Proposed Law Reforms

Law Commission of Sri Lanka

2015 – 2019

Content

2019

Contempt of Court

Proposed by

Law Commission of Sri Lanka

CONTEMPT OF COURT

(1) For the purposes of this Act,"Contempt of Court" shall mean :-

"Any express or overt Act, deed, words uttered,publication made, or by deliberate innuendo, which engenders a real likelihood of scandalizing, the court or the judiciary, or bringing the judiciary into disrepute, or undermining the authority, or independence, or impartiality, or dignity, or integrity, or efficacy, of the court or the judiciary, or eroding, or lowering the estimation of the judiciary, or undermining the Faith and confidence of the People in the judiciary or in any Court and/or in the Court system and/or in the judges who administer justice and/or in any one or more judge.,

"Any willful act of disobedience in respect of a judgment or decree, order or direction, or any deliberate refusal to comply with or implement or give effect to any such formal judgment, order or direction of any Court of Law or a Labour Tribunal or any willful refusal to comply with any undertaking or other assurance provided or furnished to any court of law or a labour tribunal, shall also constitute contempt of court.

NB – I have excluded contempt by necessary implication or innuendo... etc. as that too, would I feel, be too wide, subjective and hence, dangerous, given the implications of far reaching punitive sanctions.

(2) For the purposes of this section, the "Judiciary" shall mean, the Supreme Court of the Republic of Sri Lanka, The Court of Appeal of the Republic of Sri Lanka, All High Courts, District Courts, Magistrate's Courts, Primary Courts and Labour Tribunals and any judge of any such court or President of a Labour Tribunal –

NB - I have restricted the definition of "judiciary" as appearing in article 105(1), in as much as that definition (at least for the purpose of contempt), appears to be to be far too wide as it covers even tribunals or such others institutions as Parliament may establish by written law.

However, it shall not be contempt for a judgment, decree, order or direction issued by any Court or Labour Tribunal, within the definition of "judiciary" as contained above, to be subjected to *bona fide* comment or assessment or evaluation or review,whether by publication or otherwise in the public domain.

(3) For the purposes of the above, "Publication" shall mean a communication addressed to the public at large, or any section of the public , or disseminated to or circulated amongst the public, or any section of the public, or contained, inserted or included in any forum, format or other source, to which any member of the public can have ready access.

(5) "Communication" shall mean any article or other printed content, any speech or other verbal conveyance and also includes content in the print media or electronic media, e mail, the worldwide web and all other forms of social media and other mobile platforms capable of broadcasting to multiple users instantaneously.

NB – I have specifically excluded modes of communication through mobile devices, like Whatapp or Viber platforms or text messaging as that can I feel, be too wide.

NB - But on the other-side of the divide, viral messaging through Whatsapp or Viber or such other mobile platforms can seriously compromise the judiciary. For discussion amongst the members of the Commission please.

2019

Amendments to the Registration of Documents Ordinance

Proposed by

Law Commission of Sri Lanka

AMENDMENDMENTS TO SECTIONS 32, 33 AND 34 OF THE REGISTRATION OF DOCUMENTS ORDINANCE 23 OF 1927

32 (1) A caveat may warn and/or give notice to a person on the registration or recording of any instrument dealing with a land;

32 (2) No Caveat shall be registered unless the same is presented with a statutory certificate from the Caveator's Attorney-at-law to the effect that in his opinion the Caveator has a registrable interest in the land or any right to the title and interest of such land on which the Caveat is lodged, specifically stating the nature of the estate or interest claimed and the title thereto of the Caveator.

32 (3) The persons and/or bodies at whose instance a caveat may be entered are-

a) any person or body claiming title to, or any registrable interest in, any land or undivided share in any land or any right to such title or interest;
b) any person or body claiming title to, or any registrable interest in, any land or undivided share in any land or any right to such title or interest through a unregistered instrument which is incapable of immediate registration;
c) the spouse of any person claiming title to, or any registrable interest in, any land or undivided share in any land or any right to such title or interest;
d) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest and Trustees of such trust;
e) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (c);
f) any person claiming title to, or any registrable interest in any land or undivided share in any land or any right to such title or interest by way of inheritance either by testate or intestate succession;
g) Attorney-at-Law or the Power of Attorney Holder of a person or a body referred to in (a), (b), (c), (d), (e) and (f);
h) Executor/Administrator of the testate/intestate estate of a person who had any registrable interest in, any land or undivided share in any land or any right to such title or interest;

32 (4) upon the receipt of a caveat the Registrar shall

a) satisfy himself/herself on the eligibility of the caveator to lodge such caveat in-terms of subsection 32(3) (a) – (h) above and the form of the caveat in terms of subsection 32(8), and

b) if satisfied with the eligibility of the caveator to lodge such caveat in-terms of subsection 32(3) (a) – (h) above and the form of the caveat in terms of subsection 32(8), make a memorandum thereon of the date and hour of the receipt thereof, and

c) shall enter a memorandum thereof in the Register, and

d) shall forthwith send a written notice of such caveat through the registered post to the person or body against whose title or whose right to registration of an instrument is affected by such caveat shall have been lodged, directed to his/ her or the body's address appearing in the Register or given in the caveat, and

e) register the caveat in the same manner as other instruments, but shall retain the caveat.

32 (5) A caveat shall be in force for such period;

a) as may be specified therein, not being longer than the period covered by the fee paid on the caveat subject to subsections 32(5)(b), 32(6), 32(10) and 32(11) below;

b) b. not exceeding five (05) years at a time subject to subsections 32(5)(b), 32(6), 32(10) and 32(11) below;

32 (6) A sum of Ten Thousand Rupees (Rs.10,000/-) shall be paid per annum to register a caveat for all purposes and intents.

32 (7) The notice to be given to the caveator shall be in the prescribed form and shall be sent by registered letter to the address mentioned in the caveat.

32 (8) A caveat lodged subject to and in-terms of subsection 32(2) and 32(3) must:

a) be in the approved form specifying:

i) the name/s of the caveator;

ii) an address/addresses in Sri Lanka at which notices may be served on the caveator;

iii) the name/s and address/addresses of the caveatee/s

iv) nature of the interest claimed by the caveator;

v) the grounds in support of the claim;

vi) where the lot affected by the caveat and, where that lot is comprised in a folio, the correct volume and folio;

vii) where the caveat relates only to part of the land, the lot affected by the caveat and, where that lot is comprised in a folio, the correct volume and folio;

viii) where the caveat relates to only part of the land, such description of that part as will enable it to be identified to the satisfaction of the Registrar;

b) be verified by the statutory certification by the Caveator's Attorney-at-Law referred to in Section 32(2), specifically stating the nature of the estate or interest claimed and the title thereto of the caveator, and

c) be signed by the caveator or by his/her Attorney-at-Law or the legally appointed agent.

32 (9) If, while a caveat is in force, an instrument affecting the land described in the caveat is presented for registration, and in an action commenced by the caveator in a competent court within thirty (30) days from posting of the notice required by subsection 32(7) it is proved to the satisfaction of the court that the instrument presented for registration is or was at the time of registration void or voidable by the caveator or fraudulent as against him or in derogation of his lawful rights, the court may order the instrument to be cancelled as may be necessary to preserve the rights of the caveator, and may order necessary entries to be made in the register.

32 (10) (a) A caveat may be withdrawn wholly or as to part of the land thereby at anytime affected by a signed instrument of withdrawal citing the reason/s for such withdrawal and sent to the Registrar by registered post;

i by the caveator, or by the caveator's Attorney-at-Law or the legally appointed agent of such caveator at whose instance it was entered, or

ii by the executor or executrix of the will, or the administrator or administratrix of the estate, of the caveator upon the caveator's demise, or

iii the guardian or next friend of a minor on whose interest the caveat was lodged

iv where two (02) or more caveators claim to be entitled to the interest protected by the caveat and one (01) or more (but not all) of them has died, by the surviving caveator or caveators;

v where the caveator is adjudicated a bankrupt, by the Official Assignee;

vi where the caveator is a body corporate and is in liquidation, and the estate or interest claimed by the caveator has become vested in the liquidator, by the liquidator;

(b) On receiving any instrument of withdrawal under sub-section 32(10)-(a), the Registrar shall-

(i) cancel the entry of the caveat in the register in the prescribed manner noting thereon the reason for the cancellation cited in the instrument of withdrawal and the date thereof, and

(ii) give notice to the person or body against whose title or whose right to registration of an instrument was affected by such caveat, directed to his/ her or the body's address appearing in the Register.

(32) (11) (a) The person or body against whose title or whose right to registration of an instrument was affected by such caveat, by summons, call on any caveator, the Registrar and the Attorney-at-Law who provided the statutory certification in terms of section 32(2), to attend before the Court to show cause why the caveat should not be removed and to claim compensation for damages sustained by such person or body by the lodgment of the caveat by the caveator without any reasonable cause and unreasonable failure to withdraw such caveat in a joined suit or summarily under Chapter XXIV of the Civil Procedure Code; and the Court may, after allowing the parties a reasonable opportunity to be heard, make such order with regard to the removal of the caveat and compensation as appears just in the circumstances;

(b) The person or body against whose title or whose right to registration of an instrument was affected by such caveat, by summons, call on any caveator, , the Registrar and the Attorney-at-Law who provided the statutory certificate in terms of section 32(2), to attend before the Court to claim compensation for damages sustained by such person or body by the lodgment of the caveat by the caveator without any reasonable cause notwithstanding the withdrawal of the disputed caveat by the caveator prior to the institution of action under this section in a suit or summarily under Chapter XXIV of the Civil Procedure Code; and the Court may, after allowing the parties a reasonable opportunity to be heard, make such order with regard to compensation as appears just in the circumstances;

(c) The person or body against whose title or whose right to registration of an instrument was affected by such caveat, is entitled to an Interim Order/s against the Defendant/s in cancelling and /or removing the Caveat so lodged by the Defendant/s.

(d) If the caveator does not appear in response to the summons in 32(11)(a) and 32(11)(b), the Court may, if satisfied that the summons was duly served, proceed to hear and determine the application ex-parte.

(e) The Attorney-at-law who provided a statutory declaration in terms of subsection 32(2) can be added as a Party to any legal proceeding instituted in terms of 32(11)-(a) and 32(11)-(b) if such Attorney-at-law has prima-facie failed and/or neglected his/her duty to exercise reasonable care and judgment in providing such statutory declaration.

(f) For the avoidance of doubt –

i. the court referred to in this section is the District Court.

ii. joined suit means joining a suit for claim for compensation with an application for the cancellation and/or removal of a caveat.

iii. unreasonable failure to withdraw means, failure on the part of the caveator to withdraw the caveat before any damage being caused to a person/s or body against whose title or whose right to registration of an instrument was affected by such caveat.

32 (12) An entry shall be made by the Registrar in the Register of any order made by the Court relating to any caveat, or of the withdrawal, lapse, or removal of any caveat in terms of sections 32(5), 32(10) and 32(11) of this Act.

32 (13) (a) Where a caveat has been removed by the Registrar in accordance with sections 32(10) and 32(11) of this Act, the Registrar shall not enter on the register any subsequent caveat affecting the same land or interest by the same person (same caveator), or for the same purpose, except by order of the court.

(b) For the avoidance of doubt the court referred to in this section is the District Court.

32 (14) Nothing in this section shall affect any other power which may be possessed by any court of ordering any instrument to be rectified or cancelled.

33 (1) Registration of a priority notice, seizure notice, seizure priority notice, or lis pendens may be cancelled at the request in writing of the person by whom or on whose behalf it was presented for registration.

(2) A District Court may, on the application of any person interested in any property affected by registration of a priority notice, seizure notice, seizure priority notice, or Lis pendens, if it is satisfied that the registration was or has become unnecessary, order that the registration be cancelled. An application under this subsection may be made in a suit or summarily under Chapter XXIV of the Civil Procedure Code.

(3) A cancellation under this section shall be registered by the Registrar in the prescribed manner.

34 Any person injured by reason of the registration or renewal of a priority notice, seizure priority notice, or Lis pendens without reasonable cause, or by unreasonable failure to request cancellation of registration of a priority notice, seizure priority notice, or Lis pendens may recover compensation

from the person who applied for such registration or renewal. A claim for such compensation may be joined with an application for the cancellation of the notice, or Lis pendens or may be made by suit.

2018

Disposal of Court Production

Proposed by

Law Commission of Sri Lanka

DISPOSAL OF COURT PRODUCTIONS – CATEGORIZATION/RECOMMENDATIONS

Pursuant to the last meeting at which my proposals were discussed and it was agreed that I would identify/work out the relevant broad categories of productions and the manner of disposal, I am submitting a further revised edited version.

However, if any member needs any clarification, it may be useful to read this edited version in conjunction with my original note which contains the tabulation of the various categories of productions etc, the presently applicable law, the law in India and the very useful and practical, Standard Operating Procedures of the Scottish Police :

POSSIBLE CATEGORIES AND RECOMMENDATIONS FOR THE DISPOSAL OF SUCH ITEMS/GOODS

GOODS THAT ARE SUBJECT TO SPEEDY AND NATURAL DECAY

- With regard to the goods that are subject to speedy and natural decay, including timber, food items etc, they should only be kept in police custody if and until it is absolutely necessary to so, but as a general norm , they should be handed over to the claimant,, once comprehensive photographs are taken and / or video-graphed, and using digital technology when appropriate and all necessary details are filed in terms of the Evidence Ordinance.

