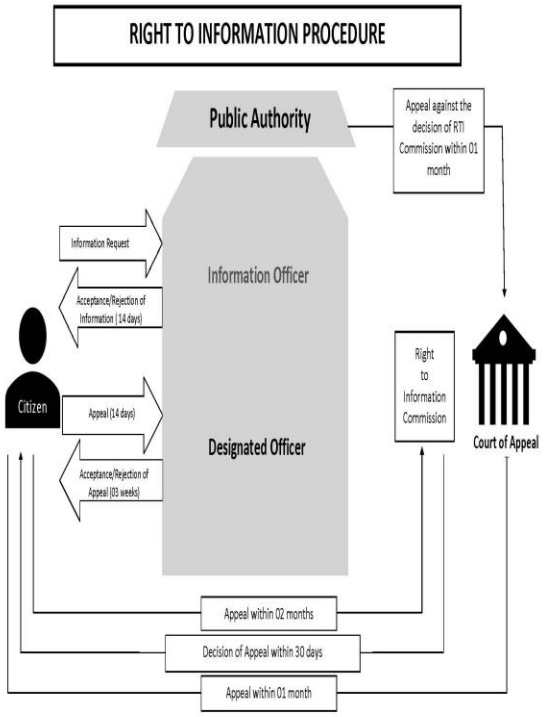
Any citizen who is not satisfied with a response received on an appeal made to a Designated Officer, may prefer an appeal to the Commission within two months of receipt of such response. The procedure of making inquiries on appeals made to the Commission are set out under Regulations 13-31 of the Right to Information Act, as approved by the Minister in charge of the subject under Section 42(2) of the Act.

[12] http://www.rticommission.lk/web/index.php?option=com_content&view=article&id=11&Itemid=142&lang=en (accessed on 17.09.2019)

2.3.3. Appeals to the Court of Appeal

A citizen or a public authority aggrieved by the decision made by the Commission may appeal against such decision to the Court of Appeal within one month from the date on which such decision was communicated to the citizen or public authority[13].

The procedure of receiving information is simply illustrated by the following chart.



3. Criticisms on the Act

When this Act is studied in depth as a whole, it is evident that the Act is more favorable to the citizen who seek to receive information. Some experts state that rights of persons could be at risk due to the right to receive information. This means that disclosure of some information in the possession of a public authority may lead to breach of rights of certain persons. But the Act provides the opportunity not to disclose information if there is a likelihood of unwarranted invasion of the privacy of an individual, in disclosing any information[14]. Therefore, the argument that rights of individuals may be threatened by the

[13] Right to Information Act No.12 of 2016, s 34(1)

[14] Right to Information Act No.12 of 2016, s (1) (a)

Right to Information Act could be abandoned to a certain extent.

It appears that there is still a lack of awareness among the general public about this Act and about the scope of the Right to Information Commission which was established under the said Act. If proper steps are not followed to make the general public aware of the importance of this Act and of the ability of receiving information as a right, it would be difficult to achieve the expected goals of this legislature. On the other hand, it appears that the public authorities have an indifferent attitude towards this Act. That is because, the Act entrusts them with an additional task of collection of information and to provide the same, and as it causes certain difficulties for them to attend in such duties with limited resources while attending day-to-day duties. If they are made aware of the importance of the Act and of the benefits that they also could receive as citizens, staff members of public authorities may perhaps attend to activities pertaining to this Act with a more positive view.

Some laws and regulations have prevented disclosure of information even for the interest of the public. For example, the Establishment Code has prohibited the public servants to disclose information pertaining to state policy and administrative decisions[15]. Sri Lanka Press Council Law has prohibited to disclose sources of information in reporting news[16]. According to provisions of the Banking Act No.30 of 1988, banks have a legal duty to protect and not to disclose information of their clients[17]. Further, when it comes to state banks, there is a conflict between this limitation and the provisions of the Right to Information Act. In these circumstances, there are occasions where government servants face difficulties in deciding as to what law they should comply with. But according to Section 4 of the Right to Information Act, the provisions of the Right to Information Act shall prevail over any other written law. Therefore, it is necessary to make arrangements to thoroughly make aware the staff members of public authorities.

Some formal actions are required to be initiated without any delay, in order to raise public awareness of the importance of the Right to Information Act, and as to how to get it enforced as a fundamental right. This could be implemented at an institutional level for public authorities, and the general public could be addressed by workshops

[15] Establishment Code, Chapter 31, s 3,
[16] Sri Lanka Press Council Law s 32(1)
[17] Banking Act No 30 of 1988, s 77,

and awareness programmes conducted through Divisional Secretariat offices.

Awareness programmes must be conducted for staff members of public authorities to encourage them to implement provisions of the said Act with a more positive attitude, instead of the existing indifferent attitudes. information officers and designated officers should especially be made aware of the legal process of disclosing information/ denial of information as set out in the Act, and of the rules and regulations introduced under the said Act as well.

Steps should be taken to include lessons on Fundamental Rights including the Right to Information in school curriculum, and thereby the society may become aware of this right and its importance.

There are loopholes in procedures of collecting and maintaining information in public institutions. This has been a result due to the inadequacy of infrastructure. It appears that it has been difficult to provide information within the time-frame imposed by the Act, especially because information is not computerised. In this context, government intervention is required to provide necessary resources, trained workers, new technology and infrastructure to public authorities in order to collect information in various institutions and to store them in such a way to enable easy retrieval of such information when necessary. It is also required, as a long-term measure, to introduce to the country a common public database with state intervention, as it exists in countries like Singapore and Malaysia, and thereby the general public shall be able to access the data base and to receive required information without any difficulty. The public authorities could upload to the said common state database where all such information could generally be disclosed and then the public authorities may not have to face difficulties that would arise in implementation of provisions of the Act.

Under the provisions of the Right to Information Act, no civil or criminal liability shall be imposed on an information officer or any public authority, for any disclosure of information which is done in good faith by such information officers[18].

However, the Commission has the power to take legal actions against a person who commits an offence under the Act, before a Magistrates Court[19]. If found guilty in such a prosecution, the offender may be subject to a fine not exceeding

[18] Right to Information Act No.12 of 2016, s 30

[19] Right to Information Act No.12 of 2016, s 39

Rs. 50,000/= or an imprisonment up to two years or both. In addition, there is a possibility for the appropriate disciplinary authority to take disciplinary actions against the offender. Accordingly, the Act includes provisions that contains the capacity to take steps against those who avoid implementation of the provisions of the Act. The possibility of reaching expected results of this Act could be increased by properly enforcing the said provisions when necessary.

4 Summary

The right to search for and receive information beyond borders and impartially as guaranteed by the Universal Declaration of Human Rights (1948) and Article 19 of the International Covenant on Civil and Political Rights (1966) of the United Nations has been legally enforced locally by Parliamentary legislations of 19 countries in Asia presently. India, Pakistan, Bangladesh and Nepal are among these countries; the Indian Right to Information Act which was introduced in 2005 is being actively utilized. Following this trend, Sri Lanka has also established a wide legal framework for receiving information by the Right to Information Act No. 12 of 2016. The Right to Information Commission was also established under the said Act in order to supervise and to enforce disclosure of information.

Every citizen has a responsibility in achieving the expected results from this Act by proper implementation of the said legal framework, and it is the responsibility of the State to engage in carrying out necessary awareness programmes required for making an attitude change in society to realise this responsibility, and to provide required infrastructure.

In brief, there would be a mammoth impact on inefficiency, bureaucracy and arbitrary political activities in public sector, by legal enforcement of the right to information and that would eventually provide a great support for establishment of democracy, media freedom and economic development and to achieve sustainable development.

CRY PARENTS CRY!

Nanda Senanayake
Attorney-at-Law

Cry Parents Cry: since there is nobody to protect your teenage girls-neither the law enforcement authorities nor the National Childcare Protection Authority; definitely not the human rights enthusiasts... not even the Law itself!

So, cry parents cry,
Make them sigh,
They're old enough and wise,
to know better.

Illustration 1

'A', an eleventh grader from a well affluent family who attends a well-known girls' school in Colombo falls in love with a muscular six-footer 'B'. She's deeply in love with him and he cajoles her to elope with him. The girl-a *virgo intacta* [a virgin]-goes with family heirlooms, enjoys a few days of romantic euphoria with 'B' at his place. 'B' sells all the jewellery 'A' has brought with her within a couple of days. Next 'A' observes peculiarity of behavior in 'B' who sniffs stuff and confronts him. To her trepidation she finds out that her knight in shining armor is an ex con, a habitual drug addict and, last but not least, a married man with three small children of his own! 'A' goes back to her parents who rush to the nearest police station to unfold the story. The officer, not with the least botheration of even lifting the pen, asks, 'how old is she'?' and when the weeping mother divulges the daughter is only sixteen years and one month, the officer throws the next question: 'is she of unsound mind?' and when the Father cries 'No' the officer replay the wordings, 'sorry, ma'am, we can't do anything? But when the Father shouts that the daughter has been raped and the family heirlooms have been stolen by her lover, the officer responds: 'if you start shouting, I'll put you in the cell and charge you for intimidation and obstruction!'

When the O.I.C. steps out of her room the grieving parents pour their grievance: 'our darling little girl is only sixteen and she's been raped; why can't you bring the scoundrel to justice?' repeats 'A's aunt to the looming physique of the O.I.C.

'Because' blurts the woman Chief Inspector in charge of the Women and Childcare Section of the police station. 'Your darling little girl is over sixteen years of age; she's not a child, and our law

supposes that sex between consenting adults is not an offence unless she's of unsound mind or was in a state of intoxication.'

A law student, who had come to collect his driving license after payment of fine for a minor offence, happened to be an interesting spectator of this commotion and ventures to assist the gathering by throwing some questions to the police.

Q: She's sixteen years of age and you consider her as an adult?

A: Not me, the Law.

Q: She cannot even vote lout you consider her as an adult?

A: Not me, the Law.

