

# **Terminating Relationships- Husband and wife, Employer and Employee: A Critique of Sri Lankan Law**

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## **Background**

This paper looks at the Sri Lankan legal responses to fractured relationships in the spheres of husband and wife and employer and employee. In examining the husband wife relationship we will confine ourselves to the General Law since an examination of the Special laws and the General Law cannot be done within the scope of a limited piece of writing. In the case of the employer employee relationship we will examine both the statutory and non statutory legal framework.

## **Justification**

It will be argued that in both relationships which have a contractual underpinnings the law adopts an unduly interventionist stance which requires reassessment. Furthermore misconduct or fault looms large in the determination of whether the relationship should be terminated or not. In the marriage relationship the basis of the divorce law is the matrimonial offence principle which has been described as “deep seated in our jurisprudence”<sup>1</sup> The law does not concern itself with whether the relationship between husband and wife is functional or not. The intransigence of the law has led to the “uncontested divorce “which in fact is divorce by mutual consent, a far cry from fault. In the employer employee relationship, once again fault or misconduct is an important factor in determining whether termination is justified. Unlike in the husband wife relationship it is not misconduct alone that justifies the termination of the relationship between employer and employee. Thus a bona fide closing of a business or the downscaling of a business justifies the termination of employment. In the Sri Lankan context such non - disciplinary terminations are strictly regulated and require the approval of the Commissioner of labour unless the employee consents to the termination.<sup>2</sup>

Fault impacts significantly on the ancillary relief that can be obtained in a divorce action. Until 1977 alimony and property settlements could only be granted to the innocent spouse. In the case of alimony moreover it could only be granted to an innocent wife despite some judges observing that this was not a humane practice.<sup>3</sup> The amendments to the Civil Procedure Code paved the way towards de emphasizing fault in relation to alimony and property division.<sup>4</sup> Yet there is no indication that the section is widely used for compensating spouses at the termination of the marriage for their respective contributions

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<sup>1</sup> Tennekoon V Somawathie Perera 1986(1)SLR 90 at p 98.

<sup>2</sup> Termination of Employment (Special Provisions) Act no 45 of 1971 section 2(1) a

<sup>3</sup> Civil Procedure Code No 2 of 1889 (as amended). See also Ebert v Ebert (1939 40 NLR 388

<sup>4</sup> Civil Procedure Code Amending Act No 20 of 1977 section 100 which brought into effect the amended section 615 which does not make any reference to fault in the ordering of conveyances, gross sums of money or annual or monthly sums of money on divorce or separation.

to the marriage. By contrast, in the employer-employee relationship compensation plays a key role. Principles relating to compensation have been developed in the context of both unjustified<sup>5</sup> and justified terminations.<sup>6</sup> In the case of an unjustified disciplinary or non disciplinary termination a wide array of factors are taken into when awarding compensation. Nevertheless reinstatement remains at least in the statutory framework the preferred remedy. In the case of a justified disciplinary termination usually there is no compensation payable. In the case of a justified non-disciplinary termination compensation is based on social security and social justice. The law recognizes that an employer has a right to re-organize his business but equally an employee should be assured job security.<sup>7</sup>

There is a distinct difference between the procedures involved in a divorce action and those involved in an action for termination of employment. A divorce action like any other ordinary civil action must be by way of plaint and answer.<sup>8</sup> The court cannot grant relief beyond what the plaintiff has claimed. Pleas for matrimonial relief are normally combined with a claim for damages, custody, alimony, maintenance of children and a request for costs. The defendant has a right to answer the allegations and defend himself.<sup>9</sup> An ex parte trial is possible in certain defined circumstances.<sup>10</sup> Evidence maybe given by the petitioner in person, or through an affidavit. At the end of this process judgment will be issued.<sup>11</sup> A decree for divorce must initially be a decree nisi and cannot be made absolute until the expiration of 3 months.<sup>12</sup>