- A bond should be signed to the effect that such articles will be produced if required at the time of trial is signed; and after taking proper security and under pain of punishment.

CAVEAT - However, in cases where time is of the essence and the character of such goods or food items require that the same be used or consumed etc. without delay, such goods may be released upon a bond for the value of such goods and the bond shall be forfeited in the event that the owner is proven to a different person.

VEHICLES

With regard to **vehicles**, there can be two scenarios put in place :-

SCENARIO 1

a) This is where the lawful or legal owner of the vehicle, which is the subject matter of the alleged offence makes a valid claim for the same before court. The alleged owner should provide written proof of his lawful status. Such proof shall primarily be the Registration Book issued by the Commissioner of Motor Traffic.

b) In the absence of the Registration certificate for a good and valid reason that the Court deems reasonable, then the Court may accept in its discretion and in lieu of the registration certificate, the Revenue Licence for the previous 3 consecutive years, together with the Insurance certificates in respect of the said vehicle for the previous 3 consecutive years.

c) In any such event, the vehicle may be released to the owner once comprehensive photographs are taken and / or video-graphed, and using digital technology when appropriate and all necessary details are filed in terms of the Evidence Ordinance, and a bond is signed to the effect that such vehicle will be duly produced if required at the time of trial; and after taking proper security and under pain of punishment in the event of failure to produce the vehicle when required.

d) One of the conditions should be that the vehicle shall not be permitted to sell the said vehicle until the completion of the trial and the judgment of the court.

e) The Court of first instance shall have the discretion to remove such condition after its judgment, notwithstanding any appeal that is filed or may be filed.

f) Although in the ordinary Course, during the course of the trial, such person shall not be permitted to sell the vehicle until the completion of the trial, nevertheless,depending on the severity of the offence and the imperative need or LACK THEREOF, to have the vehicle available for inspection for the purposes of the trial, the court shall have the discretion to dispense with the prohibition on the sale.

SCENARIO 2

a) If no one makes a claim to the goods which are productions OR vehicles etc, within six months of the date of the production, the Court shall order the sale or auction of the vehicle, after taking appropriate photographs of the said vehicle and after detailed investigation reports are prepared in terms of the Evidence Ordinance.

THE PROCEEDS OF THE SALE OR AUCTION

b) The proceeds of the sale or the auction shall be deposited in the account of the court or a special interest bearing account created for this purpose.

LIQOUR

- With regard to **liquor**, firstly, necessary investigation reports should be made in accordance with the evidence ordinance.Several random samples may be taken and duly sealed so that there cannot be allegations of tampering by the defence and specimen samples can taken, sealed and sent to the Government Analyst, if required for analysis and reporting.
-
- But in no case, shall large quantities of liquor be stored at police stations. No purpose is served by such storage and will only lead to occupying valuable space and perhaps even siphoning off
-
- There should also be a system of releasing consignments of liquor that are not illegal per se, to be released to the legal owner on production of proof of ownership, including the necessary excise permits in terms of the Excise Ordinance, Regulations and Excise Notifications.

g) If the Court if satisfied of the ownership of the claimant, who is not the accused or the wrong doer, then the same could be subject to the same processes of photographing and / or video-graphing, using digital technology when appropriate and all necessary details being filed in terms of the Evidence Ordinance, and a bond being signed to the effect that such consignments will be duly produced if required at the time of trial; and after taking proper security and under pain of punishment in the event of failure to produce any samples of portions of the consignments, when required.

h) However, this should be exercised only in a special situation, as after the recording and photograph etc is effected and government analyst reporting done, there will be no necessity for the same to be produced at the trial.

NARCOTIC AND DRUGS

- With regard to **Narcotic and drugs,** the entire consignment should be weighed and photographed and otherwise recorded and relevant or random samples taken, sealed and referred to the Government Analyst for analysis and reporting and further samples retained if necessary and thereafter, the rest of the quantity to be destroyed upon the direction of the Court.

CURRRENCY AND COINS

- With regard to **Currency and coins,** Money should not be stored in or within the court and should be deposited in a special National Bank or in the account of the court, after necessary documentation and photography is effected,, as in the cases set out above.

The court may release the said monies, being either noted or coins or both, to the lawful owner pending the conclusion of the trial, subject to proper proof to the satisfaction of the court, being adduced by the owner.

CAVEAT

However, it is inherently difficult to prove the owner of notes or coins, and it may not be desirable to release monies without exercising the strictest of circumspection.

However, where there is clear prima facie evidence that monies were taken or stolen from the possession of a specific person, then the same could be released to such person, subject to conditions deemed fit at the discretion of the court and after entering into the relevant bonds for return, if ownership is proven to be otherwise at the trial.

One alternative option is to deposit the monies in a frozen special interest bearing account or a fixed deposit or Repo through a national bank, and to release the principal sum together with the accrued interest thereon to the lawful owner at the end of the trial, with .

COMPUTERS, PHONES, ELECTRONICS

- With regard to **Computers, phones and other electronics**, they can be released to the owner upon proper proof and also recording and also, binding over in the manner identified above

LIVESTOCK AND ANIMALS

- With regard to Livestock and animals, there are two scenarios

SCENARIO A

a) Livestock that are seized or intercepted or apprehended to pimarily be placed in the custody of animal welfare shelters in the manner contemplated by section 2(1) of the Animals Amendment Act No.10 of 2009, until the conclusion of the trial or in cases.

The aforesaid section 2(1) of Act No.10 of 2009 stipulates as follows :

"Notwithstanding anything to the contrary in any other written law, where any offence in relation to an animal is committed and where such offence is brought to the notice of the Magistrate, having competent jurisdiction, the Magistrate may, pending the determination of the case, make an interim order, to the effect that the animal against whom the offence has been committed :-

b) be handed over to the custody of an animal care centre, approved by the Minister by order published in the gazette,

c) be handed over to any Non-Governmental organization whose primary objective is concerned with the welfare of animals or

d) be handed over to the custody of any person whom the court is satisfied is actively engaged in caring for animals".

There is a very laudable and discernible shift in direction on the part of the legislature in recognizing the need to protect animals from cruelty and mis-handling and some of the other complimentary legislation evidences the creation of a rights regime for animals. This is also manifested by the prefaratory portion of the section which states ""Notwithstanding anything to the contrary in any other written law". Thus, this section has an over-arching effect and we as the Commission can I feel, adopt a similarly rationalized analogy in respect of the disposal of livestock and animals

PS – in lighter vein, the Chairman's daughters too would heartily agree I would think and I feel accordingly that in this case, (AND IN THIS CASE ONLY), the chairman should have as 3 votes in total aggregation, on the matter, in order to defeat the vote of any other members who are not in agreement. I will provide the 4th and most emphatic vote most unashamedly, for my own proposal.

SCENARIO B

a) The above shall be recognized by law as the norm. However, unfortunately, we cant do away completely with the discretion of court where the rightful owner adduces impeccable written proof of his ownership and in such a case, the court may exercise its discretion to release the animal to its rightful owner, subject to the usual recording and bonds and pain of punishment as set out above.

The difficulty arises where there is evidence to show that the animal has been earmarked by the rightful owner for slaughter and where he has a permit/licence. We need to discuss this more pl.

GEMS, JEWELLERY, GOLD AND PRECIOUS AND METALS

- With regard to **Gems, Jewellery, Gold and precious metals, noble Metals and other metals,** they should be released to the owner upon satisfying the court of his lawful ownership, and after first effecting a valuation (in the case of gems and jewellery, from the Gem and Jewellery Authority of Sri Lanka) and also weighing, photographing, recording, and binding over.

  If no claim is made by the lawful owner within six months, then the same to be sold by auction and placed in a special interest bearing account of as national bank or the account of the court.

WEAPONS AND EXPLOSIVES

- With regard to **Weapons and explosives,** if the lawful owner produces the relevant permits or licenses, the same may be released to him, after due photographing, recording and binding

over but not in the case where such weapons have been used by the owner to commit violent or other grievous offences such as murder or robbery etc.

In the alternative, If no owner comes forward within six months, then after due recording, the said weapons to be released to the Ministry of Defense.

ANIMAL FURS, SKINS, TUSKS, HORNS, TEETH ETC

- With regard to **Animal furs, skins, tusks, horns etc.** these should be released to the Department of Wildlife under conditions to be imposed by Court.

STOLEN TREASURE

- With Regard to **STOLEN TREASURE,** they must be forthwith, after due recording, be released to the care and custody of the Department of Archaeology or the Central Cultural Fund, upon recorded conditions of producing the same if required.

OTHER RESIDUAL ISSUES

In assessing the value of goods, the courts should procure or cause to be procured, the due market value of the goods by the appropriate authority, depending on the nature of the goods.

All photographs of productions should be signed by the Judge of the Court of first instance.

The photographs must depict all the features and dimensions of the production and be taken in colour and must be also backed up by a pen drive/memory stick/Usb etc and these must be sealed and properly stored on the direction of the judge.

2018

The Jurisdiction of the Commercial High Court

Proposed by

Law Commission of Sri Lanka

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අංක 80, 4 වැනි මහළ
අධිකරණ මාවත, කොළඹ 12.

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இலங்கையின் சட்ட ஆணைக்குழுத் திணைக்களம்

DEPARTMENT OF THE LAW COMMISSION OF SRI LANKA

මගේ අංකය
எனது இல.
My No.
LC/R/03/2018

ඔබේ අංකය
உமது இல.
Your No.

දිනය
திகதி
Date
27/09/2018

Secretary,
Ministry of Justice

Dear Madam,

Amount to be Fixed for the Purposes of Paragraph 1 of the First Schedule to Act 10 of 1996

The Law Commission unanimously decided to recommend that the Honourable Minister issue a Notification to be published in the Gazette fixing Rupees twenty-five million (Rs. 25,000,000/-) as the amount for the purposes of paragraph (1) of the First Schedule to the High Court of the Provinces (Special Provisions) Act. No. 10 of 1996, in lieu of the sum of Rupees one millionspecified in that paragraph.

I would be grateful if you could bring this recommendation to the prompt attention of the Honourable Minister.

Yours Sincerely,

Chairman, Law Commission

olc

2018

Recovery of Damages for the Death of a Dependent Bill

Proposed by

Law Commission of Sri Lanka

L.D. O 25/2017

AN ACT TO PROVIDE FOR THE RECOVERY OF DAMAGES FOR THE DEATH OF A PERSON CAUSED BY A WRONGFUL ACT, OMISSION, NEGLIGENCE OR DEFAULT OF ANOTHER AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH AND INCIDENTAL THERETO.

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows: -

Short title.

1. This Act may be cited as the Damages for the Death of a person Act, No... of 2018.

Right to maintain an action.

2. (1) Where the death of a person is caused by a wrongful act, omission, negligence or default of another, the person referred to in subsection (2) (hereinafter referred to as the "applicant") shall have the right to maintain an action for damages in respect thereof, against the person whose wrongful act, omission, negligence or default caused the death of such person.

(2) The action may be maintained by-

(a) a parent or the parents jointly;
(b) a child or the children jointly;
(c) a sibling or the siblings jointly;
(d) a grandparent or the grandparents jointly; or
(e) the guardian.

Damages for the Death of a person.

3. In an action to recover damages for the death of a person, the applicant may recover damages for –

(a) the loss of that person's love and affection and care and companionship; and

(b) the mental pain and suffering.

No right of succession.

4. Where an applicant dies-

(a) before a claim under this Act is made; or

(b) after a claim is made but before a judgement is delivered,

the heirs, executors or administrators of such deceased applicant shall have no right for the damages.

Assistance of an expert.

5. The Court may, for the purpose of deciding any matter under this Act, call on one or more persons specially skilled in any matter relevant to the matter under consideration, for assistance.

Damages where abandonment has occurred.

6. Any applicant who has abandoned the deceased person shall not be entitled to claim damages under this Act.

The provisions of this Act in addition to any other remedy.

7. The provisions of this Act shall be in addition **to** and not in derogation of any other right or remedy provided by any other written law or unwritten law.

Sinhala text to prevail in case of inconsistency.

8. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

29.06.2018 1.39 pm

වෙනත් යම් තැනැත්තකුගේ අයුතු ක්‍රියාවක්, නොකර හැරීමක්, අතපසු කිරීමක් හෝ පැහැර හැරීමක් හේතුවෙන් යම් තැනැත්තකුගේ මරණය සිදුවීම සම්බන්ධයෙන් අලාභ අයකර ගැනීම සඳහා සහ ඒ හා සම්බන්ධ සහ ඊට ආනුෂංගික කරුණු සඳහා විධිවිධාන සැලැස්වීම පිණිස වූ පනතකි.

ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ පාර්ලිමේන්තුව විසින් මෙසේ පනවනු ලැබේ:-

පුනුඹු නාමය

1. මේ පනත, 2018 අංක දරන යම් තැනැත්තකුගේ මරණය සම්බන්ධයෙන් අලාභ අයකර ගැනීමේ පනත යනුවෙන් හඳුන්වනු ලැබේ.