Q: But the Age of Majority Act, Maintenance Act, Penal Code, International Convention on Civil and Political Rights act, and even the United Nations Convention on the Rights of a Child says child means a person under the age of eighteen years?

A: Yes, yes, yes. But I can't do anything because the law supposes so.

The Father quotes, 'if the law supposes so, the law is an ass-an idiot.'

Illustration 2

'A's best friend and classmate 'C' following her friend's footsteps precisely, elopes with 'D', double her age at *hora somni* [at bedtime]. Parents of 'C' without seeking the assistance of the police finds 'C' at a hotel with 'D' and bring her to the police and make a complaint. 'A's father after hearing the story comes to the police station and informs 'C's parents that it is useless to make a complaint as the act of 'D' does not constitute an offence. 'Yes,' says the O.I.C. The grandmother of 'C', a dignified old lady aged 75, says: 'aiyo, the manager and the staff of the hotel also had seen them kissing and misbehaving'

'What, are you sure?' asked the O.I.C.

'Yes, they told me so,' replied the grandmother.

'Don't worry,' O.I.C. continues, 'we'll prosecute the hotel staff'

'What do you mean, a man who rapes a mere kid cannot be brought to book but any person who had seen the rape can be prosecuted!' Words pour out of the mouth of the Mother.

'Don't even mention the word rape because the girl was over sixteen and she has consented to the intercourse. But we can definitely put the entire staff in the cell because the law supposes any person knowingly permits any child to remain in any premises for the purpose of causing such child to participate in any term of sexual activity commits an offence and the child means a person under eighteen years of age!'

'lf the law supposes so, the law is an ass-an idiot,' shouts the decent grandmother.

Illustration 3

'X', an *et pupillio* [student] aged sixteen years five months and two days is taken away by 'Y', a sweet boy aged eighteen plus, from the paternal grandmother who is in *loco parentis* [in place of a parent] of 'X'. Even though 'Y' is a *persona non grata* [person not appreciated] at 'X's home, grandmother as secretly thinking of getting 'X' married to 'Y' when 'X' was of age. On their honeymoon 'X' conceives. 'X' and 'Y' visit the grandmother and are forgiven immediately. The happy couple with the grandmother goes to the registrar of marriages to get married. 'Nope' says the registrar. 'Why? I have been looking after my granddaughter since the age of five days after her parents died of a tragic car accident. I am the guardian and I will give consent to the marriage,' persisted the good old grandmother.

'Very sorry, the law supposes that to be a valid marriage both parties to the marriage have to complete eighteen years of age. Even if the parents were alive and gives consent I am still unable to register the marriage!' explains the good natured registrar.

'If the law supposes so,' laments the grandmother, 'the law is an ass-an idiot,'

Illustration 4

Two days after celebrating her sixteenth birthday 'E' goes missing. Frantic parents go and make a complaint. Messages are sent to police stations all over the Island; mortuaries are searched of to no avail... no news of 'E'. After three days little brother of 'E' starts singing that his sister had an affair with an *aiya* of his school and gives details. While the heat accumulates on *aiya*, he comes to the police station accompanied by a lawyer and 'E'. Girl wants to go with the boy as she has been deflowered by the boy. The girl's parents plead with the police to have the girl examined by the J.M.O. and put the boy behind bars. 'What for? We can't sue him. Girl's sixteen years and she's gone with the boy with her consent and had sex,' comments the O.I.C. Little brother of 'E' murmurs something in the ear of his mother. 'What's it'?' asks the O.I.C.

'She's on the Facebook wearing a bikini in a compromising manner with the boy,' says little brother showing the same.

'Now we do have a case,' grunts the officer. 'Whose Facebook account is this?'

'That *aiya*'s friend 'F's,' comes the ready answer.

'Don't worry, we'll get that *aiya*'s friend before Court and remand him pending further investigations,' boasts the O.I.C. in a commanding manner.

‘What’d you mean? The boy who rapes my daughter cannot even be arrested but his friend who has a photograph of her in his Facebook can be remanded?’ Father of ‘E’ bemoans.

‘Yes, the law supposes so,’ answers the officer.

‘If the law supposes so, the law is an ass-an idiot,’ acknowledges the Father.

Illustration 5

The O.I.C. is in a pensive mood. He had been blasted early morning by his superior officer for arresting a politico’s henchman ‘H’. Hitherto he has managed to secure his position without any trouble. Now all this! Politico has promised his senior officer that a Fundamental Rights case is at his doorstep. This beautiful girl ‘G’ had come and complained that her husband ‘H’ was having a homosexual affair with ‘l’. She had shown him video recording, photographs and brought an eyewitness. Everything was in shipshape and apple-pie order for a juicy Court case. Nothing was wrong. His IB’s were in order. The video and photographs together with the high-tech apple phone had been properly sealed as productions. Old sergeant has prepared the B-Report in a spellbinding manner. Nothing wrong there either. He may be transferred; he didn’t mind that. It is an occupational hazard. But this Fundamental Rights case threat bothered him. Has he done something illegal by arresting ‘H’ with this overwhelming evidence? There was talk the new Constitutional amendments were going to legalize homosexuality. There were protests over it. Then it has to be illegal. He calls the sergeant and asks him to bring the Penal Code with all its amendments. Asks the duty officer not to bother him and starts reading the damned Penal Code. After one hour and reading all the amendments for the umpteenth time he attains enlightenment about Act No. 22 of l995. ‘Upon all the three hundred and thirty million deities’ shouts the O.I.C., ‘homosexual activities are not illegal; release ‘H’ immediately! ’ And starts Writing furiously in the IB.

Old sergeant couldn’t believe his ears: ‘what’s this sir?’ asks the sergeant.

‘Homosexual activities are legal?’ answers back the O.I.C.

‘lf homosexuality is legal then the law is an ass-an idiot,’ comes the reply from the sergeant.

‘Never mind that, release ‘H’. I have to safeguard my arse!’ Tells the O.I.C. to the sergeant reminding him that with different spelling but same pronunciation of the so far repeated word indicates a different meaning in English.

'It was all Mrs. Bumble. She could do it' urged Mr. Bumble; first looking around to ascertain that his partner had left the room.

'That is no excuse,' returned Mr. Brownlaw, 'you were present on the occasion of the destruction of these trinkets, and indeed are, more guilty of the two in the eye of the law; for the law supposes that your wife acts under your direction?

'lf the law supposes that' said Mr. Bumble squeezing his hat emphatically on both hands, 'the law is a ass - a idiot. If that's the eye of the law, the law is a bachelor, and, worst, I wish the law is that his eye may be opened by experience - by experience.

Oliver Twist/Charles Dickens

The above quote was from the *Oliver Twist* by Charles Dickens based on, one could say, the English Common Law where husband and wife were considered as one person in law and husband was responsible for wife's misdeeds. The husband being responsible for wife's follies were laughable and the law at that time, Dickens considered, as an ass - an idiot, which led to the above criticism.

One look at the above illustrations and the laws applicable to them will enlighten us that those laws are laughable and the same criticism is applicable to them i.e. 'the law is an ass-an idiot'.

Are we a nation of sex maniacs or does our entire population consists of perverts? Some of the amendments and additional offences brought into the Penal Code and other enactments during the 1995 circa have caused more confusion than bringing the offenders to the Book. True, the sweeping changes were intended to stop child marriages and strict laws to punish the sex offenders were considered as *Ex necessitate* [of necessity] by the framers of the law, but the explanations given below for the above illustrations would surmise that eye has to be opened and amendments be brought to eradicate the conflicts, lacunas and dissimilarities attached apropos laws.

Explanations to Illustration 1

Why can't the police prosecute 'B' after he had committed such a horrendous act? Law in relation to kidnapping is mentioned in section 352 of the Penal Lode. It states: *'whoever takes any minor under sixteen years of age if a female out of the keeping of the lawful guardian of such minor without the consent of such guardian is said to kidnap such minor from lawful guardianship?'*

Definition for statutory rape (as commonly used) is: *'a man is said to commit "rape" who has sexual intercourse with a woman with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man'* (s. 363 [e] Penal Code)

Since 'A' is over sixteen years of age 'B' cannot be prosecuted for kidnapping or for rape.

But, why did the O.I.C. ask whether 'A' was mad?

Well, our laws prohibit women of *non compos mentis* [not sane] getting themselves involved in any kind of sexual activities. If she is to have sex she has to cure herself. Poor creatures they cannot even enjoy a mere act of kissing. Strictly speaking there is no such prohibition, but any man who gets himself involved in sexual intercourse with a woman of unsound mind will face a jail term of seven to twenty years. (s. 363[c]/364 Penal Code)

Any person who, for sexual gratification does any act by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the human body of any other person being an act which does not amount to rape... with the consent of the other person where such consent has been obtained at a time the other person was of unsound mind commits the offence of grave sexual abuse and the punishment is the same as of rape. (s. 365B Penal Code)

So the next time if you intend to participate in any form of sexual intimacy with a woman other than your own wife please see that you take her to a psychiatrist and get a certification that she is sane. On the other hand if she consents for such examination by a psychiatrist then definitely she is insane.

Explanation to Illustration 2

When the girl is sixteen years of age, our laws stipulate that if she goes with a man with consent and has sexual intercourse or any other sexual intimacy the man cannot be prosecuted. But, Section 286C and 360B imposes a duty on the onlookers and people who stand and wait and watch knowing that the premises they have a control over is being used for the commission of an act constituting child abuse.

Speaking of 'abuse of a child', a child means a person under' eighteen years of age. 'Abuse' is not interpreted. Dictionary meaning of abuse is: 'use (something) to bad effect or bad purpose." If we take the literal meaning, Child Abuse can be in sexual form, abusing a child in filth also could be Child Abuse, partaking alcohol by a child may amount to alcohol abuse, eating too much food could constitute bulimia and can be interpreted as abusing of food by a child and so on and on and could go on forever. Interesting factor attached to Section 286C is the absence of the word 'sexual' in the same. While none of the above actions are offences by itself a duty is

cast on any person who has charge, care, control or possession of any premises being used for the commission of an act constituting child abuse to inform the O.I.C. of the nearest police station; if not he will face a jail term of up to two years.

