behaviour: hooliganism, curelty, the commission of a crime, adultery, the refusal of a spouse to do socially useful work, alcoholism and the use of narcotics. The third group of conditions which would lead to a cessation or variation of a maintenance award is where a marriage is of a short duration or where the working disability of one spouse was due to an illness which was not communicated to the other spouse prior to the marriage. Thus we see that fault does play an important role in the Soviet Union in the determination of maintenance awards. Whether or not this flies in the face of pristine socialist philosophy, I shall leave for more qualified political commentators to determine. As Professor Luryi suggests, it is probably a reflection of the concept that rights and liberties are inseparable, as specifically exemplified by the Soviet constitution.[55]

Fault, then, is a major criterion for assessing responsibility or obligation to pay and right to receive maintenance in all developed legal systems of the world, including those of the Communist bloc. It has always been this author's contention that the concept of retribution can be equated to a primal instinct, and as such is a common denominator of all mankind. "Justice," as expounded by the law, mirrors these deeply engrained human feelings.

VII. DIVORCE

Divorce was always recognized in post-revolutionary Russia. Classical Marxism-Leninism recognized the social desirability of this legal device to effectively terminate a marriage and alter the status of the parties concerned.[56] Hence, from its inception, no specific grounds need be utilized to obtain a divorce in the Soviet Union. On the contrary, our present Canadian divorce law is based on an amalgam of legal philosophy. We still retain some of the old "fault" grounds such as adultery, cruelty, etc.[57] and pay at least some credence to "no-fault" divorce in that the concept of "marriage breakdown" is also utilized.[58]

The Russian position is much closer to that of the United Kingdom and California. In the United Kingdom, the major basis for divorce is "irretrievable marriage breakdown,"[59] while in California it is "irreconcilable differences."[60] It is obvious, however, that in the U.S.S.R., as in the bulk of western jurisdictions, the "right" to divorce is not untrammeled. Although Lenin specifically stated that "one cannot be a democrat and socialist without immediately demanding freedom of divorce. . . .,"[61] the Soviet legal system does not grant full credence to the doctrine of unmitigated freedom of divorce. Divorce in Russia, as in most western jurisdictions, still remains primarily a discretionary remedy. In the final

54. Luryi text, *Supra* n. 131.

55. Constitution of the U.S.S.R. (1977) Art. 59.

56. Luryi text, *Supra* n. 135.

57. *Divorce Act,* R.S.C. 1970, c. D-8, s. 3.

58. *Divorce Act,* R.S.C. 1970, c. D-8, s. 4.

59. *Divorce Reform Act,* 1969, c. 55, s. 1 (U.K.).

60. *Cal. Civil Code,* s. 4506(1) (West).

61. Luryi text, *Supra* n. 138.

analysis, whether to grant a divorce decree or not is in the seignorial dispensation of the presiding court.[62] Social policy does coincide in both East and West, simply because a divorce decree means dissolution of an entire family unit; and not only the imparting of a new status to the husband and wife.[63]

Society at large has a stake in the retention of the family unit. This is the rationale for the intervention of that mysterious and august personage known as the "Queen's Proctor" in Commonwealth jurisdictions.[64] Professor Luryi, in his article, refers to the role of the State Registry offices in adjudicating uncontested divorces, even where, in some instances there are children of the marriage.[65] Unified family courts, are as yet only nascent in Canada, although their creation has been urged by many Canadian law reform bodies. A comparative study of other legal systems is always a salutary method of drawing upon the experience of other legal jurisdictions in solving problems. One notes with interest the comments voiced by Professor Fred Zemans.[66] Hopefully, this is a case where we in the West could extract a page from the Russian book, and in this manner be able to assist litigants in uncontested divorce cases by assuring them of speedy and inexpensive divorces where warranted without unduly infringing on the "public interest."