නඩුවක් පවත්වාගෙන යෑමේ අයිතිය

2. (1) යම් තැනැත්තකුගේ මරණය වෙනත් යම් තැනැත්තකුගේ අයුතු ක්‍රියාවක්, නොකර හැරීමක්, අතපසු කිරීමක් හෝ පැහැර හැරීමක් හේතුවෙන් සිදුවන අවස්ථාවක දී, (මෙහි මින්මතු "ඉල්ලුම්කරු" යනුවෙන් සඳහන් කරනු ලබන) (2) වන උපවගන්තියේ සඳහන් තැනැත්තකු වෙත එම තැනැත්තාගේ මරණය සිදුවූයේ එම වෙනත් යම් තැනැත්තකුගේ අයුතු ක්‍රියාව, නොකර හැරීම, අතපසු කිරීම හෝ පැහැර හැරීම හේතුවෙන් ද එම වෙනත් යම් තැනැත්තාට එරෙහිව අලාභ අයකර ගැනීම සඳහා නඩුවක් පවත්වාගෙන යෑමට, අයිතියක් තිබිය යුතු ය.

(2) (අ) දෙමව්පියන්ගෙන් අයකු හෝ දෙමව්පියන් එක්ව;

(ආ) ළමයකු හෝ ළමයින් එක්ව;

(ඇ) සහෝදර සහොදරියන්ගෙන් අයකු හෝ සහෝදර සහෝදරියන් එක්ව;

(ඈ) සීයා හෝ ආච්චි හෝ සීයා හා ආච්චි එක්ව; හෝ

(ඉ) භාරකරු,

විසින් නඩුව පවත්වාගෙන යා හැකි ය.

යම් තැනැත්තකුගේ මරණය සම්බන්ධයෙන් අලාභ

3. යම් තැනැත්තකුගේ මරණය සම්බන්ධයෙන් අලාභ අයකර ගැනීම සඳහා වූ නඩුවක දී, ඉල්ලුම්කරු විසින් -

(අ) එම තැනැත්තාගේ ආදරය සහ කරුණාව මෙන්ම රැකවරණය සහ සහසම්බන්ධතාව අහිමිවීම සම්බන්ධයෙන්; සහ

(ආ) මානසික වේදනාව සහ පීඩාව සම්බන්ධයෙන්,

අලාභ ලබාගනු ලැබිය හැකි ය.

අනුප්‍රාප්තිය සඳහා අයිතියක් නැති බව

4. (අ) මේ පනත යටතේ හිමිකමක් ඉල්ලීමට පෙරාතුව; හෝ

(ආ) හිමිකමක් ඉල්ලීමෙන් පසුව එහෙත් නඩු තීන්දුව ලබා දීමට පෙරාතුව,

ඉල්ලුම්කරු මියයන අවස්ථාවක දී, අලාභ ලබාගැනීම සඳහා මියගිය ඉල්ලුම්කරුගේ උරුමක්කරුවන්ට, පොල්මෑකරුවන්ට හෝ අද්මිනිස්ත්‍රාසිකරුවන්ට කිසිදු අයිතියක් නොතිබිය යුතු ය.

විද්වතකුගේ සහාය ලබාගැනීම

5. මේ පනත යටතේ වූ යම් කරුණක් තීරණය කිරීමේ කාර්ය සඳහා, අධිකරණය විසින්, සලකා බලනු ලබන කරුණට අදාළව යම් විශේෂිත කුසලතාවයක් ඇති තැනැත්තන් එක් අයකුගේ හෝ වැඩි දෙනෙකුගේ සහාය ලබා ගැනීම සඳහා කැඳවනු ලැබිය හැකි ය.

අත්හැර දැමීමක් සිදු කර ඇති අවස්ථාවක දී අලාභ ගෙවීම

6. මියගිය තැනැත්තා අත්හැර දමා ඇත්තා වූ යම් තැනැත්තකුට, මේ පනත යටතේ අලාභ ඉල්ලීම සඳහා හිමිකමක් නොතිබිය යුතු ය.

වෙනත් යම් ප්‍රතිකර්මයකට අතිරේකව මේ පනතේ විධිවිධාන පවතින බව

7. මේ පනතේ විධිවිධාන, වෙනත් යම් ලිඛිත නීතියක් හෝ අලිඛිත නීතියක් මඟින් විධිවිධාන සලස්වා ඇති ඔවුනොත් යම් අයිතියකට හෝ ප්‍රතිකර්මයකට අතිරේකව විය යුතු මෙන්ම සහ එම අයිතිය හෝ ප්‍රතිකර්මය එමඟින් අඩු කරනු නොලැබිය යුතු ය.

අනනුකූලතාවක් ඇති වූ විට සිංහල භාෂා පාඨය බලපැවැත්විය යුතු බව

8. මේ පනතේ සිංහල සහ දෙමළ භාෂා පාඨ අතර යම් අනනුකූලතාවක් ඇති වුවහොත්, එවිට, සිංහල භාෂා පාඨය බලපැවැත්විය යුතු ය.

வேறொருவரின் தவறான செயல், செய்யாமை, கவனயீனம் அல்லது தவறுகை ஒன்றினால் விளைவிக்கப்பட்ட ஆளொருவரின் இறப்புக்கான சேதவீடுகளை அறவிடுவதற்காக ஏற்பாடு செய்வதற்கும் மற்றும் அத்னுடன் தொடர்புபட்ட அல்லது அதன் இடைநேர்விளைவான கருமங்களுக்காக ஏற்பாடு செய்வதற்குமானதொரு சட்டம்.

இலங்கைச் சனநாயக சோசலிசக் குடியரசின் பாராளுமன்றத்தினால் பின்வருமாறு சட்டமாக்கப்படுவதாகுக:-

சுருக்கப் பெயர்.

1. இச்சட்டம் 2018ஆம் ஆண்டின் ..... ஆம் இலக்க, ஆளொருவரின் இறப்புக்கான சேதவீடுகளை அறவிடுதல் சட்டம் என எடுத்துக்காட்டப்படலாம்.

வழக்கொன்றைப் பேணுவதற்கான உரிமை.

2. (1) வேறொருவரின் தவறான செயல், செய்யாமை, கவனயீனம் அல்லது தவறுகை ஒன்றினால் ஆளொருவரின் இறப்பு விளைவிக்கப்படுமிடத்து, (இதனகத்துப் பின்னர் "விண்ணப்பகாரர்" எனக் குறிப்பீடுசெய்யப்படும்) (2)ஆம் உட்பிரிவிற் குறிப்பீடு செய்யப்பட்ட ஆள், எந்த ஆளின் தவறான செயல், செய்யாமை, கவனயீனம் அல்லது தவறுகையினால் அத்தகைய ஆளின் இறப்பு விளைந்ததோ அந்த ஆளுக்கெதிராக, அதுதொடர்பில் சேதவீடுகளுக்கான வழக்கொன்றைப் பேணுவதற்கு உரிமையுடையவராதல் வேண்டும்.

(2) வழக்கானது பின்வருவோரினால் பேணப்படலாம்:-

(அ) பெற்றோரொருவர் அல்லது கூட்டாக பெற்றோர்கள்;

(ஆ) பிள்ளை அல்லது கூட்டாக பிள்ளைகள்;

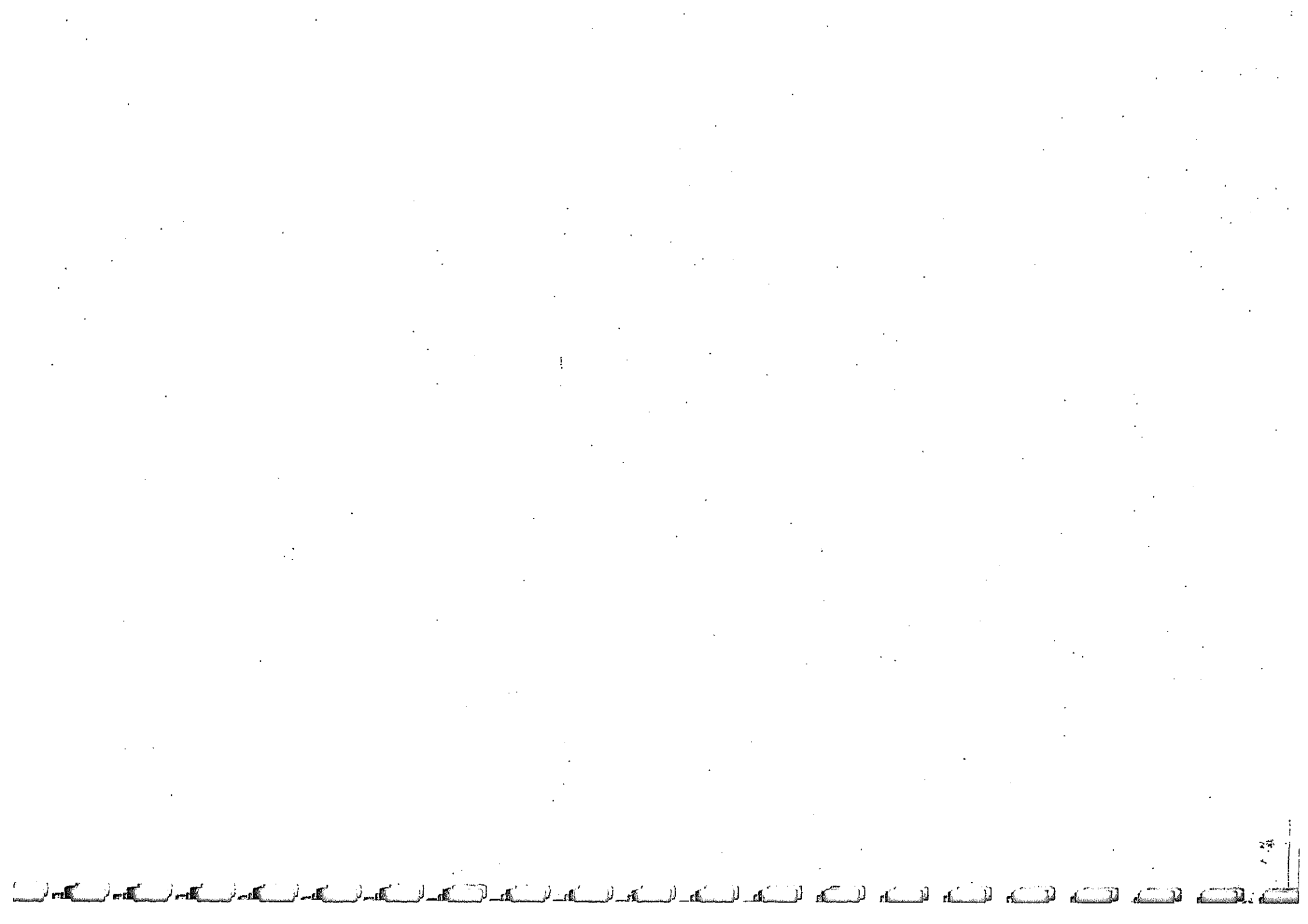
(இ) உடன்பிறந்தோர் அல்லது கூட்டாக உடன்பிறந்தோர்கள்;

(ஈ) பாட்டன் அல்லது பாட்டி அல்லது கூட்டாக பாட்டன் மற்றும் பாட்டி;

(உ) பாதுகாவலர்.

ஆளொருவரின் இறப்புக்கான சேதவீடுகள்.

3. ஆளொருவரின் இறப்புக்கான சேதவீடுகளை அறவிடுவதற்கான வழக்கொன்றில், விண்ணப்பகாரர், பின்வருவனவற்றுக்கான



சேதவீடுகளை அறவிடலாம் -

(அ) அவ்வாளின் அன்பு, ஆதரவு, கவனிப்பு மற்றும் தோழமை என்பவற்றின் இழப்பு; அத்துடன்

(ஆ) மனவேதனை மற்றும் துன்பம்.

அடுத்துறுவதற்கான உரிமையில்லை.

4. விண்ணப்பகாரரொருவர் -

(அ) இச்சட்டத்தின்கீழான உரிமைக்கோரிக்கையொன்று செய்யப்படுமுன்னர்; அல்லது

(ஆ) உரிமைக்கோரிக்கையொன்று செய்யப்பட்ட பின்னர் ஆனால் தீர்பொன்று ஆக்கப்படுமுன்னர்,

இறக்குமிடத்து, அத்தகைய இறந்துள்ள விண்ணப்பகாரரின் மரபுரிமையாளர்கள், நிறைவேற்றுநர்கள் அல்லது நிருவாகிகள் சேதவீடுகளுக்கான உரிமையெதனையும் கொண்டிருத்தலாகாது.

நிபுணரொருவரின் உதவி.

5. நீதிமன்றமானது, இச்சட்டத்தின்கீழான ஏதேனும் கருமம்பற்றி முடிபுசெய்யும் நோக்கத்துக்காக, கவனத்தின்கீழுள்ள கருமத்துக்கு இயைபான ஏதேனும் கருமத்தில் விசேட தேர்ச்சிபெற்றவர்களான ஒன்று அல்லது அதற்கு மேற்பட்ட ஆட்களின் உதவியைக் கோரலாம்.