It is also noteworthy to mention that the information must be to the nearest police station. So if a person from Anuradhapura informs about a child abuse to the National Child Protection Authority in Colombo still he commits an offence.

Section 360B is deeper in depth but partly similar to 286C.

Whoever knowingly permits any child to remain in any premises for the purpose of causing such child to be sexually abused or to participate in any form of sexual activity... commits an offence of sexual exploitation of children. (s.36OB [1][a] Penal Code)

In the above section, word 'sexually' has been used. Also if any form of sexual activity of a child takes place, the person who allows such child to remain in the premises commits an offence. The meaning of 'child' is same as in Section 286C. This is funny, very, very funny! Any person who participates in any form of sexual activity with a person over sixteen years of age with consent is not an offence but any person who permits a person below the age of eighteen years to remain in any premises to participate in any form of sexual activity commits an offence. Main act is not an offence but an onlooker who has some sort of control over premises can be prosecuted. So, the grandmother of 'C' calling law as an ass and idiot is quite justifiable!

Explanation to Illustration 3

Omnia vincit amour-love conquers all: 'X's love has conquered all. All except the Sri Lankan Law!

Amor et melle et fella est-love is rich with both honey and venom: 'X's love to 'Y' and vise versa is rich with honey. Venom in the form of Law has ruined their lives. Child yet to be born will be *fillius nullius* (illegitimate child). Law does not allow pregnant 'X' to get married to 'Y' even if the guardian (or even if her parents were living, with their consent) gives consent for 'X' to get married.

An assorted number of laws were enacted 1995 circa to protect minors. The amendments to end child marriages among the majority of the population were brought in overnight. (Muslim Marriage and Divorce Act was not amended to end child marriages!) In the era of everything being instant, why not the laws? Amendments to the Marriages (General) Ordinance to end child marriages had a devastating effect on girls aged between the ages of sixteen and eighteen. Statutory rape was upgraded from age twelve to sixteen years. Marriageable age was considered as eighteen years after the Act No. 18 of 1995 came into force. In spite of it being amended by Act No. 12 of 1997 section 22 of the Marriages (General) Ordinance which could give consent to marriages of underage persons by Father, Mother or guardian had little or no effect as a result of very strong wordings in section 15. Section 352 of the Penal Code was never amended to

uplift the kidnapping age. Interpretation of Section l5 and section 22 in *Gunaratnam v Registrar-General* ([2002]2 SLR 302) sealed the fate of teenagers aged between sixteen and eighteen. *Gunaratnam v AG* is very clear about the strong wordings in section 15 of the Marriages (General) Ordinance. It is also interesting to note that the words 'legislature' nor 'lawmakers' is used in the same but the words `framers of the law' is used. Framer is a person who shapes or creates a concept plan or a system. (Dictionary meaning) So, the person who created Section 15 had no intention whatsoever to allow marriages between persons if either or both were under eighteen years of age.

Ultimate result is that a girl above sixteen but below eighteen can get herself involved in any form of sexual activity but she is unable to get married. *O tempora 0 mores*! (Oh the times oh the morals!)

Well what can you call the period between the age of sixteen and eighteen of girls? Grace period for men! Heydays for pedophiles. Dr. Colvin R. De Silva once in the Parliament said 'the words 'murder by statute' when some parliamentarians tried to introduce death penalty retrospectively, what can you call the scenario of 'X'? Rape by statute? Grave sexual abuse by statute?'

Whatever it is, there seems to be some kind of dark, strange and peculiar symbiosis between lawmakers and pedophiles. Whether the symbiosis is mutualistic, commensalism or parasitic or all in one is everybody's guess!

So 'X"s grandmother calling the law as an ass an idiot is excusable.

Explanation to Illustration 4

Section 286A of the Penal Code enumerates the instances of obscene publication, exhibition etc elating to children. 286A(4) states that child means a person under eighteen years of age.

A careful perusal of section 286A as a whole and in separation reveals that even though having sexual intercourse or any other form of sexual activity with a girl over sixteen years of age is not an offence; posting an indecent photograph of the girl mentioned on the Facebook will allow the law enforcement authorities to prosecute the contributor to such webpage. Whilst the actual act of intercourse is not an offence a mere picture posing in a bikini on the Facebook will mean hell of a lot of trouble for the contributor to such webpage! Pardoning of 'E's father for calling the law as an ass an idiot is not enough; he should be medalled!

Explanation to Illustration 5

Why did the O.I.C. release 'H'?

Section 365B of the Penal Code permits any person to use his genitals or any other part of the body or any instrument on any orifice or part of the body of any other person for sexual gratification, Provided the acts do not fall under subsections (a), (aa), (b) or (c). Subsections (a), (aa), (b) and (ci) speak of without consent of the other person, with or without consent when that person is under sixteen years of age, when the consent has been (*actus me invitofactus non est meus actus* = an act done by me against my will is not my act) obtained through intimidation etc. of the other person or the consent acquired while the other person was mad or in a state of intoxication. It is implied that use of orifice or any other part of the body with consent for sexual gratification is allowed between persons and it is also implied that those acts does not constitute as indecent acts. Hip hip hurray! Three hearty cheers for the Legislature of yesteryear! At last homosexual and other forms of lesbian activities are legalized after 315' of October, 1995!

Section 365A of the Penal Code might relate to homosexual and lesbian activities. But after a careful reading of 365A, 365B and 363 will enlighten us thus; 365A of the Penal Code teaches us about acts of gross indecency between persons whilst an offence of rape can be committed only by a ‘man’, an act of grave sexual abuse and gross indecency could be done either by a man, woman or a transsexual because both sections 365A and 365B speak of a ‘person'!

That leaves us with activities of transsexuals, shemales and lady boys. But they are also persons by all means. If that is so activities of them in sexual forms cannot be considered as wrongdoings, since gross indecent act is not interpreted anywhere and it is your guess as good as mine as to its proper meaning!

Once the Law was sitting on the bench
And Mercy knelt a-weeping
“Clear out!” he cried “disordered wench!
Nor come before me creeping
Upon your knees if you appear,
'T is plain you have no standing here”
' Then Justice came. His honour cried:
“Your status?.... devil seize you!”
“Arnica curiae” she replied...
“Friend of court so please you”
“Begone” he shouted... there’s the door...
I never saw your face before!”

With one sweeping flow of his pen Ambrose Bierce explained what law and justice are. Mercy has no place in Law; neither friends nor favourites will be tolerated. But the eye of the law has to be opened by experience. Sweeping changes and amendments are necessary to eradicate the ridiculous nature of laws. Some of Sri Lankan laws as enumerated above are a shame to the maxims of *Actus legis nemini est damnosus* and *Actus legis nemini facit injuriam* which in turn means respectively 'the Act of the law is hurtful to no one' and 'an Act of the law does injury to no one'. People in whose sovereignty governments are based are tolerant, but they will not be tolerant forever!

So, cry parent cry,
Make them sigh (O will they?),
They're old enough and wise,
to know better (O are they?).
Dum tacent clamant: though they are silent they cry loud!

FAIR USE MIGHT BE UNFAIR

Pamoda Jayasekera

Magistrate of Nuwaraeliya

Introduction

Fair use is a legal doctrine that promotes freedom of expression by permitting the unauthorised use of copyright protected materials in certain circumstances**.** Fair use has a special place in copyright law. Otherwise stated fair use may be considered a defense, but not a right. Fair use is the most frequently used of exception for copyrighted work. This article intends to examine the scope of fair use and further **to explain how four factors balancing test is evaluated in a question of fair use.**

Section 11 [1] of the Intellectual Property Act No 36 of 2003 (IP Act)[1] provides in respect of fair use as;

> *Notwithstanding the provisions of sub-section (1) of Section 9 the fair use of a work, including such use by reproduction in copies or by any other means specified by that section for purposes such as criticism comment news reporting teaching (including multiple copies for classroom use) Scholarship or research shall not be an infringement of Copyright.*

It is important to note that Section 11 of IP Act is identical and a verbatim recreation of section 107 of the **United States Copyright Act of 1976**[2]: however, neither the Sri Lankan IP Act nor the US Copyright Act defines the term "fair use".

Black's Law Dictionary defines word fair use as;

> *'A reasonable and limited use of a copyrighted work without the author's permission, such as quoting from a book in a book review or using parts of it in a parody. Fair use is a defence to an infringement claim, depending on the following statutory factors 1. The purpose and character of the use 2. The nature of the copyright work 3. The amount of the work used and 4. The economic impact of the use'*

[1]Intellectual Property Act No 36 of 2003(as amended)
[2]United States Copyright Act of 1976

The English Law [3] and Indian Law [4] use the term "fair dealing" instead of fair use. In the English case of *Hubbard and Another V Vosper and Another* [5], Lord Denning defines the doctrine of fair dealing[6] as follows,

> *"It is impossible to define what is 'Fair dealing' it must be a question of degree. You must consider first the number and extent of the quotation and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author for a rival purpose that may be unfair. Next, you must consider the proportion to take long extracts and attach short comments may be unfair, but short extracts and attach short comments may be fair. Other considerations may come to mind also. But after all, is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of Copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing."*

Based on the above, it can be determined that there is no exact statutory definition to fair use, and it will always be a matter of fact, degree and impression varying from case to case. In many countries the legislative arm relinquished the right to courts in deciding what fair use is.

History and development of fair use

Under the Licensing of the Press Act of 1662 (Licensing Act), the Royal Company of Stationers had the monopoly of publishing books. In addition to this absolute authority, they had the right to seize and burn books published by any other publisher. When the Licensing Ac lapsed for the final time in 1964, the Royal Company of Stationers continued to publish books based on perpetual copyrights[7]. In this era there was no practice of fair use what so ever. In 1710 British parliament enacted the Statute of Anne [8] (Copyright Act of 1710) which justified certain types of fair use in copyrighted work[9].