Another point of similarity between Soviet divorce law and ours is the mandatory waiting period.[67] There is a three-month waiting period between the issuing of the petition for divorce and an absolute declaration of divorce in the U.S.S.R. There is an analogous condition precedent in most Western jurisdictions, although the manner in which it is implemented is quite different. I am referring to the prescribed period of time between the initial issuance of a decree *nisi,* or interim decree of divorce, and the issuance of a final or absolute decree.[68] Only upon the entering of the decree absolute of

62. Interestingly enough, in Canada there is strong *dicta* to the effect that once a petitioner has established a right to divorce by complying with all the prerequisite conditions of the Canada *Divorce Act,* and, in particular, where a petitioner has established adultery pursuant to s. 3 of the *Divorce Act* once the presiding judge has "satisfied" himself that collusion, condonation and connivance have not existed, then, as a matter of right, the petitioner is entitled to a divorce. *See Schuett* v. *Schuett,* [1970] 3 O.R. 206; (1970), 12 D.L.R. (3d) 586; 2 R.F.L. 248 (C.A.)
Controversy has ensued since the handing down of the *Schuett* decision. Some experts in the field have intimated that the old discretionary remedies previously incorporated into Canadian divorce law and which were primarily ecclesiastical in origin, have now gone by the board. By way of further comment the author would point out that even in Sweden, that much vaunted bastion of advanced social reform, there is a prescribed waiting period prior to the issuance of a divorce decree subsequent to the filing of necessary consent documents in the appropriate registry office by the parties concerned.

63. Luryi text, *Supra* n. 140.

64. For a typical example of the Queen's Proctor becoming a third party intervenent in private divorce proceedings, see the Manitoba decision of *Stone* v. *Stone and Bedord and the Queen's Proctor for Manitoba* (1970), 71 W.W.R. 589 (Man. C.A.). In that particular decision, the divorce Judge who initially heard the petition granted a decree. The actual whereabouts of the purported female respondent was unknown. The Queen's Proctor subsequently intervened and a new application was entered by the petitioner for an order for substitutional service upon the purported female respondent. This application was denied, and the petitioning wife appealed. Although Freedman, C.J.M. dissented, stating at 593 that "one does not commit adultery with a phantom," the Manitoba Court of Appeal, for reasons not all that clearly articulated, upheld the order denying the application for substitutional service. The reasons for their denial appeared to be based primarily on "leaving unanswered serious questions and leaving unresolved the doubts which the proceedings give rise to." Although collusion was only peripherally alluded to, the Court noted with approval the comments of Wilmer, J., in *Sage* v. *Sage; Stockbridge* v. *Stockbridge* [1947] 1 All E.R. 492, in which he stated in 496, "I desire to leave no doubt that, in my judgment, at the public interest is the paramount consideration." *Id.,* at 604.

65. Luryi text, *Supra* n. 143.

66. F. Zemans, "The Undefended Divorce: Time to Trim the Waste" (1978), Can. Lawyer 12.

67. Luryi text, *Supra* n. 145.

68. *Divorce Act,* R.S.C. 1970, c. D-8, s. 13(1), which provides as follows: Every decree of divorce is in the first instance a decree nisi and no such decree shall be made absolute until three months have elapsed from the granting of the decree and the court is satisfied that every right to appeal from the judge when granting the decree has been exhausted.

divorce is the personal legal status of the parties involved irretrievably altered. The policy considerations are the same in both instances; a waiting period allows appropriate defences or appeal proceedings to be entered and gives the couple involved time to consider the propriety of their actions, in view of the irreparable alteration of their status that is the result of divorce. It is worthwhile mentioning that in both the U.S.S.R. and in Canada, the prescribed three-month waiting period may be waived or abridged by an appropriate order of the divorce court.[69] Clearly, at least in this regard, the common dictates of society are the same in many of the world's jurisdictions.