கைவிடுகை ஏற்பட்டுள்ளவிடத்தான சேதவீடுகள்.

6. இறந்துள்ள ஆளைக் கைவிட்டுள்ள எவரேனும் விண்ணப்பகாரர் இச்சட்டத்தின்கீழான சேதவீடுகளை உரிமைகோருவதற்கு உரித்துடையவராதலாகாது.

இச்சட்டத்தின் ஏற்பாடுகள் வேறேதேனும் பரிகரிப்புக்கு மேலதிகமானவையாக விருத்தல்.

7. இச்சட்டத்தின் ஏற்பாடுகள், வேறேதேனும் எழுத்திலான சட்டத்தினால் அல்லது எழுத்துருவில்லாத சட்டத்தினால் வழங்கப்பட்ட வேறேதேனும் உரிமைக்கு அல்லது பரிகரிப்புக்கு மேலதிகமானவையாக இருத்தல் வேண்டும்; அவற்றைக் குறைப்பனவாகவல்ல.

ஒவ்வாமை ஏற்படும் பட்சத்தில் சிங்கள உரை மேலோங்கி நிற்றல்.

8. இச்சட்டத்தின் சிங்கள, தமிழ் உரைகளுக்கு இடையே ஒவ்வாமை ஏற்படும் பட்சத்தில் சிங்கள உரையே மேலோங்கி நிற்றல் வேண்டும்.

2018

Divorce, Custody and alimony Law

Proposed by

Law Commission of Sri Lanka

THE RECOMMENDATIONS OF THE LAW COMMISSION WITH REGARD TO AMENDING THE LAW PERTAINING TO DIVORCE, CUSTODY AND ALIMONY.

CONSOLIDATION/CODIFICATION OF THE LAW

The Commission is of the view that for the purposes of clarity, convenience of ascertainment and for logical presentation and sequence, the laws/statutes presently dealing with Divorce, Alimony and Custody, should be codified in one single integrated statute, in order to introduce a systemized, single law on the above subjects.

A DEFINITION/CONCEPT

The codified law should contain a definition of "irretrievable breakdown of marriage" and/or the formulation of the concept of the same.

One possible formulation could be as follows :-

The marriage has deteriorated to such an extent that there is no reasonable prospect of the resumption of marital relations.

Another possible formulation may read as follows :-

Where the parties are unable to unwilling to co-habit and there are no reasonable prospects of re-conciliation.

THE GROUNDS FOR DISSOLUTION OF THE MARRIAGE -

The grounds for dissolution should be the presently established grounds (also with an inclusion of the ground of cruelty/violence/abuse etc). The Commission's recommendation is, in addition to these grounds, the further and additional ground of **"irretrievable breakdown of marriage", to be included as a separate and distinct ground of divorce.**

A CONSENSUAL SITUATION

With regard to a purely consensual situation, where both parties unanimously agree that there should be a dissolution of marriage on a no fault basis, then there can be a joint application made in order to move court that there is an irretrievable breakdown situation and the court could, in the normal course, unless there are exceptional circumstances which militate against the same, grant the divorce on the said grounds.

One of the said exceptional situations could be where the attendant circumstances are such, that the Judge reasonably forms the view that the purported consent given by one of the parties, is not real consent, but that the same has been procured through/by duress, undue influence/disadvantaged bargaining status/lack of resources, to engage in litigation etc or that the said consent is a façade and is illusory.

In such a situation, the court could be vested with the discretion and the jurisdiction to decide whether in fact, there is full consent between the two parties.

In the exercise of such discretion, the court would be guided by the provisions of the newly proposed, codified statute, pertaining to the basic guidelines/indicative factors enumerated therein, in order to decide whether there is in fact a breakdown situation.

The Law Commission is mindful of the fact that obviously, there is no fool proof system, but the above matters could serve to balance the following competing interests :-

a) On the one hand, the interests of a quick/clean break on the basis of a no fault based divorce, where both parties have taken full cognizance of the fact that they have irreconcilable differences, or have fallen out of love or that the marriage has deteriorated to such a degree that there is no reasonable prospect of it being resuscitated, AND

b) On the other hand, the need for due sanctity to be accorded to the institution of marriage, as a social institution, which is deeply embedded within the consciousness of the people, AND

c) the need to protect a party whose purported consent is not real consent, for some of the reasons inter-alia, set out in the preceding paragraphs above.

A SITUATION WHERE THERE IS NO MUTUAL CONSENT BECAUSE ONE PARTY DOES NOT WANT A DIVORCE

In a situation where there is no consent and one party seeks the dissolution of the marriage on the basis of breakdown, then there could be a minimum period of two years before the dissolution would be granted ipso facto by the effluxion of such period per se.

During that period, the parties may consensually, or unilaterally, decide whether they wish to live together or not, during this period.

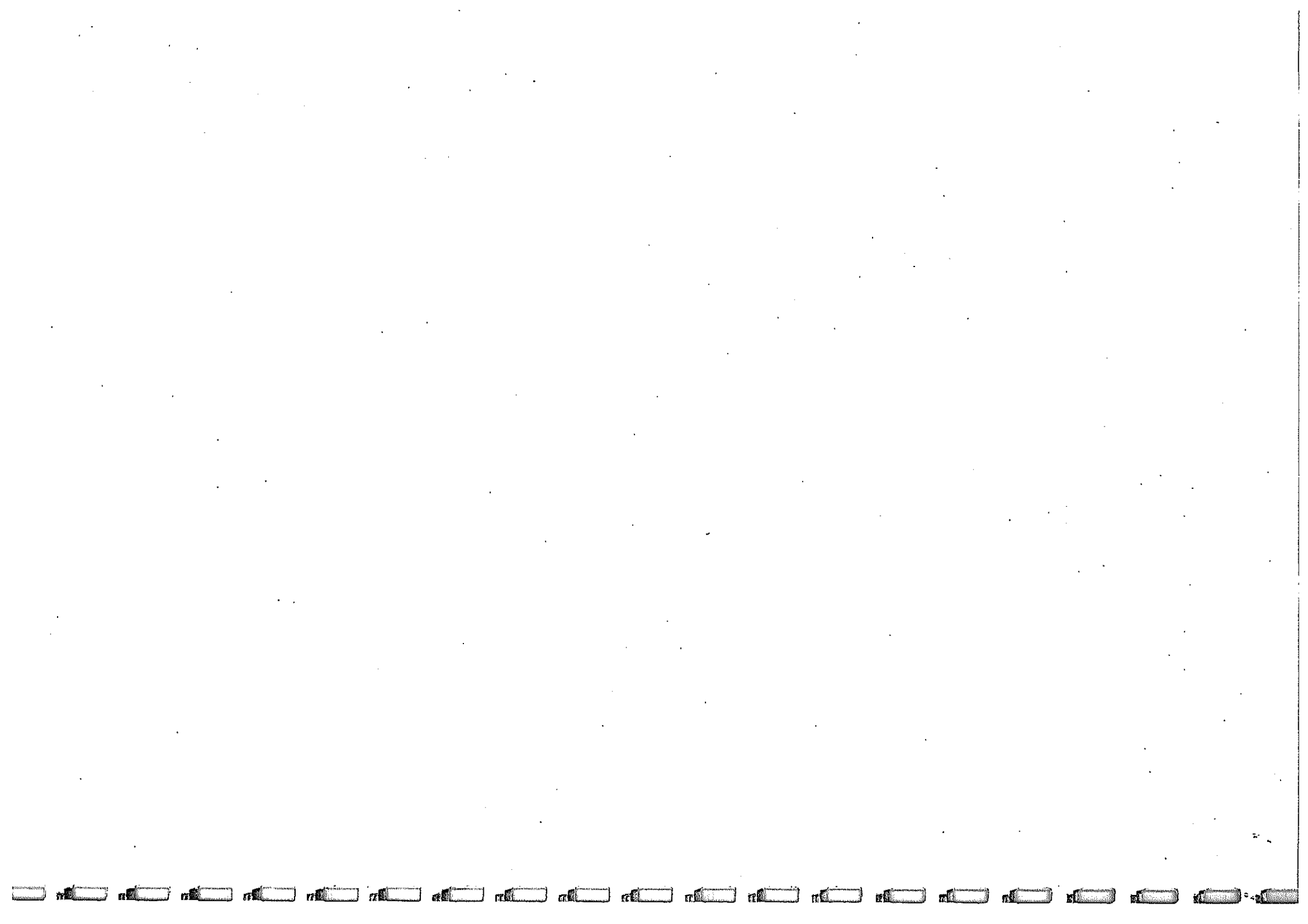
This would be particularly useful when the marriage is an abusive one, of either physical or emotional abuse.

At the end of the two year period, the law should provide for a presumption to be drawn that the marriage has irretrievably broken down, and that the divorce could be granted accordingly.

But in order to impose a safeguard, the Commission is of the view that this should be subject to the qualification that this presumption would be a rebutable one and that if one party seeks to have the said presumption rebutted, on the basis of adequate indicia and evidence, then the court would once again have the discretion to make a decision thereon, having recourse to the definition and indicative factors/governing factors, pertaining to irretrievable breakdown and also determine in the course thereof, whether there is a reasonable prospect/possibility of the marital relations being revived or resumed and conclude accordingly whether it would therefore be premature to grant the divorce on the ground of breakdown.

As an additional situation, notwithstanding the effluxion of the two year period stipulated by statute, if the court is of the view that the best interests of the issue/children of the marriage would be seriously affected, then in such a situation too, the court would be empowered to decide whether in terms of the indicative guidelines/governing factors, that there is in fact an actual breakdown situation.

The Commission is further of the view that there should not be a minimum period before which either spouse or both spouses can APPLY OR MOVE Court for a dissolution of the marriage, on the basis of an irretrievable breakdown of the marriage.



CUSTODY

The best interests of the child should be the paramount and over-riding consideration.

Perhaps in the case of a child below and upto the age of two or three, preference should be accorded to the mother, unless there are strong factors that militate against the mother being granted custody, due to her unsuitability.

Other than the case of a child below and upto the age of 2 or 3 years, joint custody could be granted, pending the main inquiry. But during this period, if and upon adequate material being shown by either party, the court can be moved that one party is not suitable to have the joint custody of the child, prior to the main inquiry

Some form of time lines should be imposed in respect of the main inquiry, in order to expedite the same, in the interest of the child, so that the child could settle down his/her routine, which should be disrupted as minimally as possible.

ALIMONY

The Commission is of the view that the normal principle to be adopted should be that it should not exceed a 50 /50 ratio with regard to the division of community property.

However, the Court could by law be vested with a specific "JUST AND EQUITABLE JURISDICTION" to decide the matter according to the exigencies attendant upon the case.

The Court should decide in its discretion, and upon reasonable cause being shown, what the most appropriate equation should be, having regard to the attendant circumstances,in respect of community property, taking cognizance of multiple factors, like financial affluence, capacity, contribution to the marriage, sacrifices made in respect of one's career in order to keep the home fires burning or caring for the children, disadvantaged status, unequal bargaining power, etc.

The various categories/stages of alimony to be clearly spelt out in the proposed codified statute.

One of the guiding principles, depending on the stage at which alimony is sought, would be that the persons paying the alimony, shouldmaintain the other spouse in the same situation/condition/comfort/affluence, that she/he was used to during the pendency of the marriage.

But Alimony in general, should not be a duty in perpetuity.