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[3]Copyright, Design and Patent Act 1988(as amended)
[4]The Copyright Act 1957 (as amended)
[5][1972] 2 QB, [1972] 1 ALL ER 1023
[6]Section 6 (2) of the Copyright Act 1956
[7] Copyright without a finite term
[8]The Statute of Anne granted publishers of books legal protection for 14 years with the commencement of the statute
[9]Section IX & XI of Statute of Anne.

Contemporaneously the US enacted the Copyright Act of 1776 the provision of which envisage rights to reproduce, adapt, publicly distribute, and publicly perform and publicly display the copyrighted work.[10]

With this background, the origin of the fair use doctrine made its first appearance in the United States in the case of *Folsom V Mash* [11], by way of an opinion written by Justice Story while sitting as a circuit judge. Justice Story laid down the rule for fair use which was adopted by the US Congress[12].

England recognised the doctrine of fair dealing (as an alternative to fair use) in the Imperial Copyright Act of 1911. British Colonies such as Australia, New Zealand, and South Africa, soon adopted the provisions of the English Imperial Copyright Act. Subsequently, this Act was repealed in the UK by the **Copyright Act of 1956** which was in force until 1988 and was replaced by the **Copyright, Designs, and Patent Act of 1988**[13].

Copyright Ordinance No 02 of 1908 was the first Sri Lankan legislation pertaining to copyright law that made a reference to fair dealing[14]. Later-on the British introduced their Copyright Act of 1911 to Ceylon which then came in to force as an Ordinance to amend the law relating to copyright. However, the Copyright Act of 1956 was not introduced to Sri Lanka (Ceylon at that time) because Ceylon became an independent nation in 1948. The British concept of fair dealing was embedded in the Sri Lankan legal system until it was replaced in 1979. The concept of fair use was first introduced to Sri Lanka by Act No 52 of 1979 Code of Intellectual Property [15] (IP Act of 1979) and the same is reflected in the existing **Intellectual Property Act No. 36 of 2003** (IP Act of 2003) as well. The relevant sections for fair use in the IP Act of 1979 as well as the prevailing IP Act of 2003 are almost identical to the US Copyright Act.

Four Factors Balancing Test of Fair Use

As the Section 11 (1) of the Sri Lankan IP Act provides the provision for fair use, which allows criticism, comments, news reporting, teachings (which includes the use of multiple copies for classroom/academic purposes) scholarships or research. Though this is intended to be descriptive it is not prescriptive in nature. Moreover, Section 12 of the Sri Lankan IP Act sets out a list of conducts which are permitted within the ambit of fair use. The intention of the above-

[10]17 USC § 106 (1988)
[11]9F.Cas 342 US Circuit Court judge for the District of Massachusetts (1841)
[12]The United States Congress is the bicameral legislature of the federal government of the United States
[13]Section 29 & 30
[14]Section 23 of Copyright Ordinance no 02 of 1908.
[15]Section 13 of Code of Intellectual Property Act No 52 of 1979

mentioned legislation is not to narrow it down for purposes of Section 11 (1); where section 11 (3) clearly extends the applicability of fair use doctrine to act of fair use in section 12. This situation is very similar to that of Sections 108 and 109 of the US Copyrights Act.

Fair use is a flexible copyright exception, based on the idea that the "use" compromise of an act that has to be fair to escape being an infringement. Defenses for fair use are most likely to succeed in areas such as education, criticism, literature, parody and news reporting. When applying the fair use doctorine, courts balance several factors in reaching their decision; which is often called a "Balancing Test". It was challenging to specify at which point does fair use cease and where does infringement starts. In many jurisdictions four aspects are considered when determining fair use.

Purpose of use - most common test for look why the wrongdoer used copyrighted work. Whether such use is of a commercial nature or is for non-profit educational or charity purpose.

Nature of copyright work - some works are better protected than others. For example facts, and data in a physics book are not protected by copyrights, whereas creative expressions of the movie Harry Porter is well protected.

The proportion that has been used - The amount and substantiality of the portion used in relation to copyrighted work. The amount and substantiality can have not only a meaning of qualitative value but also a meaning of quantitative value.

Economic impact - The effect of the use upon the potential market for or value of the copyrighted work.

These four factors are used as a balancing test. It is a test that is very attentive to the specific circumstances of the particular use. However, one factor being S positive or negative would not decide whether or not it is fair use. A court determining will always walk through all four factors and decide whether the inculcation of facts is fair use or not.

Since provisions for fair use in Sri Lankan IP Act has considerable similarities with the US Copyrights Act, the below-mentioned US judgment would provide better understanding of the said four factors.

Sony Corporation V Universal City Studios [16] (Betamax case) is a classic example of applying the fair use doctrine. Sony was being sued by Universal pictures for creating the Video Cassette Recorder (VCR). Universal studios argued that recording of something in a TV show is a violation of their copyrights because the universal studios did not permit to copy their TV shows which were protected under copyright law. In this landmark case, Universal Studios argued the point

[16]Sony Corp. of America V Universal City Studios, Ins 464 United State Reports 417 (1984)

that by creating the VCR device, Sony cooperation was vicariously liable for copyright infringement in allowing the general public to record TV shows.

Court went through each factor of the balancing test and decided the matter in favour of Sony Corporation. In considering the first factor, Purpose of use, Court held that with the argument educed by the Sony Corporation that there is no strict copyright infringement as the device was used only to shift the time of the program. Viewers who were unable to watch the original program may record and watch it later; and this is merely shifting time. The economic impact factor too favoured Sony. The Court held if the device was used to make copies for a commercial or profit-making purpose, such use would presumptuously be unfair. However, the Court's findings established that time-shifting for private home use must be characterized as a non-commercial or a non-profitable activity."

Other two factors were weighed against Sony Corporation. Nature of the works such as movies and fictions well protected in copyright law, are well within the subject matter of this case. The proportion of the usage is either 100% or the entire TV show.

Despite Two out of four factors being against Sony, US Supreme Court ruled that the making of individual copies of complete television shows for purposes of time-shifting does not constitute copyright infringement; and it qualified as fair use. This decision was a boom to the home video market as it created a legal, safe haven for the technology, which also significantly benefited the entertainment industry through the sale of per-recorded movies.

Cambell v Acuff rose Music [17] is another significant case where in addition to the four factors of fair use, the US Supreme Court considered a new legal concept known as 'Transformative fair use', a theory derived from a law article written by Judge Pierre N Laval in 1990. 'Oh Pretty Women' is a classic song by Roy Orbison's and whereas the Parody version of the same done by the rap group named '2 live crew' was found to be of fair use even though it uses a significant amount of the context of the original song and evidently used for commercial use.

In the said case, in justifying the purpose of use, the court found that the Parody version is clearly of transformative value despite its commercial nature linked to the illustrative purpose of criticism. When considering Nature of the work, Court asserted that the creative nature of the original song does assign it more protection, but that is not as important in the fair use analysis as 2 live crew's work is a parody. Court declared that the amount and substantiality of the permissible use of the original work depends upon the extent to which the overriding purpose and character of the new work is to parody than the original, rather than serve as a market substitute for the original; as such 2 live crew's copying of the original was not deemed excessive to its purpose. Weighing in on the Economic impact factor, Court was very comfortable that

[17] Campbell v. Acuff-Rose Music, Inc. 510 United State Reports 569 (1994)

parodies are not substitutes for the original market and do not have an economic impact on the original version at all.

Bill Graham Archive V. Dorling Kindersley [18] is another transformative fair use case where Bill Graham Archives, owned the copyright to seven images of event posters and the ticket images of S Grateful Dead (a rock band), and Dorling Kindersley Ltd in collaboration with Grateful Dead Productions, sought to reprint the images in reduced-size in a book titled Grateful Dead: The Illustrated Trip which was intended as a cultural history of the band. Illustrated Trip contains over 2000 images representing dates in the history of Grateful Dead in chronological order along with a time-line and explanatory text.

The Court upheld that Dorling Kindersley's copying of the images was fair use and further went on to mentioned that his use of the concert posters and tickets as historical artifacts of Grateful Dead performances is transformative and different from the original expressive purpose of copyrighted images. The Court held that the images copied in their entirety did not weigh against fair use because the reduced size of the images was consistent with transformative purpose. Additionally, the Court found that the Dorling Kindersley's use did not harm the market for Bill Graham Archive's sale of the copyrighted artwork.

Prince V Cariou [19] was a recent case on photography. Richard Prince is a transformative artist whotakes other people's work and transforms them into new and different things. He had taken some photographs of Patrick Cariou who had spent time with Rastafarian and published a book Yes Rasta, a book of portraits and landscape photographs taken in Jamaica. Richard Prince altered and incorporated said photographs into a series of paintings and collages called 'Canal Zone' that was exhibited at a gallery as well as the gallery's exhibition catalogue. In this case, the US Appeal Court found that twenty-five out of the thirty works at issue constituted fair use because Prince's composition, presentation, scale, colour palette, and media are fundamentally different and new compared to the original photographs, as is the expressive nature of work. The Court also found no evidence that Prince's work usurped either the primary or derivative market for Cariou's photographs.

Although the four factor balancing test provides us with a roadmap for permissible use, a definitive determination can be made only by a Court depending on individual facts. However in the above mentioned judgments, Courts have recognized what does not constitute to be copyright infringement even though the copyrighted work are used for profit making purposes

[18]Bill Graham Archives v. Dorling Kindersley, Ltd. United States Court of Appeals for the Second Circuit 448 F.3d 605 (2006)

[19]Cariou v. Prince, United States Court of Appeals for the Second Circuit 714 F.3d 694 (2013)

(*Cambell v Acuff rose Music*) or where the entirety of the work has been used (*Betamax case*) or where the nature of the work has been highly creative (*Betamax case*).