The process discussed above is a formal judicial process and stands in sharp contrast to the procedures involving a disciplinary termination of the employment relationship. It also stands in sharp contrast to the procedure which has to be followed where a termination of employment is sought on non- disciplinary grounds e.g. closure or rationalization of the business. Where there is an unjustified disciplinary termination the principal forum for relief is the labour tribunal. The labour tribunal is required to make all inquiries into the application and hear all such evidence as it considers necessary.<sup>13</sup> Thereafter it can make a just and equitable order.<sup>14</sup> The tribunal's role is not merely assessing the evidence that is brought before it but that of ensuring that it obtains the necessary evidence. The approach is more inquisitorial than adversarial.<sup>15</sup> Significantly the Evidence Ordinance does not apply

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<sup>5</sup> *Jayasuriya v Sri Lanka State Plantations Corporation* (1995)2 SLR 379

<sup>6</sup> *Caledonian (Ceylon) Tea and Rubber Estates Ltd v Hillman* (1978) 79 NLR 421

<sup>7</sup> *Supra* at pp 430-431

<sup>8</sup> Civil Procedure Code section Section 40 ,73 and 75

<sup>9</sup> *Ibid* section 80 and 81

<sup>10</sup> *Ibid* section 84

<sup>11</sup> *Ibid* section 151 read with section 179.

<sup>12</sup> Section 604

<sup>13</sup> Industrial Disputes Act no 43 of 1950 section 31C (1)

<sup>14</sup> *Idem*.

<sup>15</sup> N Balasubramaniam “ Emerging Issues pertaining to labour Tribunals In Sri Lanka “in Prevention and Settlement of Labour Disputes in Sri Lanka (ed) A Sivnanthiran and Dhara Wijayatilake pp.36-37

in Labour tribunal proceedings<sup>16</sup> and the tribunal can map out its own procedure. Conciliation and mediation are also entrenched forms of dispute settlement found in the Industrial Disputes Act.<sup>17</sup> Non disciplinary terminations are dealt with in an out of court setting with the Commissioner of Labour or his representative looking at all the circumstances surrounding the intended termination or the termination.<sup>18</sup> Where the termination is found to be unwarranted the primary remedy is restoration of the employment.<sup>19</sup> Yet compensation as we have seen earlier is an alternative that has received judicial sanction.

### **Methodology**

Primarily this study will be based on legislation and case law. Law commission reports and other reports will be examined. Additionally books and articles which have looked at the marriage relationship and the employment relationship will be examined.

### **Outcome**

The research will demonstrate that the legal responses to the terminated employment relationship or the relationship that is about to be terminated is far more pragmatic than the response to the marriage relationship that is in jeopardy. The procedures applicable in relation to the termination of the employment relationship are moreover more suitable for dealing with the issues arising from such terminations.

### **Conclusion**

This research will establish that in relation to both the marriage relationship and the employment relationship the emphasis must be on the viability of the relationship and that of developing processes where the parties themselves are actively involved in resolving the issues arising out of the terminated relationship. If the marriage is found not to be viable then the law must develop policy guidelines on how the matrimonial property is to be divided and how a spouse is to be compensated for marriage generated needs. Similarly if the employment relationship is found to be untenable again the law should look at compensation rather than reinstatement or restoration of the relationship. Can reinstatement work should be the focus of the inquiry. In dealing with terminations that are sought to be justified on the basis of operational requirements the law must be more realistic looking closely at current economic patterns , the nature of the industry or enterprise and the demands of the particular enterprise. The current protectionist legislation may have been meaningful in the context of a closed economy with little or no scope for alternative employment. Its retention today without a modification of its basic tenets must be reexamined.

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<sup>16</sup> Industrial Disputes Act section 36(4)

<sup>17</sup> Industrial Disputes Act Section 3(1) d and section 4(1)

<sup>18</sup> Termination of Employment (Special Provisions )Act No 45 of 1971 section 2

<sup>19</sup> Ibid section 6