MAINTENANCE

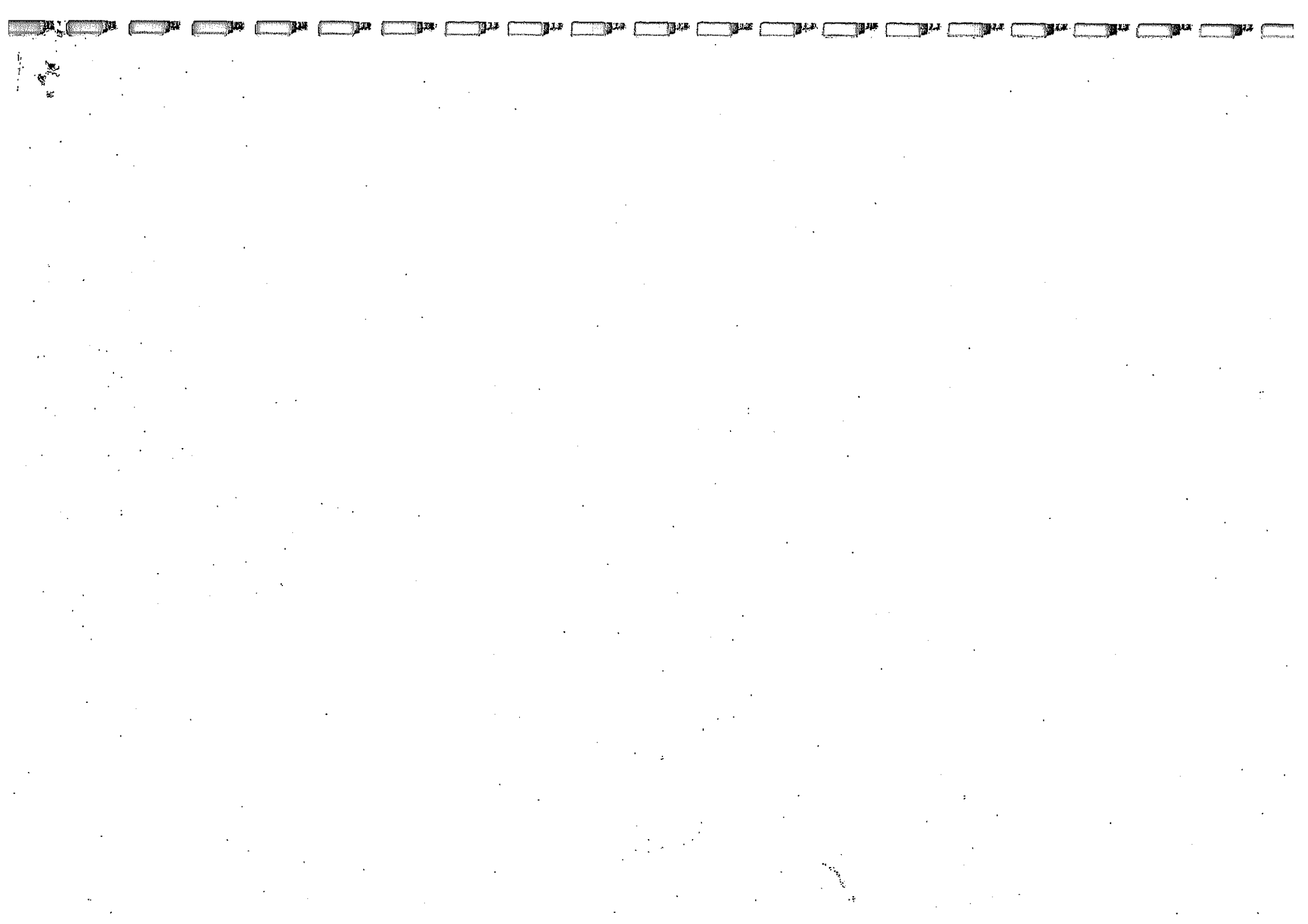
The jurisdiction to be vested in the District Court and not the Magistrate's Court, and as a complimentary adjunct thereto, adequate enforcement and punitive powers to be also vested with the District Court.

THE DIVISION OF PROPERTY UPON THE DISSLOLUTION OF THE MARRIAGE

With regard to property which was acquired during the course of or subsistence of the marriage, the same should, in the ordinary course, be divided on the basis of a ratio approximating to an equal division of 50/50.

But with regard to inherited property (like Thediathettam in the Thesawalamai law), the individual spouse who inherited such property should be permitted to retain the same.

However, the problem arises where there is no other property that was acquired during the subsistence of the marriage, in which event, the Court would have the discretion to achieve some equitable distribution of property.



2017

Amendments of the Companies act No.07 of 2017

Proposed by

Law Commission of Sri Lanka

Consequent to what we agreed on at the last meeting, I have attempted a rough draft of possible sections to be included in respect of the revival of sick companies, for comment and suggestions please.

SUGGESTED PILOT DRAFT SECTIONS

An application for the declaration of sickness of a Company, may be instituted in the High Court of the Western Province (Exercising Civil Jurisdiction) District Court having jurisdiction in the matter, by any one or more of the following parties :-

I. A Company,
II. A Shareholder,
III. A Director,
IV. A Creditor (NB. here I feel we should insert a basic threshold)
V. Any other person who is deemed by the Court, to have a sufficient interest in the welfare or the revival of the Company.

1. Any such application that may be made to Court under subsection (1) above, shall be supported with a formal Certificate, issued by a Firm of Independent Auditors, endorsing that the Company is presently not a going concern and that in the considered professional opinion of the said Firm of Auditors, having regard to the overall financial position of the company and the projected financial position, duly assessed in terms of Sri Lanka Accounting and Auditing standards, that there is no reasonable prospect, in the ordinary course of business, that such company would assume the status of a viable going concern in the future.

2. The firm of Auditors issuing such certificate, shall have not less than three members or partners as the case may be, holding valid practicing licenses, issued by the Institute of Chartered Accountants of Sri Lanka.

   Provided however, that the professional services of such firm of Independent Auditors shall not have been previously retained by such company, at any point of time.

3. Any such application as referred to in sub-section (1) above, may also be accompanied by any others documents in support thereof, in order to satisfy the Court with regard to the sickness of the Company and with regard to the status of the petitioner to institute such application.

4. However, if the certificate issued by the above mentioned Firm of Auditors, certifies that the company is not a going concern and that there is no reasonable prospect, in the ordinary course of business, that such company would be a viable going concern in the future, then such certificate shall constitute prima facie proof of the fact that the Company is not a going concern.

   Provided however, that an application that is made without a certificate issued by a certified auditor, shall not be entertained, unless an independent firm of Auditors, having not less than three members or partners, as the case may be, holding valid practicing licenses, issued by the Institute of Chartered Accountants of Sri Lanka, is made a party respondent, or the members or partners thereof, are made party respondents to the application, as the case may be.

   Provided further, that the professional services of such firm of independent Auditors shall not have been previously retained by such company, at any point of time.

5. Upon a duly constituted application for declaration of sickness being instituted, the Court shall notice all the respondents, who shall be permitted to file statements of objections, within a period of ..... the summons returnable date and the petitioner shall be permitted to file a statement in reply thereto, within a period of .....

6. No party shall be entitled to any extension of time with regard to the pleadings referred to above and upon the counter-reply of the petitioner being duly filed, or where the petitioner indicates that he does not wish to file any such statement in reply, then upon the filing of the statement of objections of the respondents, the court shall forthwith fix the matter for inquiry, and such inquiry shall be fixed not later than two months therefrom.

7. If the Court comes to the conclusion, upon due inquiry that the certificate of the auditor is not acceptable, having regard to Sri Lankan Accounting and Auditing Standards or the standard of professionalism governing the duties and functions of a Registered Auditor, holding a licence to practice, issued by the Sri Lanka Institute of Chartered Accountants, the Court may order the Firm of Auditors, issuing the certificate, to pay a penalty in an amount specified by the Court, into the account of the Court.

8. The quantum of such penalty shall not exceed a sum of Rs.

9. The order made by the Court, pertaining to the declaration of sickness of a Company and permitting the application to proceed, shall not be subject to an appeal and shall be final.

10. Upon such a final order being made, the court may make all such orders as it thinks fit, in order to facilitate the revival resuscitation of the Company, into a viable going concern, including but not limited to the following matters and upon such terms and conditions as it may consider to be just and equitable :-

a) Appointing a Committee or Committees, to facilitate the revival process, subject to the direction and supervision if necessary, of the Court .

b) Appointing a firm or firms of independent auditors, to supervise all financial matters, subject to the direction of the Court or of any court appointed committee, as the Court may deem fit.

c) The conducting of further audits by the said Court appointed Auditors, in order to :-

(i) ascertain the precise nature of the assets and liabilities of the Companies,
(ii) to report to court with regard to the progress made and the financial status of the company during all and every stage of the revival process,
(iii) to make financial forecasts and projections, based on Sri Lanka Accounting Standards,
(iv) To furnish a formal certificate upon the conclusion of the revival process, pronouncing upon the conversion of the company from a sick company into a viable going concern,
(v) Or in the alternative, to report to court as to whether all attempts at revival have failed and that the ongoing financial status of the company is such, that it is incapable of any further revival into a viable going concern,

d) Directing the calling of requests for investment proposals and appointing a Committee or Auditors, for the formal and objective evaluation of the proposals in order to select the most advantageous financial proposal and to report back to court with regard to the adequacy of the said proposal and the credibility of the proposal, in order to secure the conversion of the company from a sick company into a viable going concern.

e) Directing the evaluation committee to select the proposal, which is Qualitatively and Quantitatively, the most advantageous and responsive proposal.

f) Directing that the investor or investors whose financial proposal is selected, as hereinafter provided, shall be thereafter added as party respondents by the petitioner, in order to permit them to be heard before the Court.

g) Permitting such investor or investors, as the case may be, to file a statement in order to apprise the Court of any concerns or issues that they wish to raise and for the purposes of satisfying the court at any point of time, of the continuing fitness of its proposal.

h) Directing the investor, to infuse further capital or funds, over and above those committed in the financial proposal, for the purpose of securing the revival of the company, that the court may deem as being reasonable and not one which constitutes an excessive or unreasonable burden on the investor.

i) Directions with regard to all reporting structures during the process of revival.

j) The establishment of a fund titled the "Investment Fund", to which all monies pertaining to the revival process, including those made by the selected investor or investors as the case may be, shall be deposited and maintained.

k) For the disbursement of monies from the Investment Fund.

l) The identification and prioritization of the order and manner of the payment or satisfaction of the liabilities of the Company.

m) The formulation of a scheme of payments and all the relevant methodologies to be adopted.

n) The discharge of all the contractual and legal obligations of the Company, including but not limited, to the statutory dues of the employees.

o) Notwithstanding the articles of association of the company, restrain any one or more of the Directors of the Company, from functioning as directors or from participating at any board meeting, during the process of the revival and upto the stage of the issuance of the certification by the Auditors of the completion of the revival process,

p) Directing the investor to make a mandatory offer for the purchase of the shares of all or any one or more of the existing shareholders of the company, at a price to be determined by the Court, after consultation with any court appointed auditor or at the net share price.

q) In the event of the shareholders or a sufficient number of shareholders being unwilling to dispose of their shareholding in favour of the investor, direct the issuance of further share equity in order to accommodate the elevation of the investor equity holding in the company.

2016

Proposed Amendments to the Civil Aspects of International Child Abduction

Proposed by

Law Commission of Sri Lanka

Convention on the Civil Aspects of International Child Abduction, No. 11 of 2001

The Hague Convention on Civil Aspects of Child Abduction was primarily designed to ensure that a parent or other person does not remove the child from its habitual residence to another location for the purpose of depriving the other parent and the child of the enjoyment of custody that they would otherwise have. Thus, the Hague Convention requires ratifying States to return children to their habitual residence if they have been abducted out of such place of habitual residence by a parent or another person. This obligation is subject to certain exceptions, such as where the removal was with the consent or acquiescence of those bearing rights to custody; and situations where grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. These exceptions are also reflected in Sri Lanka's domestic legislation (Civil Aspects of International Child Abduction Act No. 10 of 2001).

Notwithstanding these exceptions however, there are situations in which the return of the child may not reach the threshold of the specified exceptions, but may nevertheless result in perverse outcomes. In such cases, the judge is not empowered to make a decision not to return a child, even if such return appears to the judge to be in the best interests of the child.

Section 11 (1) of Act 10 of 2001 provides the Court with the discretion to refuse to return a child to his/her country of habitual residence in the following situations:

> *(a) the person, institution or other body having the care of the person of the child was not exercising such rights of custody at the time of removal or retention, as the case may be, or had consented to, or subsequently acquiesced in, such removal of retention, as the case may be ; or*
>
> *(b) there is grave risk that the child's return would expose the child to physical or psychological harm of otherwise place the child in an intolerable situation*

Best interests of the child and the Hague Convention

Proponents of strict adherence to the Convention insist that the compromise reached between States during the drafting of the Convention reflects the best interests of the child, as all children have a right not to be taken away from their place of habitual residence without a court of law in such jurisdiction determining whether such removal is in fact in their best interests. They cite the need for deterrence, and that a summary return of the child without extensive litigation would better achieve this.

Despite this, however, there are serious concerns regarding the absence of specific reference to the best interests of the child as a reason not to return a child. This is particularly the case since Sri Lanka is under a legally binding international obligation to ensure that the best interests of the child shall be a primary consideration in all actions concerning children, whether in courts or otherwise. Article 3(1) of the Convention on the Rights of the Child reads: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a ***primary*** consideration." (emphasis added)

Second, Sri Lankan civil jurisprudence has recognized the best interests of the child standard as the primary consideration, especially with respect to custody applications. This principle is also applied in other cases as well. In any event, Parliament has now determined that the best interest standard would apply to all matters concerning children. Section 5 (2(of the ICCPR Act provides that: "[i]n all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of ***paramount*** importance." (emphasis added)

Given the provisions of the ICCPR Act, it may be argued that the High Court when considering the return of a child to his/her habitual residence is bound to apply the best interest standard even in Hague Convention proceedings. However, Act 10 of 2001 is indubitably *lexspecialis*with respect to actions concerning the return of children to their habitual residence, which may lead a court to disregard the provisions of section 5(2) of the ICCPR Act—and our common law—in favour of the specific provisions of the law on international child abductions. In these circumstances, there is a need for legislative intervention to address existing ambiguities and specifically provide for the standard judges are to adopt.