Conclusion

Fair use is one of the most complicated areas of the copyright law, and the same has been referred to as 'the most troublesome in the whole law of copyright'[20]. In any fair use case, it is required to walk through all four factors and determine whether it is fair use or not. Finding an appropriate balance in copyright issues is not easy. But in one direction it is surely unfair to simply not compensate authors and publishers of copyrighted material that is used.

[20]Deller v Samuel Goldwyn United States Court of Appeals for the Second Circuit - 104 F.2d 661 (1939)

THE DEVELOPING TRENDS IN COMMERCIAL ARBITRATION:

-DUTIES & RIGHTS OF ARBITRATORS AND PARTIES-

Keerthi Kumburuhena

L.L.M in International Commercial Law (Aberdeen)
Magistrate and Additional District Judge - Bandarawela

a. Introduction

A remarkable relationship exists between the arbitration tribunal and its stakeholders in international commercial arbitration compared with other dispute resolution mechanisms. Throughout the past, various principles have been introduced to strike a balance between the jurisdiction of the tribunal and the rights and duties of the parties and arbitrators. The relationship between the arbitrators and the parties is a 'contractual' one and a one of 'status'.[1]

b. Sources of Jurisdiction

There are a number of methods through which an arbitral tribunal could receive its jurisdiction. Two of them are significant. Firstly, the jurisdiction could be stemmed from the arbitration agreement itself as a condition precedent to litigation.[2] Secondly, the source of jurisdiction could be either domestic laws or institutional rules. For instance, in certain jurisdictions despite the non-existence of an arbitration agreement between the parties to the dispute, Court has discretion to direct them to arbitration. Hence, absence of an arbitration agreement is no bar to prevent a tribunal to receive its jurisdiction. In order to grant powers to an arbitrator, the agreement to arbitrate does not necessarily be in writing.

According to **United Nations Commission on International Trade Law** (UNCITRAL) Model Law on International Commercial Arbitration, if the parties have already negotiated the terms of arbitration in any recorded manner, it is sufficient for the tribunal to start executing the rights granted to it by the parties.[3] In other words, even if the underlying contract never exists, parties have a right to seek arbitration while arbitrators have a right to hear the matter. For instance, during contractual negotiations if the parties have discussed arbitration terms and if they were recorded in any manner, the arbitration agreement could survive.[4] This method has

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[1]Michael J. Mustill and Stewart C. Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) 220.

[2]*Scott v. Avery* (1856) 5 H.L. Cas. 811.

[3]UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) (UNCITRAL Model Law), Option I, art 7 (3).

[4]ibid, art 7 (3).

strengthened the right to arbitrate and application of the doctrine of separability, even where the underlying contract never exists.

If the arbitration tribunal receives its jurisdiction from an arbitration agreement then two conditions are to be satisfied. Firstly, parties should have had agreed to submit their dispute to arbitration rather than resorting to any other dispute resolution method, such as litigation, mediation or negotiation. Secondly, there should be a specific scope of matters which could be forwarded before the arbitration tribunal. The scope of matters to be arbitrated would be determined either subjectively or objectively. If parties themselves decide the scope of the arbitrability, then it is the 'subjective arbitrability' approach and whereas the 'objective arbitrability' means where the scope of arbitrability is determined by the law of the 'Seat' of arbitration.

Although parties could provide jurisdiction to the arbitration tribunal to decide certain matters through subjective arbitrability, these powers are always subject to the objective arbitrability. In other words, the law of the Seat could intervene in determining the jurisdiction of the arbitral tribunal. For instance, in some jurisdictions, insolvency or bankruptcy disputes could not be arbitrated. An argument could be advanced that the parties' discretion to determine the scope could be overridden by the law of the Seat. However, this argument becomes irrational, as consequently the law of the Seat, too, is decided by the parties. Therefore, parties could select the most suitable and convenient law as their Seat. Hence, it is clear that parties to dispute have an absolute discretion to determine jurisdiction of the arbitral tribunal in terms of arbitrability.

Furthermore, parties' legal capacity is significant in terms of the relationship with arbitrators. This has been described in various methods in different jurisdictions. For instance, according to **Section 103 (2) (a) of the Arbitration Act 1996 of UK**, legal incapacity would adversely affect a party who is attempting to enforce an arbitration award. In other words the recognition or the enforcement of the award may be refused, if the person against whom it is invoked proves that a party to the arbitration agreement by virtue of the law applicable to him, has no capacity.[5]

1. Contractual Relationship

[5]Arbitration Act 1996 of UK, s 103 (2) (a).

The nature of the relationship between the arbitrator and the parties concerned is a 'contractual' one[6] where an agency could exist. For instance, once the arbitrators are appointed, they could act as agents of the parties concerned. Arbitrators execute a contract based on function for specific parties in private.[7] Hence, both the role of arbitrators and that of the arbitration tribunal are to determine the dispute according to the rules selected by parties on the merits of the case.[8] Therefore, in terms of the contractual relationship, an arbitrator is not expected to play the role of a judge who metes out justice.[9]

The relationship between the parties and arbitrators commences by submitting the dispute for arbitration. However, there is an issue regarding the terms and conditions in such a contract, because there may be different methods of imposing duties upon their relationship. For instance, arbitration rules which parties have agreed upon might contain the duties which the arbitrator should perform. In addition, when appointing arbitrators, parties could also submit a Terms of Reference (TOR) which may also contain the duties and responsibilities of both arbitrators and the parties.

Moreover, there may be certain other expressed and implied conditions imposed upon the contract between arbitrators and parties by the operation of the domestic law.[10] Arbitrators are part of an arbitral set-up which could be an institution or an ad-hoc body. For instance, parties could select an institution such as the International Chamber of Commerce (ICC) as the tribunal to hear their disputes. In ad-hoc arbitration, parties could select a set of arbitrators according to their expertise in the related field or to their capability in resolving disputes.

2. Status-Based Relationship

The relationship between arbitrators and parties is a 'status', which is judicial in nature.[11] The meaning of the 'status' reflects that the arbitrator performs a role similar to that of a judge. Hence, under the concept of status, the arbitrator could have a considerable level of immunity which prevents him from being accused of his judgment or opinion. In other words, in certain jurisdictions, the arbitrator's liability could be limited regarding any procedural defects. For instance, **Arbitration Act No. 11 of 1995 of Sri Lanka** (the 1995 Act) mentions that an arbitrator shall not be liable for negligence in respect of anything done or omitted to be done by

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[6]Nigel Blackaby, Alan Redfern and Martin Hunter, *Law and practice of international commercial arbitration* (5th edn, Sweet & Maxwell 2009) para 5.47.

[7]Lord Neuberger, 'Arbitration and the rule of law' (2015) 81 (3) Arbitration 276, 277.

[8]Joshua D. H. Karton, 'The Arbitral Role in Contractual Interpretation' (2015) 6 (1) Journal of International Dispute Settlement 4, 40.

[9] ibid 40.

[10]Blackaby, Redfern and Hunter (n 6) para 5.48.

[11]ibid para 5.47.

him in the capacity of an arbitrator, but shall be liable for fraud in respect of anything done or omitted to be done in that capacity.[12]

In the United States, arbitrators have immunity from legal proceedings against their conduct as arbitrators. According to English Arbitration Law in the United Kingdom, arbitrators would be liable for their conduct as arbitrators, only if they have worked in 'bad faith'.[13] Therefore, countries such as the USA and the UK which have a Common Law system tend to maintain a higher level of immunity for the conduct of arbitrators, whereas countries which have Civil Law jurisdiction have provided no such immunity compared with Common Law jurisdictions.[14]

Further, it is worth considering the approaches followed by the international arbitration institutions regarding the relationship between parties and arbitrators. The Introductory Note of the International Bar Association (IBA) Rules of Ethics for International Arbitrators mentions that there should be immunity for international arbitrators from being sued under domestic law.[15] In addition, due to the considerable 'status' of arbitrators, there are a number of moral and ethical obligations imposed upon them. For instance, an arbitrator has a duty to decline an appointment offer, to if he is unable to provide sufficient time and attention to the case.[16]

3. Duties and Rights of Arbitrators and Parties

There are a number of duties and rights vested in arbitrators and parties, which could be derived either from parties' 'consensus' or from the '*lex arbitri'* or from arbitration rules[17] or ethics.[18] For instance, an arbitration institute such as ICC has defined their own set of duties which an arbitrator is obliged to follow in ICC arbitration proceedings. Since the '*lex arbitri'* stems from the 'Seat of Arbitration', it could impose duties connected to the validation of arbitration agreement, appointment and removal of arbitrators, natural justice rules, recourse against arbitration, recognition and enforcement of agreement and rendering of the award.

However, the 'consensus' of the parties is significant here, because even the law of the 'Arbitration Seat' is determined by the agreement of parties. It is well worth analysing the ever-present duties and the rights of stakeholders in international commercial arbitration and understand the firmness of their attachment.