The reconciliation process is an inherent feature of both Soviet and Canadian divorce law. Section 7 of the Canada *Divorce Act* imposes upon the solicitor for the petitioner the statutory obligation to ask his client about the possibility of effecting a reconciliation, and to advise as to the various agencies which can help effect the reconciliation. Section 8 of the same *Act* imposes a like obligation upon the court. The *Act* provides a mechanism to adjourn the divorce hearing and set the appropriate reconciliation machinery into motion.[70] Most Canadian provincial legislation establishing courts of inferior jurisdiction to deal with separation of the spouses, maintenance, custody of and access to the children, and the disposition of marital property, also contain similar provisions.[71] The Province of Manitoba, for example, has long prided itself on the facilities for reconciliation that have been an integral component of the structure of the family court for approximately 40 years. The Alberta family court situated in Edmonton has, during the last few years, implemented a full-blown mechanism in order to assist and facilitate the process of reconciliation. In the U.S.S.R., it is compulsory for both spouses to attend a court session with a view to effecting their possible reconciliation.[72]

What is of extreme interest here is that according to statistics compiled by the Supreme Court of the U.S.S.R., 25% of such endeavours prove successful. Although accurate statistics in this regard have not been compiled in Canada, it would be apparent to most practitioners of Canadian family law that this effective reconciliation rate of 25% is much higher than in the Canadian experience. It would be fair to say that most Canadian lawyers who intensively engage in the practice of family law would agree that very few reconciliations are finalized after the initiation of divorce proceedings, particularly in those instances where one or both of the spouses have

69. Luryi text, *Supra* n. 146 and *Divorce Act*, R.S.C. 1970, c. D-8, s. 13(2), which provides as follows: Notwithstanding sub-section (1), where, upon or after the granting of a decree nisi of divorce,
(a) the court is of the opinion that by reason of special circumstances it would be in the public interest for the decree to be made absolute before the time when it could be made absolute under sub-section (1), and
(b) the parties agree and undertake that no appeal will be taken, or any appeal that has been taken has been abandoned,
the court may fix a shorter time after which the decree may be made absolute or, in its discretion, may then make the decree absolute.

70. *Divorce Act*, R.S.C. 1970, c. D-8, ss. 8, 21.

71. *The Family Maintenance Act*, S.M. 1978, c. 25, ss. 9(1) and 9(2) is a typical example. The court, before proceeding to hear any application brought before it or at any later stage in the proceedings, if it appears that there is a possibility of reconcilation, may adjourn the proceedings to afford the spouses an opportunity to becoming reconciled and may further direct the spouses to a person with experience or training in marriage counselling or guidance or some other suitable person, for assistance with a view to their possible reconciliation.

72. Luryi text, *Supra* n. 149.

already taken the step of retaining counsel to act on their behalf. One wonders why the gross disparity exists between the Russian and Canadian experiences. Is the reconciliation process in the U.S.S.R. more effective? Or does the answer lie within the structure of Russian society? In all probability, the latter is true, for, as stated by Professor Luryi, the court frequently turns for help to the community in divorce actions.[73] Undoubtedly, in the U.S.S.R., workers groups, neighbourhood Communist party blocs, and societal peer pressures all play a role in persuading the unhappy couple that reconciliation is a far better alternative to being designated as an individual who has engaged in a course of conduct that, in many instances, is considered socially and politically unacceptable. That is not to say that social pressure could not also achieve the same results in the Western world. The essential difference is that in the U.S.S.R. such community intervention in private affairs is officially sanctioned by both the government and the courts.

Soviet family law does not categorize formal grounds for divorce. Divorces are obtained on the basis that "further cohabitation of the spouses and the preservation of their family have become impossible."[74] This terminology is remarkably similar to the definition of cruelty contained in the Canada *Divorce Act*.[75] Nevertheless the test of the impossibility of further cohabitation as enunciated in Article 33 of the Family Code is much more comprehensive, in that it encompasses all possible grounds upon which a Soviet court can base a divorce decree. These causes of action can run the gamut from psychological incompatibility to mere jealousy.[76] Historically, in the Commonwealth, this concept of the impossibility of further cohabitation was enunciated by the House of Lords in the leading case of *Russell* v. *Russell*.[77] The basic ground for divorce in the U.S.S.R. is thus very advanced; from a social policy point of view it went beyond the bounds of judicial acceptability in most jurisdictions of the Western world, at the time of its enactment in the U.S.S.R. There is an obvious dissimilarity in the application of this pristine principle in the U.S.S.R. and its possible application in the west. Professor Luryi points out that quite often, Soviet courts, in evaluating reasons for judgment, look at them from the point of view of "the Communist morality."[78] He points out that the Soviet courts need not refuse to grant a decree where one of the spouses desired to give the children of the marriage a religious upbringing. The Court held that to rear children in a religious family would be to contravene the principles of Socialist morality, or atheistic morality.[79] Hence, I think it would be fair to say that in many instances Soviet law can prove to be highly politicised; judicial

73. *Id.*, at n. 150-51.