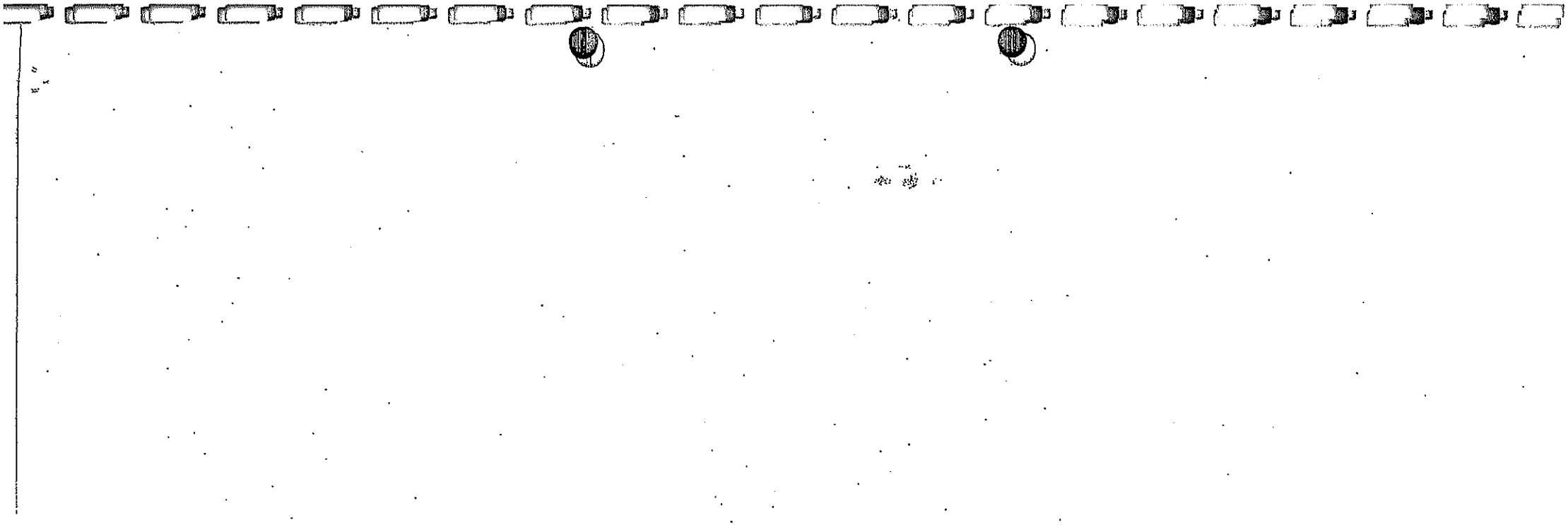
Comparative Experience

Sri Lanka is not the only jurisdiction to struggle with the seemingly draconian provisions of the Hague Convention on International Child Abduction.

In the case of ***Neulingerand Shurukvs Switzerland***[1], the Grand Chamber of the European Court on Human Rights concluded this analysis of the principles by noting that it followed from Article 8 of the European Convention on Human Rights[2] that a child's return could not be ordered automatically or mechanically when the 1980 Hague Convention was applicable. The child's best interests, from a personal development perspective, would depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.Consequently, those best interests had to be assessed in

[1] *Neulinger and Shuruk v. Switzerland* (Application No 41615/07), Grand Chamber, INCADAT Reference HC/E/ 1323

[2] Article 8(1) of the Convention provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."



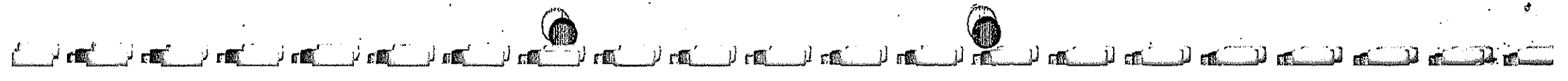
each individual case. This was primarily a task for domestic authorities, and in that they enjoyed a certain margin of appreciation, but this was subject to a European supervision whereby the Court would review under the ECHR the decisions that those authorities have taken in the exercise of that power.

The Court added that it had to ensure that the domestic decision-making process was fair and allowed those concerned to present their case fully. It was for the Court to ascertain whether the domestic courts had conducted an in-depth examination of the entire family situation and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.

The Court has followed this approach in two other cases: ***Sneersone and Campanella v. Italy*** (14737/09) and ***X v. Latvia***(27853/09). Both these cases involved a mother who had allegedly abducted the children out of the habitual residence of the children. The Courts held that a summary return of the child breached Article 8 of the European Convention, and that the said Article required a detailed assessment of the interests of the competing interests of the parties including that of the child.

Application to Sri Lanka

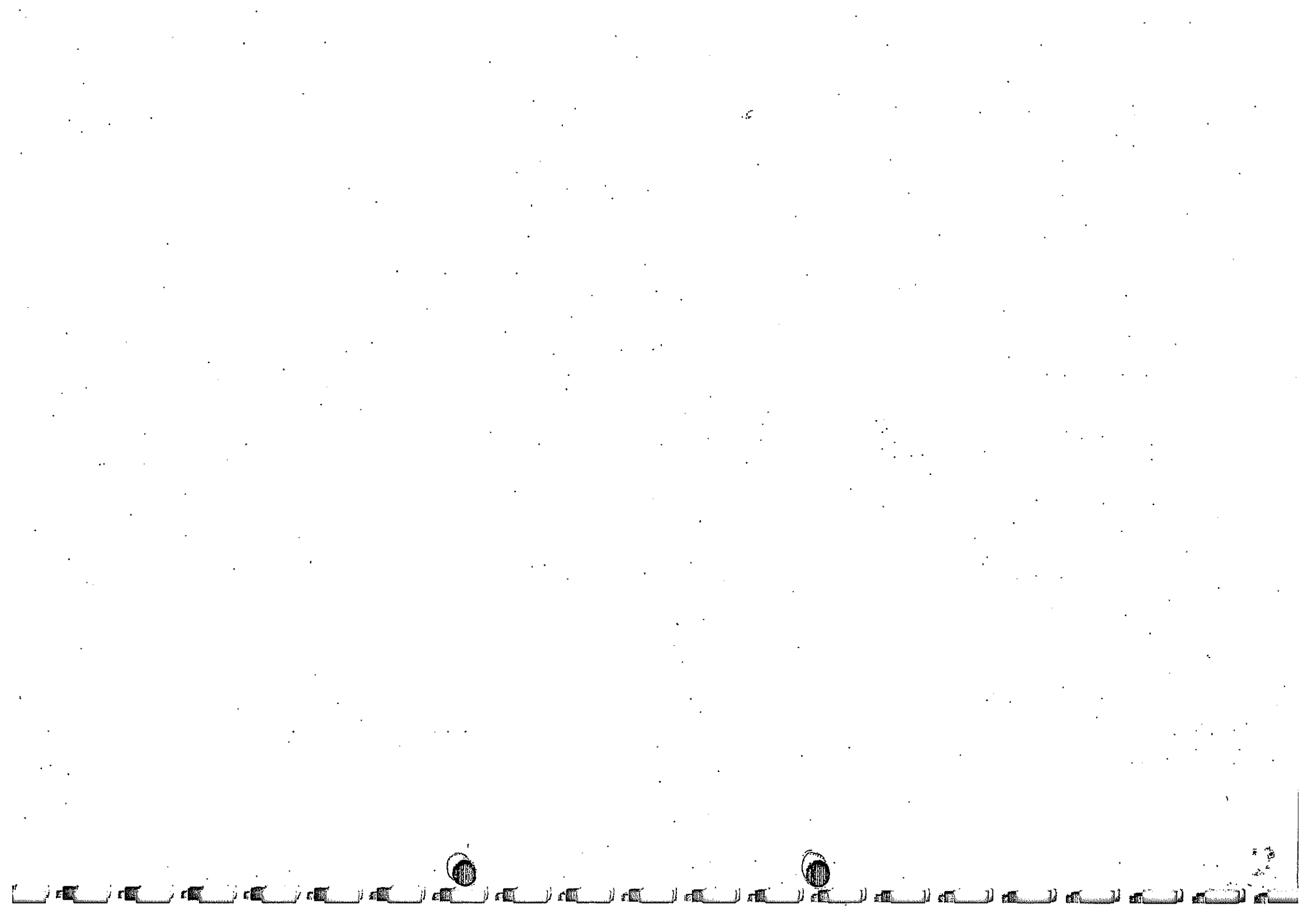
In the Sri Lankan context, there is an additional but serious consideration pertaining to delays. Given delays in the dispensation of justice, and notwithstanding the fact that a summary procedure is supposed to be adopted with respect to return proceedings, the reality is that our legal system could well take several years between the date of the removal of the child to Sri Lanka and enforcement of an order to return a child to another country. It is entirely possible that the child could become well settled in Sri Lanka during that period, and accustomed to life here, such that return of the child could retard the child's development and progress. In these circumstances, it would be salutary if the Court could have recourse to this factor. However, this principle must be balanced against the need to avoid incentivizing the removing parent engaging in dilatory tactics to increase the likelihood of a resolution in his/her favour. The best interests of the child standard strikes this balance, as it permits a balanced consideration of the child's status and quality of life in Sri Lanka against the right of the child and the remaining parent to access and/or custody as the case may be.



Conclusion

In view of the foregoing, the Law Commission may wish to consider the following amendments to Section 11(1) of Act 10 of 2001:

1. Repeal of the provision "(b) there is grave risk that the child's return would expose the child to physical or psychological harm of otherwise place the child in an intolerable situation" and replace it with the provision "(b) the child's return would not be in the best interest of the child"; or
2. Retain (a) and (b) and insert "(c) the child's return would not be in the best interest of the child"; or
3. Amend (b) to read: "(b) the child's return would not be in the best interest of the child or there is grave risk that the child's return would expose the child to physical or psychological harm of otherwise place the child in an intolerable situation"



2016

Proposed Amendments of the Arrest Procedures

Proposed by

Law Commission of Sri Lanka

ARREST

The textual and judicial authorities appear to have some degree of consensus with regard to the following, fundamental first principles :-

The investigation of criminal offences is the first essential step in the system of administration of justice.
The term "arrest", is defined in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as "the act of apprehending a person for the alleged commission of an offence, or by the action of an authority".

The purposes of an arrest are trite, i.e, to prevent a person from committing, or continuing to commit, an unlawful act, to enable an investigation to be carried out in relation to an alleged unlawful act committed by the person arrested or to present a person before a court, for consideration of any charges against him or her.

The principle of individual liberty is one of the essential core principles from which all human rights flow. Deprivation of liberty is an extremely serious matter and can be justified only when it is both lawful and necessary.

The three principles of liberty, legality and necessity underlie all the specific provisions on arrest. Deprivation of liberty is subject to judicial scrutiny. There are judicial and constitutional safeguards against arbitrary interference with the liberty of the person.

FREEDOM FROM ARBITRARY ARREST – ARTICLE 13(1)

Article 13(1) of the Constitution postulates that :-, "No person shall be arrested except the procedure established by Law. Any person arrested shall be informed of the reason for his arrest.

PROTECTION AGAINST ARBITRARY DETENTION – ARTICLE 13(2)

Article 13(2) provides that "Every person held in custody, detained or otherwise deprived of personal liberty, shall be brought before the judge of the nearest competent court, according to

procedure established by Law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with the procedure established by Law.

Any person arrested must be brought without undue delay before a court of law, whose function is to ascertain, as guardian of the liberty of the individual, that the deprivation of liberty occurred in accordance with law.

ARTICLE 14(I)(h) - THE RIGHT TO FREEDOM OF MOVEMENT

Article 14(1) (h) recognizes the freedom of movement of a citizen.

THE PRIMACY ACCORDED TO THE PRESUMPTION OF INNONCE

Article 13(5) of the Sri Lankan Constitution 1978 stipulates as a matter of a rigourosly important, first principle, that every person shall be presumed innocent, until he is proven guilty. If any person is arrested and if thereafter, he is exonerated of the alleged offence then issues of severe injustice arise.

THE EXCEPTIONS/RESTRICTIONS IMPOSED BY ARTICLE 15(7)

In terms of Article 15(7) of the Sri Lankan Constitution 1978, the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14, shall be subject to such restrictions, as may be prescribed by Law, in the interest of National security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "Law" includes regulations made under the law for the time being, relating to public security.

The much vexed issue then is, should arrest be the exception or the general norm.
The much vexed issue is whether arrest should be the general norm or the exception

Although society, as a collective entity, has to be protected from offenders and criminals and also, although both punitive justice and also deterrent justice should be resorted to in appropriate circumstances, nevertheless, these paramount collective interests, but also be sufficiently and suitably balanced with the entrenched rights and interests and liberties of the individual, who is the basic constituted element of collective society.

Thus, it would be appropriate to consider suitable amendments to the existing law in order to move towards a regime where arrest is not necessarily the norm and not mechanically or perfunctorily resorted to but regarded as a mechanism or device invoked as somewhat of a last resort.

Obviously, in the following situations for instance, arrest would essential :-

For instance :

a) upon reasonable suspicion of his having committed, or about to commit, a criminal offence or a breach of breach of the peace or where it is reasonably apparent that there is a threat to law and order

b) during the commission of an offence, or in a situation where such commission is obviously imminent to any reasonable person

c) obviously, in execution of for instance, of a judicial order or detention order

However, in the rest of the cases, (which would in reality, be the majority of the instances), it could well be argued that the following guiding principles and norms should come into effect prior to and/or when making/deciding to make arrest and that the same should incorporated in a formal provision of law/statute :-

Arrest could be resorted to when there is or there is a reasonable probability of :-

- any flight risk

- If the accused person attempts to or is likely to interfere with or influences or impedes in some way, the investigation

If the accused person interferes with or is likely to interfere with witnesses

- If there is any public disquiet

Furthermore, Rules could be promulgated under section 55 of the Police Ordinance, by the IGP and approved by the Minister of Defence,

This provides for the framing of Rules to guide police officers in the discharge of their duties.