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[12]Arbitration Act No. 11 of 1995 of Sri Lanka, s 45.
[13]Arbitration Act 1996 of UK, s 29 (1).
[14]Blackaby, Redfern and Hunter (n 6) para 5.53.
[15]International Bar Association (IBA) Rules of Ethics for International Arbitrators 1987, Introductory Note.
[16]K. Kanag-Isvaran and P.C. and S.S. Wijeratne (eds), *Arbitration Law in Sri Lanka*, (ICLP 2006) 56.
[17]Blackaby, Redfern and Hunter (n 6) para 5.46.
[18]ibid para 5.43.

a. Right to Appoint Arbitrators

Parties have a right to appoint arbitrators, and to determine the number of personnel needed for the hearing. They shall be free to agree on a procedure for appointing the arbitrators subject to the provisions of the **Arbitration Act No. 11 of 1995** of Sri Lanka.[19] In addition, parties have a right to appoint an arbitrator in case of a default of either. In the instance of a sole arbitrator if the parties are unable to agree on the person, then such arbitrator shall be appointed on the application by a party by the High Court.[20]

In an arbitration consisting three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed, shall appoint the third arbitrator. If a party fails to appoint the arbitrator within sixty days of receipt of a request to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within sixty days of their appointment, then the appointment shall be made upon the application by a party, by the High Court.[21]

If parties have opted to settle their dispute at an arbitration institution, they could then delegate the right to appoint arbitrators to that institution. For instance, if the parties have nominated ICC as the institution to settle their dispute, then the ICC has the right to appoint the arbitrators and consequently form the tribunal. However, in a 'ad-hoc arbitration', parties themselves could appoint the arbitrators to the tribunal. When appointing arbitrators, certain institutions permit the parties to select their arbitrator from a list. For instance, according to Organization for the Harmonization of Corporate Law in Africa (OHADA) Arbitration Rules, parties could select the arbitrator from such a list.[22]

Arbitration tribunal receives its jurisdiction once it is appointed and therefore, the appointment is a key right vested in parties. At the time of dispute, even if one party refuses to participate in the process of appointment of an arbitrator, the other party could continue the process and form the tribunal, provided that both parties have agreed to settle their dispute by way of arbitration. In order to avoid such issues, default procedures have been laid down in certain arbitration rules such as appointing an arbitral referee. In the case *of Honeywell International Middle East Ltd v. Meydan Group LLC,*[23] the Court held that it was possible for a tribunal to hear the matter in the absence of the participation of one party.

In Sri Lankan Arbitration Law, there is no provision as to who should or should not be an arbitrator. The parties may by agreement require that an arbitrator shall have particular

[19]Arbitration Act No. 11 of 1995 of Sri Lanka, s 7 (1).
[20]ibid s 7 (2) (a).
[21]ibid s 7 (2) (b).
[22]Organization for the Harmonization of business law in Africa (OHADA) Arbitration Rules 1999, art 3.2.
[23][2014] EWHC 1344 (TCC).

qualifications and expertise relevant to the nature of the dispute.[24] However, in certain jurisdictions the parties' right to appoint arbitrators is subject to their Domestic Law. For instance, in Scotland, a person should be 16 years old or above to be appointed as an arbitrator.[25] The jurisdictional relationship between a party and the tribunal does not commence merely by the appointment of arbitrators. In order to initiate such a relationship, the appointment must be properly informed to the other party. In other words, parties have a right to be informed of the appointment made by the other. Therefore, the right to appoint arbitrators is essentially followed by the duty to inform the other.

a) **Right to Revoke the Authority**

Parties could revoke the authority granted to an arbitrator if they come to understanding that he is not suitable or capable to hear the matter before him. Each party could challenge the appointment of any arbitrator, even one's own appointee with no exception. The rationale behind this right is the concept of equal treatment in the procedure. In the UNCITRAL Model Law, both parties have an equal right to present their case before the tribunal.[26] Thus, if the parties have reasons to believe that they would not have a fair hearing before the tribunal, they have a right to challenge the arbitrators.

Article 12 of the UNCITRAL Model Arbitration Law has introduced certain grounds such as lack of impartiality or independence[27] or lack of qualifications, agreed to by the parties,[28] which could be emphasized by the parties if they challenge the appointment of the arbitrators. According to the Arbitration Act No.11 of 1995 of Sri Lanka, parties have a right to make an application to Court for the removal of arbitrators. For instance, if an arbitrator unduly delays the discharging of the duties of his office, the High Court may, upon an application by a party, remove such arbitrator and appoint another in his place.[29] However, if the parties have so agreed, such removal and appointment shall be made by an arbitral institution.[30]

Further, the mandate of an arbitrator shall be terminated, if such arbitrator becomes unable to perform the functions of his office or for any other valid reason fails to act without undue delay or dies, or withdraws from office or if the parties agree on termination.[31] The other jurisdictions seem to have similar features in this regard. For instance, in the UK, the authority given to

[24]Kanag-Isvaran and Wijeratne (n 16) 38.
[25]Arbitration (Scotland) Act 2010, s 7, sch 1 part 1, r 4.
[26]UNCITRAL Model Law, art 18.
[27]ibid art 12 (1).
[28]ibid art 12 (2).
[29]Arbitration Act No. 11 of 1995 Sri Lanka, s 8 (2).
[30]ibid, s 8 (2), proviso.
[31]ibid s 8 (1).

arbitrators could be revoked by the parties,[32] and parties have a right to make an application to the Court to remove arbitrators if there are circumstances to doubt the impartiality of the arbitrators,[33] or if the arbitrator does not have the qualifications required by the arbitration agreement,[34] or if the arbitrator is physically incapable,[35] or if he refuses to conduct the proceedings in a reasonable manner.[36]

However, the circumstances mentioned in the said Section 24 of the British Arbitration Law,[37] do not include the term 'independence'. This indicates that, the English Law has not adopted certain requirements of UNCITRAL Model Law such as lack of independence of arbitrators as a ground to challenge their appointment. On the other hand, Sri Lankan Arbitration Law has adopted the lack of independence as a circumstance for removal of arbitrators. Therefore, there are distinct approaches followed by different jurisdictions.

b) **Duty to Determine the Method of the Proceedings**

Arbitration tribunal is duty bound to deal with any dispute in an impartial, practical and expeditious manner.[38] The tribunal has a duty to afford all the parties an opportunity of presenting their respective cases in writing or orally, and to examine all documents and other material furnished to it by the other parties or any other person.[39]

The International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) have conferred a wide authority and discretion upon the arbitration tribunal to determine the method to be adopted for the proceedings in terms of equality and fairness of the hearing.[40] Singapore International Arbitration Centre (SIAC) in its Arbitration Rules state that the arbitrators have a responsibility to consult the parties for the purpose of determining the most suitable method to conduct the arbitration proceedings in terms of a fair hearing.[41]

Considering the cost arising out of a long, time-consuming proceeding, both parties and as well as the arbitrators have a responsibility for each other to manage their case efficiently and in an expeditious manner. A significant responsibility is vested in the arbitrators to manage the cost

[32]Arbitration Act 1996 of UK, s 23.
[33]ibid s 24 (1) (a).
[34]ibid s 24 (1) (b).
[35]ibid s 24 (1) (c).
[36]ibid s 24 (1) (d).
[37]ibid s 24.
[38]Arbitration Act No. 11 of 1995 of Sri Lanka, s 15 (1).
[39]ibid s 15 (2).
[40]The International Centre for Dispute Resolution (ICDR), Arbitration Rules 2014, art 20 (1).
[41]The Singapore International Arbitration (SIAC) Centre Rules 2016, art 19.1.

and the length of the arbitration proceedings.[42] Hence, arbitrators are duty bound to conduct the arbitration proceedings in a most suitable method[43] to avoid time consuming delays. Therefore, they have the discretion to continue the proceedings of the arbitration in an appropriate manner.[44]

However, when deciding the method of arbitration procedure, they have to consider equality. For instance, a reasonable opportunity must be provided to both parties to present their case and to ascertain whether the process is fair and efficient.[45]

c) **Duty of Impartiality**

Once the arbitrators are appointed, they have a duty to act impartially during the arbitration proceedings. They have a responsibility to carry out their functions to a consistently high standard in terms of probity, efficiency, fairness, honesty and lawfulness.[46] If a person is requested to accept his appointment as an arbitrator, he shall first disclose circumstances, if any, which likely would give rise to justifiable doubts as to his impartiality or independence, and shall from the time of appointment and throughout the arbitral proceedings, disclose without delay any aforesaid circumstances to all the parties and also to the other arbitrators, unless they have already been so informed by the arbitrator.[47]

The appointment of an arbitrator could be challenged if any circumstances exist to give rise to justifiable doubts as to his impartiality or independence.[48] Hence, a party could challenge the appointment of arbitrators before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which would give rise to doubts concerning the arbitrator's impartiality or independence.[49] If the party challenging the appointment is dissatisfied with the order of the tribunal on such application, he may within a period of thirty days of receipt of the decision, make an appeal against that order to the High Court.[50]

In *Sierra Fishing Company & Others v. Farran & Others*, the Court had accepted the application for a removal of an arbitrator on the basis of reasonable doubts concerning his impartiality.[51] In *Sutcliffe v. Thackrah*, the Court held that the arbitrator has an implied duty to conduct the

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[42]David W. Rivkin and Samantha J. Rowe, 'The role of the tribunal in controlling arbitral costs' (2015) 81(2) Arbitration 116, 130.
[43]Blackaby, Redfern and Hunter, (n 6) para 5.49.
[44]UNCITRAL Arbitration Rules 2013, art 17 (1).
[45]ibid art 17 (1).
[46]Lord Neuberger, Keynote speech, (2015) 81 (4) Arbitration 427, 430.
[47]Arbitration Act No. 11 of 1995 of Sri Lanka, s 10 (1).
[48]ibid s 10 (2).
[49]ibid s 10 (3).
[50]ibid s 10 (4).
[51][2015] EWHC 140 (Comm).

arbitration proceedings impartially.[52] As held in *AMEC Civil Engineering Ltd v. Secretary of State for Transport*, impartiality becomes one of the key characteristics expected of the arbitrator.[53] The International Bar Association (IBA) guidelines on Conflicts of Interest in International Arbitration, mention that all arbitrators have a duty to act impartially and independently from the time of their appointment until the final award or the termination of the proceedings.[54]

According to **Arbitration (Scotland) Act 2010**, arbitrators have a duty to disclose if there is any conflict of interest relating to their status of impartiality or independence.[55] This approach is fairly different compared with English Arbitration Law which has no duty to disclose such interests.[56] There could be situations where arbitrators would have been bribed, and awards rendered in favour of that party. For instance, in Switzerland, if the arbitrators are unable to consider the important evidence attributing to an act of bribery, then such a reason could be taken as a ground to set aside an arbitration award.[57]

Furthermore, if an arbitrator believes that he has any matters related to such issues, then he must immediately disclose that to the parties. If a party wishes to challenge the appointment of an arbitrator, then notices must be sent duly, after it has been notified or after the circumstances were known. Once the parties were informed of such a situation, they have a responsibility not to cause any delay if they wish to challenge the appointment; as they would be prevented by the principle of '*estoppel*' or '*waiver*' if attempted to set aside the award at a later stage.