74. *Id.*, at n. 151-52.

75. R.S.C. 1970, c. D-8, s. 3(d) which provides as follows: has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

76. Luryi text, *Supra* n. 151-54.

77. [1897] A.C. 395. In that case, counsel for Lord Russell, the appellant, stressed that it was open for the court to base their finding of cruelty on the concept that "the duties of married life have become impossible" owing to the conduct of the respondent. *Id.*, at 408. The majority of the House of Lords held that this proposition of Sir Robert Reid, Lord Russell's counsel, "goes far beyond anything which has been laid down by the learned judges of the Ecclesiastical Court." (Lord Davey, at 468).

78. Luryi text, *Supra* n. 154-55.

79. *Ibid.*

reasoning will obviously be based on political judgments in more instances than in the West.

VIII. PARENTAL OBLIGATIONS

The objectives of Soviet and Western society are consonant in this regard. In addition, legislation appears to play a very prominent role in the delineation of parental rights and obligations in both capitalist and communist society. Professor Luryi points out that the leading statutory enactment in the U.S.S.R. in this regard is Chapter 8 of the Family Code.[80] The major difference between the U.S.S.R. and the West is that in the U.S.S.R. the Family Code imposes upon the parents of children the statutory mandate to engage in "active participation in the building of Communism."[81] In Canada, the benchmark traditionally relied upon by our judiciary in balancing the rights of the state *vis ã vis* private individuals has always been that "the paramount consideration is the welfare of the child." The commentary appended to the pertinent portion of the U.S.S.R. Family Code pertaining to parental rights is strikingly similar, in that it states that such rights should be exercised "in the interest of the children."[82] The application of this apparently similar benchmark is different in practice, however, as in the U.S.S.R. "the interest of the children" should be interpreted as "ensuring their correct upbringing and developing those roles set out for the system of education in our country in general."[83] Therefore, as in many other areas of family law, obviously parental obligations are much more politicized in the Soviet Union.

Professor Luryi goes on to point out that there is no article of the Family Code that specifically refers to personal rights of parents.[84] This is not a legislative oversight, but is a purposeful omission in order to have parents conform to the moral tenets of communism. Parental rights are subordinate to this more lofty purpose, and may not be implemented against the interest of the children. This is in direct contrast to a line of jurisprudence that has been developed by the Supreme Court of Canada commencing with the decision of in *Re Baby Duffell; Martin & Martin* v. *Duffell*[85] and further developed by the subsequent decision in *Hepton* v. Matt. The Court stated that, in appropriate circumstances, particularly where the rights of natural parents are involved, the personal rights of such parents must be given effect unless "very serious and important" reasons require otherwise, having regard to the child's welfare. By way of caveat, it should be pointed out that this particular principle should not be considered sacrosanct in Canada, as it has been hard hit by later cases.[87] In all in-

80. *Id.*, at n. 175.
81. *Id.*, at n. 176.
82. *Id.*, at n. 175.
83. Id., at n. 177.
84. *Id.*, at n. 175.
85. [1950] S.C.R. 737; [1950] 4 D.L.R. 1.
86. [1957] S.C.R. 606.
87. *McGee* v. *Walder and Cunningham* (1972), 4 R.F.L. 17 (Alta S.C.) and *Re Moores and Feldstein* (1974), 12 R.F.L. 273 (Ont. C.A.) are typical examples of recent Canadian decisions where the Canadian courts followed the "equitable" line of English decisions that hold that, even where the rights of natural parents are concerned, the welfare of the child must be the paramount issue and other considerations are subordinate.