These aforesaid guidelines with regard to arrest, could also be introduced in order to ensure that the aforesaid multiple considerations are brought to bear when making an arrest.

- A reasonable assessment of the seriousness of the offence
- The suspect demonstrates a propensity or proclivity to commit a further crime or offence

It is arguable whether it is appropriate to take some cognizance of the gravity or seriousness of the crime, although this might involve some element of subjectivity and it may not be feasible for a statute to actually recognize degrees of gravity and seriousness, of offences.

However, that been said, some of the offences in respect of which arrest would arguably be appropriate, especially in the interest of collective society and also societal perception, could be as follows :-

- Offences against state
- Murder
- Culpable homicide
- Attempt to murder
- Voluntarily causing grievous hurt
- Kidnapping or abduction
- Habitual dealing in slaves
- Extortion by placing a person in fear of death or grievous hurt
- Robbery
- Theft
- Dishonest misappropriation

- Criminal breach of trust
- Cheating
- Rape
- Child abuse
- Forgery
- Counterfeiting currency notes or bank notes
- House trespass
- Criminal trespass
- Abetments and conspiracy to commit any of the aforesaid offences.

However, even in the case of those offences, objective consideration should be made of the nature and gravity of the offence and the ex facie culpability of the suspect and reconsider whether a person should arrest or not and also, the issues as to whether :.

- any flight risk
- If the accused person attempts to or is likely to interfere with or influences or impedes in some way, the investigation
- If the accused person interferes with or is likely to interfere with witnesses
- If there is any public disquiet
- A reasonable assessment of the seriousness of the offence

The suspect demonstrates a propensity or proclivity to commit a further crime or offenc

The Following very interesting passages are contained in G.L. Peiris, Criminal Procedure in Sri Lanka under the Administration of Justice Law No.44 of 1973.

The relevant provisions of the administration of justice law are founded on the premise that although arrest before trial is sometimes necessary, the exercise of this power has to be closely

regulated by the law. The criminal courts commission had some pertinent comments to make on the subject of arrest. The indiscriminate arrest of persons from time to time in connection with the suspected commission of an offence, does not help to win the sympathy or the confidence of the public.

The subsequent release of persons arrested when it is found that there is no case against them, will inevitably lay the police open to a charge of incompetence in having made premature and groundless arrest. The law must not only be efficient, it must also be popular. Experience has indicated that the atmosphere of a police station seems to be singularly conducive to the making of confessions. This is a probably another reason why the power of making arrest during a police investigation is restrictively defined by the law, even where the substance of a confession turns out to be of assistance in the course of an investigation in that the police are furnished with the opportunity of verifying the accused's story and discovering evidence, the use of the confession itself as evidence is severely curtailed by the law.

Undoubtedly, the modern trend has been to stimulate the quest for independent evidence since such evidence is invariably more satisfactory and convincing than evidence elicited from the accused himself, particularly whilst he is under arrest.

The Courts of Sri Lanka have shown great vigilance in this regard. In muttusamy v Kannangara, Justice Gratien observed :-

"I am in accord with the view that attempts on the part of any person to delay or deter the administration of justice should not be tolerate. But it is no less important that the action of police officers who seek to arrest private citizens without a warrant., should be jealously scrutinized by their senior officers and above all by the courts.

Several propositions which have been laid down for English law (Christie v Leachinsky, 1947 AC 573) in regard to the scope and limitation of the power to make arrest, are valid in the context of our own law (Corea 1954 55 NLR 457 at 463):

1. Arrest on a criminal charge always was and still is a mere step on the procedural road to trial, verdict, judgment punishment or acquittal.

2. The power of arrest conferred by the law is limited to the purpose of the particular proceeding Namely, the specific charge formulated.

3. 3. The arrest must be made on that charge only and the person arrested must be told by the poice officer, at the time of the arrest, what the charge is. The law does not countenance an arrest in vacou.

4. The reason assigned must be that the arrest is for the purpose of a procsecution on the same charge as is the justification for the arrest.

The cumulative effect of these rules is to preclude an oppressive use of the power of arrest.

The procedural laws of Sri Lanka, control not only the making of an arrest, but continued detention of the accused. Even where an arrest has been made for adequate reasons, the question of a remand or a further remand should receive the careful and indepdnent consideration of a Magistrate.

It has been recommended that applications by the police for a remand should be made sparingly and with total realization of the consequences to the arrested persons. (Criminal Courts Comission Final Report, pg 18, para 43)

In the result, although the power of arrest has necessarily to be provided for as part of the machinery of investigation, an arrest in most cases should be the last rather than the first stage of an investigation.

The Criminal Courts commission, Final report also noted that arrest should be made only the at the end of the investigation. Not at the beginning of the investigation.

Joginder Kumar vs State Of U.P on 25 April, 1994

Equivalent citations: 1994 AIR 1349, 1994 SCC (4) 260

Author: M Venkatachalliah

Bench: Venkatachalliah, M.N.(Cj)

PETITIONER:
JOGINDER KUMAR

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT25/04/1994

BENCH:
VENKATACHALLIAH, M.N.(CJ)
BENCH:
VENKATACHALLIAH, M.N.(CJ)
MOHAN, S. (J)
ANAND, A.S. (J)

CITATION:
1994 AIR 1349 1994 SCC (4) 260
JT 1994 (3) 423 1994 SCALE (2)662

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1. This is a petition under Article 32 of the Constitution of India. The petitioner is a young man of 28 years of age who has completed his LL.B. and has enrolled himself as an advocate. The Senior Superintendent of Police, Ghaziabad, Respondent 4 called the

petitioner in his office for making enquiries in some case. The petitioner on 7-1-1994 at about 10 o'clock appeared personally along with his brothers Shri Mangeram Choudhary, Nahar Singh Yadav, Harinder Singh Tewatia, Amar Singh and others before Respondent 4. Respondent 4 kept the petitioner in his custody. When the brother of the petitioner made enquiries about the petitioner, lie was told that the petitioner will be set free in the evening after making some enquiries in connection with a case.

7. The said Senior Superintendent of Police along with petitioner appeared before this Court on 14-1-1994. According to him, the petitioner has been released. To question as to why the petitioner was detained for a period of five days, he would submit that the petitioner was not in detention at all. His help was taken for detecting some cases relating to abduction and the petitioner was helpful in cooperating with the police. Therefore, there is no question of detaining him. Though, as on today the relief in habeas corpus petition cannot be granted yet this Court cannot put an end to the writ petition on this score. Where was the need to detain the petitioner for five days; if really the petitioner was not in detention, why was not this Court informed are some questions which remain unanswered. If really, there was a detention for five days, for what reason was he detained? These matters require to be enquired into. Therefore, we direct the learned District Judge, Ghaziabad to make a detailed enquiry and submit his report within four weeks from the date of receipt of this order.

8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first the criminal or society, the law violator or the law abider; of meeting the challenge which Mr Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In People v. Defore1 Justice Cardozo observed:

The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

11. This Court in Nandini Satpathy v. P.L. Dani4 (AIR at p. 1032) quoting Lewis Mayers stated: (SCC p. 433, para 15) "The paradox has been put sharply by Lewis Mayers:

'To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right.' "

Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in 1 242 NY 13, 24 : 150 NE 585, 589 (1926) 2 176 NY 351 : 68 NE 636 (1903) 3 161 F 2d 453, 465 (2d Cir 1947) 4 (1978) 2 SCC 424 : 1978 SCC (Cri) 236 :

AIR 19'78 SC 1025, 1032 America. Since Miranda5 there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-breakers.

Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws...'. (Couch v. United StateS6). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice."

12. The National Police Commission in its Third Report referring to the quality of arrests by the police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission in its Third Report at p. 31 observed thus:

"It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in 'ail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all."

As on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure.

15. With regard to the apprehension of juvenile offenders Section 58 of the Code of Criminal Procedure lays down as under:

"Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise."

16. Section 19(a) of the Children Act makes the following provision:

"[T]he parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the Children's Court before which the child will appear;"

18. It is worth quoting the following passage from Police Powers and Accountability by John L. Lambert, p. 93:

"More recently, the Royal Commission on Criminal Procedure recognised that 'there is a critically important relationship between the police and the public in the detection and investigation of crime' and suggested that public confidence in police powers required that these conform to three principal standards: fairness, openness and workability." (emphasis supplied)

19. The Royal Commission suggested restrictions on the power of arrest on the basis of the "necessity of (sic) principle". The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure Sir Cyril Philips at p. 45 said:

"... we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him."

The Royal Commission in the above said report at p. 46 also suggested:

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case.....

20. In India, Third Report of the National Police Commission at p. 32 also suggested: "An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terrorstricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....."

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the

Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

21. Then, there is the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognised bySection 56(1) of the Police and Criminal Evidence Act, 1984 in England (Civil Actions Against the Police Richard Clayton and Hugh Tomlinson; p. 313). That section provides:

These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.

2. The police officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

22. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various police manuals.

23. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.

Arnesh Kumar vs State Of Bihar & Anr on 2 July, 2014

Bench: Chandramauli Kr. Prasad, Pinaki Chandra Ghose

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1277 OF 2014
(@SPECIAL LEAVE PETITION (CRL.) No.9127 of 2013)

ARNESH KUMAR ..... APPELLANT

VERSUS

STATE OF BIHAR & ANR. .... RESPONDENTS

J U D G M E N T

Chandramauli Kr. Prasad The petitioner apprehends his arrest in a case under Section 498-A of the Indian Penal Code, 1860 (hereinafter called as IPC) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A IPC is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years and with fine.

Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with

the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Cr.PC), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1)(b), Cr.PC which is relevant for the purpose reads as follows:

"41. When police may arrest without warrant.-(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person

(b)against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely :-

(ii) the police officer is satisfied that such arrest is necessary – to prevent such person from committing any further offence; or for proper investigation of the offence; or to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from

disclosing such facts to the Court or to the police officer; or as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

X x x x x x From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses

(a) to (e) of clause (1) of Section 41 of Cr.PC.

The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner. Before a Magistrate authorises detention underSection 167, Cr.PC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person

arrested is satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that condition precedent for arrest under Section 41 Cr.PC has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement etc., the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording its satisfaction in writing that the Magistrate will authorise the detention of the accused. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant and secondly a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

Another provision i.e. Section 41A Cr.PC aimed to avoid unnecessary arrest or threat of arrest looming large on accused requires to be vitalised. Section 41A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008(Act 5 of 2009), which is relevant in the context reads as follows:

"41A. Notice of appearance before police officer.-(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice." Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1), Cr.PC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

We are of the opinion that if the provisions of Section 41, Cr.PC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.PC for effecting arrest be discouraged and discontinued.

Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);

The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

Amendment of provision of 41 CrPC vide the code of Criminal Procedure (Amendment Act-2008)(5 of 2009).

The following amendment of Section 41 of the Criminal procedure code vide CrPC Amendment Act 2008(5 of 2009) which was brought into force on 01.11.10 vide S.O. 2687(E) dated 30.10.10 is reproduced below :-

5. Amendment of Section 41- In section 41 of the principal Act,-

(i) In sub-section (1) for clauses (a) and (b) the following clauses shall be substituted, namely:- " (a) who commits, in the presence of a police officer, a cognizable offence; (b) against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied ,namely :-

the police officer has reason to believe on the basis of such complaint , information or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary –

(a) to prevent such person from committing any further offence, or

(b) for proper investigation of the offence, or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement ,threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured , and the police officer shall record while making such arrest ,his reasons in writing ; (ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more that seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence ";

III. for sub-section (2) the following sub-section shall be substituted, namely :- "

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate". Clause 5. -The clause amends section 41 relating to power of police to arrest without warrant. It amends clauses (a) and (b) of sub-section (1) so as to provide that the powers of arrest conferred upon the police officer must be exercised after reasonable care and justification and that such arrest is necessary and required under the section . Amendment is also made in sub-section (2) of section 41 so as to provide that subject to the provisions of section 42 relating to arrest on refusal to give name and residence , no person shall be arrested in non-cognizable offence except under a warrant or order of a Magistrate .(Notes on Clauses). 6. Insertion of new section 41-A,41-B,41-C and 41-D.-After section 41 of the principal Act, the following new sections shall be inserted, namely :-

"41-A.Notice of appearance before police officer-(1) The police officer may ,is all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41,issue a notice directing the person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence to appear before him or at such other place as may be specified in the notice . (2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice . (3) Where such person complies and continues to comply with the

notice , he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded ,the police officers is of the opinion that he ought to be arrested . (4) Where such person,at any time ,fails to comply with the terms of the notice ,it shall be lawful for the police officer to arrest him for the offence mentioned in the notice ,subject to such orders as may have been passed in this behalf by a competent Court .