This is a vital point aimed at striking a balance between the rights of parties and arbitrators. In order to make arbitrators more responsible towards the parties, there are certain precautionary measures that have been adopted. For instance, according to ICC Arbitration Rules prior to the beginning of the arbitration process, the arbitrators have to sign a statement admitting their availability, impartiality and independence.[58]

d) **Duty to Behave in Good Faith**

[52][1974] AC 727.

[53][2005] EWCA Civ 291.

[54]International Bar Association (IBA) guidelines on Conflicts of Interest in International Arbitration, 2014 Part I (1).

[55]Arbitration (Scotland) Act 2010, s7, sch 1, r 8.

[56]Rom K.L. Chung, 'Conceptual framework of arbitrators' impartiality and independence', (2014) 80 (1) Arbitration 2.

[57]Antonio Musella and Ziva Filipic, 'International arbitration and alternative dispute resolution' (2015) 4 International Business Law Journal 381, 386.

[58]International Chamber of Commerce (ICC) Rules of Arbitration 2017, art 11 (2).

Once appointed, arbitrators have a duty to behave in good faith during the arbitration proceedings.[59] They are liable for fraud in respect of anything done in the capacity of arbitrator.[60] This indicates that in terms of the relationship between the arbitrators and the parties, the duty of '*bona fide'* (good faith) is significant.

e) Right to Receive Remuneration

Arbitrators have a right to receive remuneration for the services rendered by them: the parties have a duty to pay the agreed remuneration according to the decided payment method. In Arbitration Act No. 11 of 1995 of Sri Lanka, remuneration has been referred to as compensation. The parties shall be jointly and severally liable for the payment of reasonable compensation to the arbitrators constituting the arbitral tribunal for their work and disbursements.[61]
The final award shall order the payment of compensation to each of the arbitrators, with legal interest calculated, with effect from the date of expiration for a period of one month from the date on which the award was delivered.[62] The arbitral tribunal may order the payment of deposit of security by the parties for the payment of the compensation of arbitrators, in such sum and within such period as may be specified in the order.[63] If the arbitrators are not properly paid then they have a right to terminate the arbitral proceedings.[64]

4. Recent Developments

In the analysis of the duties and rights of arbitrators and the respective parties, **London Centenary Principles of Arbitration 2015** introduced by the Chartered Institute of Arbitrators could be considered as a sound set of guidelines. Accordingly, tribunals have to 'recognise and respect the choice of the parties.[65] In order to make this recognition, a tribunal needs to make sure that the proceedings are fair and just,[66] and limit Court intervention,[67] while striking a balance between confidentiality and transparency.[68]

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[59]The London Court of International Arbitration (LCIA) Arbitration Rules 2014, art 14.5.
[60]Arbitration Act No. 11 of 1995 of Sri Lanka, s 45.
[61]ibid s 29 (1).
[62]ibid s 29 (2).
[63]ibid s 29 (3).
[64]ibid s 29 (5).
[65]Chartered Institute of Arbitrators (CIArb) London Centenary Principles 2015, principle 1.
[66]ibid ,principle 1 (a)
[67]CIArb London Centenary Principles 2015, principle 1 (b).
[68]ibid , principle 1(c).

These Principles have defined the judicial nature of the tribunal. Hence, when exercising jurisdiction, a tribunal should respect the parties' choice by being 'independent', 'competent' and 'efficient' during the proceedings.[69] In other words, the arbitral tribunal has a significant responsibility to maintain its jurisdiction and to carefully balance the rights and duties of both arbitrators as well as the parties while resolving the dispute.

5. Conclusion

Arbitrators receive their jurisdiction either by agreement of parties as a condition precedent to litigation or by the application of domestic laws and institutional rules. A unique relationship exists between the arbitrators and the parties in a nature of a contract and that of status. Their duties and rights are mentioned either in the agreement to arbitrate or in arbitration law of the Seat or rules and ethics. The UNCITRAL Model Law, Rules of Arbitration and other international and national legislation have introduced various principles to strike a balance between the jurisdiction of the tribunal and the rights and duties of the parties and arbitrators. These laws, rules and principles could be effectively utilized to support and facilitate proceedings of international commercial arbitration more successfully.

[69]ibid principle 2.

WHAT WELCOMED A BRAND NEW LEGAL FRAMEWORK FOR ACTIVE LIABILITY MANAGEMENT?

A Edirisinghe

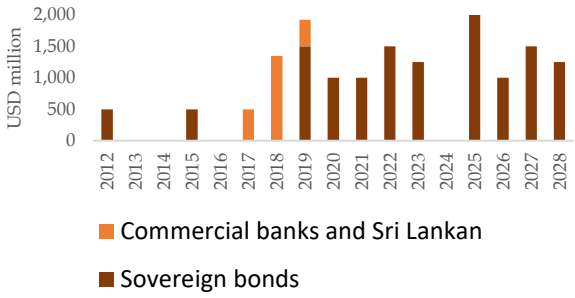
Attorney-at-Law,
LL.B, MFE (University of Colombo)

1. Introduction

Sri Lanka is faced with significantly large bullet repayments in International Sovereign bonds (ISBs), starting from 2019. Between 2019 to 2028, the country is expected to repay/refinance USD 12.15 billion in already issued ISBs, each worth above USD 500 million. Installment payments on project loans and recent term-financing facilities along with repayment of Sri Lanka Development Bonds are expected to elevate the debt service pressure in foreign currency. Outside the central government, maturing bonds of licensed commercial banks and Sri Lankan Airlines will also

demand foreign exchange for repayment as depicted in Figure 1 below.

Figure 1: Sovereign liabilities in brief



Source: Central Bank of Sri Lanka, respective annual report of commercial banks and Sri Lankan Airlines

Large bullet repayments of over USD 500 million are new to Sri Lanka. In 2012 and 2015, the country repaid USD 500 million worth of ISBs from its reserves leading to a deterioration of reserve adequacy metrics on both occasions. Going forward, bullet repayments falling due in almost every year could lead to significant strain on reserves and pressure on exchange rate. Such payments could expose the country to refinancing risk and the investors could become wary of the country's external liquidity leading to higher spreads. These factors could adversely influence macroeconomic stability.

In addition to refinancing of ISBs, there are other important risks of the debt portfolio, which need to be addressed. As a result of increasing income level, the concessional financing windows have been gradually drying up for Sri Lanka. The non-concessional and commercial component of the total external debt, which was negligible in early 2000's, rose to around 55 per centum by 2017, a transition expedited after the debut sovereign bond issuance in 2007. Along with this transition, the country experienced shortened maturities (Average Time to Maturity declined from 9.2 to 6.9 years between 2010 and 2016) and higher interest rates. A relatively high level of central government debt, large explicit contingent liabilities such as treasury guaranteed debt and implicit contingent liabilities in non-guaranteed State-Owned Enterprises (SOE) debt contribute to an adverse picture on the debt portfolio.

In response to these challenges, the authorities have initiated measures to improve the debt management function. Among them, the law passed to facilitate liability management activities is a key milestone, which is primarily aimed at managing the refinancing risk of ISBs while expecting improvements of domestic debt portfolio in the medium to long-term.

2. An overview of liability management

Liability Management or Active Liability Management (ALM) is the process of restructuring outstanding borrowing(s) in order to improve the composition of the public debt portfolio.

ALM encompasses could use various instruments with a view to improve the structure of the debt by adapting it to guidelines set by the Medium-Term Debt Strategy (MTDS). The instruments of ALM could entail, such as buying back old debt *(buy-backs)* or exchanging old debt against new debt *(switching)*; transforming fixed-rate coupons into floating-rate coupons or *vice versa (conversion)*; changing the currency denomination of old debt *(conversion)* or hedging the foreign exchange risk on external debt, *inter alia*. Whilst operation of these instruments could have varying characteristics and consequences, all ALM operations have one feature in common, i.e., *"they restructure an outstanding debt"*. Their objective is not to provide any additional funding, but to improve the composition of the outstanding debt.

Many countries use ALM either on a regular or occasional basis. An informal survey back in 2008 (Table 1) revealed that, almost all developed countries use some form of ALM regularly, while many developing countries use ALM either occasionally or on a regular basi

Table 1: Manner ALM is practiced

	Country	Don't use	Occasional	Regular
Developed	US			X
	UK			X
	Germany			X
	France			X
	Italy			X
	Sweden			X
	Ireland			X
Developing	Brazil			X
	Mexico		X	
	Indonesia			X
	Turkey		X	
	Philippines		X	
	South Africa		X	
	Colombia		X	
	Thailand	X		

Source: Tenth Bond Market Forum of OECD/World Bank/IMF (2008) [109]

Literature suggest that, initially, ALM conceived primarily as a risk management tool. However, increasingly, ALM has been playing a broader role in the function of debt management. The objectives of modern ALM operations can encompass one or more of the following.

- Increase liquidity in government securities markets
- Decrease the cost of new funding
- Manage risks of the portfolio
- Correct or take advantage of market distortions
- Stabilize market during periods of stress

Whilst it can have far reaching consequences on the way both domestic and external debt is managed in Sri Lanka, more specifically, ALM could be used to deal with refinancing risks of

[109] Tenth Bond Market Forum of OECD/World Bank/IMF (2008) <https://www.imf.org/external/np/seminars/eng/2008/bondmkt/pdf/makoff.pdf> accessed 30 September 2019

ISBs, immediately. For example, the government could decide to buy-back one of the 2019 sovereign bonds (there are two bonds maturing in 2019: USD 500 and USD 1,000) now and issue a bond, maturing in 2024 – a year in which there is no sovereign bond maturing; or simply, build buffers now for redemption of those ISBs when they fall due. Whilst there are advantages and disadvantages of each approach taken for liability management, it is expected to help manage the refinancing risk as already highlighted by rating agencies, the IMF[110] and the World Bank[111].