41-B.Procedure of arrest and duties of officer making arrest.- Every police officer while making an arrest shall - (a) bear an accurate ,visible and clear identification of his name which will facilitate easy identification ; (b) prepare a memorandum of arrest which shall be - (i) attested by at least one witness,who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made ; (ii) Countersigned by the person arrested : and (c) inform the person arrested ,unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

41-C. Control room at districts.-(1) The State Government shall establish a police control room- (a) in every district ; and (b) At State Level . (2) The State Government shall cause to be displayed on the notice bard kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrest. (3) The control room at the Police Headquarters at the State level shall collect from time to time ,details about the persons arrested ,nature of the offence with which they are charged and maintain a database for the information of the general public.

41-D. Right of arrested person to meet an advocate of his choice during interrogation - When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation ".

Section 41-D makes provisions for right of the arrested persons to meet an advocate of his choice during the interrogation though not throughout interrogation (Notes on Clauses).

Article 09 of the UDHR
No one shall be subjected to arbitrary arrest, detention or exile

Article 09(1) of the ICCPR
Everyone Has the right of liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law
Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

It shall be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to

2016

Proposed Offences under Circumstances Violating Privacy

Proposed by

Law Commission of Sri Lanka

PROPOSED OFFENCES UNDER CIRCUMSTANANCES VIOLATING PRIVACY

1. Offence Involving Intimate Image of a Private Nature.

(1)Whoever intentionally or knowingly captures, exhibits, displays, distributes, publishes or transmits an image of a person being intimate and of a private nature without the written consent of such person shall be punished with imprisonment which may extend to 3 years or with a fine not exceeding Rs..... or both.

Explanation : For the purposes of this section –

a. *"Transmit" means to electronically send an image so as make it available to the public or with the intent that it may be viewed by any person or persons.*

b. *"Capture" with respect to an image, means to video tape, photograph, film or record by any means.*

c. *"Intimate" means all or part of an individual's exposed genitals, buttocks or pubic area or the female breast.*

d. *"Private nature" means that which is not of a kind ordinarily seen in public and not intended by such person to be seen by the public.*

e. *"publishes" means reproduction in the printed or electronic form and making it available to the public;*

f. *"Image" – includes a still photograph, a video or any other visual representation.*

(2) Whoever commits the Offence under (1) with the intention of causing that individual distress shall be punished with imprisonment which may extend to ..... years or with a fine not exceeding Rs..... or both.

2. Offence Involving Sexual Image

(1) Whoever intentionally or knowingly captures, exhibits, displays, distributes publishes or transmits a sexual image of a person without his or her consent with the intention of causing that individual distress shall be punished with imprisonment which may extend to 3 years or with a fine not exceeding Rs..... or both.

(2) Except with the sanction of the Attorney-General, no person shall be prosecuted for an offence under section 2(1);

Explanation : For the purposes of this section –

a. *"Transmit" means to electronically send an image so as make it available to the public or with the intent that it may be viewed by any person or persons;*

b. *"capture" with respect to an image, means to video tape, photograph, film or record by any means;*

c. *"Sexual" means*
[i] Something that a reasonable person would consider to be sexual because of its nature, or;

[ii] its depiction and content taken as a whole, is such that a reasonable person would consider it to be sexual.

d. *"publishes" means reproduction in the printed or electronic form and making it available to the public*

e. *Image – includes a still photograph, a video or any other visual representation;*

3. <u>Offence Involving Image of a Person in an unreasonable manner.</u>

(1)Whoever intentionally or knowingly exhibits, displays, distributes, publishes or transmits an image of a person without his or her consent in a manner that no reasonable person shall consent to shall be punished with imprisonment which may extend to ..... years or with a fine not exceeding Rs..... or both.

(2)Whoever Commits the Offence under (1) with the intention of causing distress to that individual shall be punished with imprisonment which may extend to ..... years or with a fine not exceeding Rs..... or both.

(3) Except with the sanction of the Attorney-General, no person shall be prosecuted for an offence under section 3(1) and 3(2).

a. "Transmit" means to electronically send an image so as make it available to the public or with the intent that it may be viewed by a person or persons

c. "publishes" means reproduction in the printed or electronic form and making it available to the public

d. Image – includes a still photograph, a video or any other visual representation

4. **Non Consensual Use of an Image of a Person With Express Knowledge of Objection.**

(1) It shall be an Offence for any person to use an image of a person without the consent of such person with express knowledge that such person objects to the use of such image.

(2) No prosecution shall commence under this Section without the Magistrate being satisfied that the following requirements have been complied with;

a. Providing a copy of the 'Notice of Objection' filed at the Office for Commissioner for Protection of Privacy in terms of Act No.___ of ____ to the alleged Offender in the prescribed from.

b. Attending Compulsory Mediation at the Office of Commissioner for Privacy in terms of Act No. ____ of _____.

c. The production of a Certificate of Non Settlement from the Commissioner of Privacy.

-Express Knowledge for the purposes of this section shall be deemed to be within ___ days of receipt of the notice in the form of Sub Section 2(a).

5. **Defences**

(1)It is a Defence for a person charged with an offence under this part to prove that he or she committed such act in a fair manner for the public interest or for a bona fide purpose.

Comments on the Proposed Bill on Criminal Aspects of Violation of Privacy.

Section 1

The Definition 'Intimate Image of a Private Nature ' is used. The word 'Private' is necessary to qualify the definition of the word 'intimate' particularly due to the concerns arising by varying degrees of intimate exposure by person in the modern day. For instance whilst Genitals, Pubic Area and Buttocks are not of a kind ordinarily seen in public, with regard to breast due to the varying exposure levels the qualification 'not of a kind ordinarily seen in public' will narrow down any interpretational problems and capture exposure of body parts which is something more than a 'sexual' image with the qualification of 'Private Nature'. Further it was noted that this Section may also criminalise a person who captures, distributes etc an image of a person who had no intention of his nude/semi nude image remaining in private. Therefore the words 'private' were further qualified bringing in an element of expectation of privacy requiring that it 'not be intended by such person to be seen by the public'.

The reason for the aggravated offence in Section 1(2) is because there are persons who capture publish etc these images with intent to cause distress as well as persons unrelated and unknown to the Victims who also do the same. The latter will be caught under Section 1(1) whilst the former offenders perceivably known to the victims may also be subject to an offence under the aggravated section.

Section 2

Here the qualification of 'Private' is removed. This is for the reason that a 'Sexual Image' as per the definition can consist of many things of which publication capturing etc are not prima facie warranting criminal sanction. It can be an undergarment clad woman, it may be a man working out in a gym, it may be a girl in tight clothing. These are not 'Private' Images as such things can be ordinarily seen in public.

However this offence is qualified with the additional requirement of 'intention to cause distress to that individual.' The moment this additional mens rea comes in the Criminal aspect is satisfied. This is an offence where the Violation of privacy is for the purpose of causing distress.

Note the definition of Sexual which includes something that is sexual by its very nature itself. It also includes something that may not be sexual by its nature but in the context and manner of depiction it may be sexual. We must note however these kinds of images may be published or displayed in day to day life. That is the reason there is a qualification of a requirement of intention to cause distress and safeguard of the need to have the sanction of the Attorney General to institute a prosecution. Without this Sanction requirement if was identified that there may be a

danger of abuse of this Offence. It is a matter of policy whether the Sanction of the Attorney General will be a hindrance to the effectiveness of the prosecutorial effectiveness of the crime. For instance the possibility of the Sanction of the Commissioner for Privacy may be substituted. It is also noted that the creation of the 'express objection' by way of a Statutory Tort shall cover the fine line between Criminal Acts and Tort of Violating Privacy. Therefore any use of a persons sexual image where the burden of proving elements of the offence will still be covered under Section 4.

Section 3.

This Offence does not qualify the image as private or sexual. It deals with just the Image of a person being used without consent. This Offence is not intended to be an easy offence to prosecute under and the burden of proof is high. It is intended that the Statutory Tort system may create a better option for these types of conduct. It would be a difficult offence to prove but it puts offenders to notice that they should be careful before using an image of a person without consent in a very unreasonable manner. If the use is such that **no Ordinary man** would consent to such use it should be an offence. The safeguard of the sanction of the Attorney General operates against the abuse of the Offence.

It is noted that overall these offences proposed will cover the following social evils done without consent

1. Use of Nude and Semi Nude Pictures of persons by third parties Section 1(1)
2. Use of Nude and Semi Nude Pictures of Person by person with an intention to cause distress. Section 1(2).
3. Use of Images of a Sexual Nature (Which are not Private Nature but may or may not be intimate) with intention to cause distress.
4. Use of Images of persons by a third party in a manner that no reasonable person would have consented to.
5. Use of Images of persons by a person in a manner that no reasonable would have consented to so as to cause distress.

A question does arise as the intention added into some of these offence. When one says 'with the intention of causing distress to such individual' it seems that this is restricted to someone who has that particular intention of causing distress to such persons. Such as a Stalker, Ex Boy Friend, Enemy. It is noted however there are a category of persons who may be completely unaware of the Victim in the image but be a random stalker or someone who wants his website to get more hits. These persons will not have an intention to cause distress to the victim. However their use will be the same.

It is our opinion that Section 1(2) include in addition the words 'so as to cause distress' as any person who does in fact cause distress should be punished for the aggravated offence. This is a matter for discussion.

It is however our opinion that this cannot be the case of Section 2 as the Person who does not intend to cause distress may still be caught up under Section 3 and any cases that do not fall within such must be such that will covered by the Statutory Tort suggested.

Section 4.

Imagine there is an image of a person used without consent which is not of a sexual nature or covered under Section 3. What can a person do in such instance if his image is used without his consent. It would seem draconian to criminalise this use of the image. This brings up the requirement to also add to the law a provision that where an image of a person is displayed, used exhibited, transmitted without consent and such person expressly requests that image be removed etc etc and that any person who continues using such image despite express knowledge of the objection shall be guilty of an offence. However it is our opinion that the process between Notice of Objection and Removal and reasonable reasons for non removal etc must be mediated to prevent a flood of prosecutions. If there is a failure to reach a settlement this means the parties will be required to take their dispute to the Courts. It is a matter of policy as to whether non removal upon notice of objection should be a Criminal Offence or a Statutory Tort. Undoubtedly the aspect of an Invasion of Privacy remains leaving clear provision for a Civil Cause of Action. However the Criminal aspect must be considered at a policy level. However Section 4 leaves it as an offence as the right of privacy of an individual is treated by us a a higher right that the right of another to use same without consent.

The 'Notice of Objection' must be filed with the Commissioner of Privacy with a duplicate Copy with to the alleged Offendor. This notice itself may be the notice initiating the Compulsory Mediation. The Act creating the Commissioner for Privacy should also have provision to consider merit in any 'Notice of Objection'. It could otherwise lead to frivolous objection and harassment. It can be suggested a cost/security system may be imposed. The Office of Commissioner of Privacy will be necessary to police the above offence in any event. It is also proposed to have compulsory mediation to settle the dispute and only allow prosecution if there is no settlement. The Mediation, Procedure for Notices, Inquiry, Damages, etc will have to be provided by a Law which creates the the Office of Commissioner of Privacy an Institution for the Protection of Privacy.

This section and the creation of the Office can result in the creation of guidelines, and practice rulings on privacy guiding media, society, to a better culture of publication and capturing without violation of rights. The Office of the Commissioner will be required to carry out further concerns as to privacy such as Use of intrusive equipment violating privacy, date privacy, consumer privacy which are all modern concerns.

Section 5 Defenses.

It is noted that with regard to the certain offences Defenses will have to be introduced. The following is suggested. It should be the policy of the law to allow any person to commit one of these acts for public interest (as defined in case law) or for any bona fide purpose. (For instance Spouse obtaining Evidence to proof other Spouses adultery, Neighbour capturing on camera his Neighboring Child Abuser on Video). From a study of the Defences afforded in various jurisdiction it is seen that public interest is a common thread of defence. Further public and statutory bodies are subject to the Statutory Protection of non prosecution for acts committed in good faith in the course of their duties.

The defences will need to balance the Media, aestheticism, advertising etc and that can be considered under the bona fide defence. However it must be noted that whatever the purpose may be the legislature must impose a burden upon a person to use such material in a fair manner which is proportionate to the purpose of disclosure. This is the additional of 'fair manner ' to the Defence.

Other Issues

There are many procedural matters that will require consideration in the implementation of these Offences including the procedure and requirements for effective investigations. The process of Trial will also require consideration given the sensitive nature of these offences for Victims.

Further consideration will need to be given for provision of Civil/ Criminal Courts to issue protection orders in the interim stage to prevent as far as possible the dissemination of offensive content which irrespective of the Criminal aspect is a concern for the protection of the privacy of the person. This may be developed along with the Tort of Invasion of Privacy allowing a cause of action which also has the option for protection orders in the interim stage. An issue however will be the dual forums and that is a matter to be considered as to whether one forum may be given these powers. An example could be the powers exercised by the Magistrate Courts under the maintenance ordinance No. 37 of 1999 and the Prevention of Domestic Violence Act no. 23 of 2005.