The benefits of such ALM operations in Sri Lanka will be many. These include offering strong support to manage the refinancing risk; perhaps the most important risk in Sri Lanka in relation to debt management as it stands; improving the maturity profile of the debt portfolio in line with the MTDS; and gradually lowering the cost of debt. Finally, successfully conducted ALM operations could contribute to help improve the country's sovereign credit rating in the medium-term.

However, it is noted that ALM could create some fiscal costs related to buy-backs and higher interest rates due to extension of maturities as also acknowledged by Templeman (2007), where;

> *"in addition to the burden of principal repayment that falls on future generations, there is an economic cost of borrowing. Just as a lender receives interest in return for postponing consumption from the present to the future, so a borrower must pay interest for the ability to increase consumption in the present without paying for it until sometime in the future"[112].*

3. Is not the existing legal framework sufficient?

The CBSL acts as the agent of the government in managing public debt in terms of the **Monetary Law Act, No. 58 of 1949**. Debt raising and management have been executed under the **Registered Stock and Securities Ordinance, No. 7 of 1937** and Local Treasury Bills Ordinance, No. 8 of 1923, domestically. Whilst the procedures for public debt issuance and management, appointment of primary dealers, regulatory supervision of primary dealers and the procedures for market operations are mainly specified in these laws, the ISBs and other foreign loans/foreign currency denominated loans are raised

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110 International Monetary Fund, *Article IV Consultation and the Fourth Review Under the Extended Arrangement Under the Extended Fund Facility - Press Release, Staff Report and Statement by the Executive Director for Sri Lanka* (2018) < file:///C:/Users/Kishan/Downloads/cr18175.pdf> accessed 04 October 2019

111 World Bank Group, *Sri Lanka Development Update* (2017) <https://www.openknowledge.worldbank.org/bitstream/handle/10986/28826/120728-REVISED-Sri-Lanka-Development-Update-November-2017-final-31102017.pdf?sequence=1&isAllowed=y> accessed 27 September 2019

112 J H Tempelman, *The Independent Review* (Vol. XI, n. 3, Winter 2007) p. 438

under the **Foreign Loans Act, No. 29 of 1957**. In addition, the payment and settlement for government securities is governed under the provisions of the Monetary Law Act, **the Payment and Settlement Systems Act, No. 28 of 2005** and the System Rules (Version 2.1) issued thereunder. Apart from that, there are multiple legislations pertaining to matters relating to public debt including the **Tax Reserve Certificates Ordinance, No. 22 of 1957**, **Treasury Certificates of Deposit Act, No. 9 of 1989**, **Fiscal Management (Responsibility) Act, No. 3 of 2003** and the annual Appropriation Acts.

The main borrowing assignment to the government can be found in the annual Appropriation Act. The provisions of section 2 of an annual Appropriation Act states,

> *"the expenditure of the Government which is estimated … for the service of the period beginning from January 01, .. and ending on December 31, ..,… shall be met… from the proceeds of loans which are hereby authorized in terms of the relevant laws to be raised whether in or outside Sri Lanka, for and on behalf of the Government, so however that the balance outstanding of such borrowing at any given time during the financial year … or at the end of the financial year … shall not exceed rupees …".*

There is also a separate limit on outstanding Treasury bills given by the Parliament, and a separate limit for the guarantees as proportion of the Gross Domestic Product (GDP) under the Fiscal Management (Responsibility) Act.

Hence, the ceiling imposed in the annual Appropriation Act, i.e., the Gross Borrowing Limits (GBL) would curtail the ability of the government to borrow in the current financial year, to service debt liabilities which would arise in a financial year beyond the current financial year. By its very nature, an annual Appropriation Act only covers a period of 12 months and will not authorise the repayment of debts falling outside a financial year. This is why an Appropriation Act must be passed annually which will be effective for the next financial year. The Appropriation Act, therefore, does not make provisions for early settlement of debt liabilities or for the building of cash reserves for the settlement of debts which would become payable on a date beyond the current financial year.

4. Active Liability Management Act, No. 8 of 2018 in brief

- Parliament by resolution is required to approve the limit to which moneys can be borrowed by the government for the purposes of pre-financing or refinancing public debt.
- Parliament can only approve as a loan in any particular financial year, a sum of money not exceeding ten per centum of the total outstanding debt of the preceding financial year.

- All moneys raised, whether in or outside Sri Lanka should be obtained in accordance with the provisions of currently applicable laws and procedures.
- The Minister of Finance is required to decide on matters pertaining to the refinancing or pre-financing of public debt such as the sum of money to be raised by a loan, the mode of raising such loan and the manner in which the debt shall be settled, on the advice of the Monetary Board and with the approval of the Cabinet of Ministers.
- The Minister is required to communicate his decision in writing to the Registrar (the Superintendent of Public Debt), who in turn is required to make all such arrangements to give effect to such decision and settle obligations of the government on the most favourable terms that may be obtained in the interest of the government.
- Loans obtained under this Act are to be maintained in designated bank accounts and all moneys including interest lying in such bank accounts are to be treated as part of the Consolidated Fund but are to be maintained as ring- fenced accounts.
- Details of all loans obtained and money retained in the accounts are to be tabled in Parliament under the Fiscal Management (Responsibility) Act, No. 03 of 2003.
- The Minister is authorised to make regulations on the advice of the Monetary Board. However, the said regulations must be placed for approval before Parliament within 3 months of the date of the *Gazette*.

5. The role of Active Liability Management Act in facilitating ALM

5.1 Departure from GBL

For liability management purposes, it is imperative that there is authority for the debt manger to raise cash in addition the gross financing requirement determined by the government budgetary operations. In the context, the present GBL of the annual Appropriation Act, which is one of the most important legal provisions aimed at maintaining fiscal discipline, acts as a constraint to the flexibility needed for ALM operations. Due to its reliance on *'gross flows'*, it restricts the ability of the government to borrow in gross terms over and above the annual borrowing limit. As such, new borrowings carried out for ALM purposes with the intention of pre-financing or refinancing of debt will likely to breach the GBL or affect the space available for financing the budget deficit. For example, if the government raises USD 2 billion for buying-back a Eurobond as part of an ALM operation, it will not be used for deficit financing. However, it will consume close to LKR 360 billion of the annual GBL (assuming an

exchange rate of 1 USD = LKR 160) or contribute to breaching the GBL if the annual borrowings have been already close to the GBL. Supposing this money is used to buy-back an existing ISB, the stock of ISBs outstanding will come down when the net effect is considered.

It was, therefore, necessitated for Parliament to provide for a special law to authorise a separate borrowing limit to carry out ALM and also to provide for the manner and mode in which such ALM should be carried out to meet the objectives of reducing public debt at the lowest possible cost with a prudent degree of risk.

5.2 Parliament's prerogative over public finance

Article 148 of the Constitution specifies that Parliament has the *"full control"* over public financing including debt.

The provisions of section 3 of ALM Act provide for Parliament, by resolution, to authorise the government to raise a sum of money as a loan, during a particular financial year, whether in or outsider Sri Lanka, for the purposes of refinancing and pre-financing public debt of the government. However, the maximum sum of money that Parliament can approve as a loan in a particular financial year shall not exceed ten per centum of the total outstanding debt at the end of the preceding financial year. These debts should be raised in accordance with applicable laws including the Monetary Law Act, the Local Treasury Bills Ordinance, the Registered Stocks and Securities Ordinance and the Foreign Loans Act through which Parliament has already laid down the principles, procedures and controls.

The Supreme Court in Case No. *SC SD 19/2013*, which challenged the constitutionality of the Appropriation Bill for 2014, having considered the provisions of all relevant laws relating to public finance including the Monetary Law Act determined that:

> *"Thus, one would find that the legislature has enacted several means and agencies to perform the task of monitoring the raising of loans and this only goes to prove that the Appropriation Act is not the only means to control public finance and the pervasive provisions that have been recited above demonstrate the zealous concern that the legislature has displayed towards giving true meaning to the constitutional imperative stipulated in Article 148 of the Constitution that Parliament shall have full control over public finance.*
>
> *Parliament exercises this control through several of its agencies because it cannot engage in the continuous micro management of public finance. If the whole members of Parliament were to gather every time a loan is about to be raised simply for the purpose of approving the terms and conditions of a particular loan, it would frustrate the democratic governance*

of the country for which principal task the people of the nation bestowed them with all the important palladium of legislative power, privileges and immunities."

(emphasis added)

Considering the above, the Supreme Court went on to determine that the ALM Bill, in fact would further strengthen Parliament's *"full control"* over public finance when the constitutionality of ALM Bill was challenged in the *Supreme Court Case Nos. SC SD 01/2018 to SC SD 06/2018*.

6. Conclusion

Sri Lanka is faced with significantly large bullet repayments in ISBs leading to significant impact on macroeconomic stability. However, the present legal framework on budgetary operations, i.e., the annual Appropriation Act only gives the space to service the debt maturing in the budget, and does not allow explicitly for the building up of cash buffers and early retirement of debt maturing beyond the budget year. This welcomed a brand new legal framework broadly setting out the procedure in raising debt for the purposes of ALM, without being curtailed from budgetary ceilings but helping fiscal consolidation. However, in carrying out ALM activities, it is noteworthy to consider not to shut into Buchanan's (1958) connotation that:

"by financing current public outlay by debt, we are, in effect, chopping up the apple trees for firewood, thereby reducing the yield of the orchard forever"[113].

[113] J M Buchanan, (1958). "Public Principles of Public Debt: A Defense and Restatement", *The Collected Works of James M. Buchanan,* (Vol. 2. Indianapolis, Ind.: Liberty Fund 1958).