

distinction in a capitalistic society are obvious; the courts and the legislature do not wish, if at all possible, to impede in any way the viability of commerce. Cynics may say that as commercial assets in the Soviet Union would theoretically at least be of little import, so would assets of any nature, for in a communist society the opportunity is lacking to amass property in any significant amount. There are, however, many examples of individuals who have acquired considerable wealth in the Soviet Union. For instance, Professor Luryi writes of a wife who successfully contested the disposition of the proceeds of the sale of a piano and several other items which were owned by her prior to her marriage.<sup>46</sup>

## VI. MAINTENANCE

Once again, the similarities in legal obligations, at least in theory, far overshadow the differences. In the U.S.S.R., spouses are obliged to maintain each other.<sup>47</sup> As previously stated this has been the Canadian situation in the sphere of divorce since 1968.<sup>48</sup> In the sphere of separation, Ontario was the first to pass legislation in this regard,<sup>49</sup> followed closely by Manitoba.<sup>50</sup>

In his article, Professor Luryi, following accepted European practice, refers to the term "alimony" to encompass all elements of what we know as "maintenance." Technically speaking he is correct; the term "alimony" is of Latin origin meaning the payment of an alimentary allowance, or a payment for sustenance and support. Hence, "alimony" encompasses every branch of the law of maintenance. In the Common Law world, "alimony" gradually came to acquire a very restrictive and technical meaning, and now generally refers to maintenance payments made by a husband to his wife during the subsistence of their marriage. Maintenance is the much broader term, connoting all aspects of a support obligation.

Perhaps the most surprising aspect of Professor Luryi's treatment of alimony or maintenance in the U.S.S.R. is the role that fault can sometimes play in the determination of a maintenance award.<sup>51</sup> Fault or culpability is a

45. See e.g., *The Marital Property Act*, S.M. 1978, c. 24, ss. 1(b), 13(2).

46. Luryi text, *Supra* n. 98.

47. *Id.*, at n. 125-126.

48. *Divorce Act*, R.S.C. 1970, c. D-8, s. 11, which provides as follows:

"(1) Upon granting a Decree Nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the wife,  
(ii) the children of the marriage, or  
(iii) the wife and children of the marriage;

(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

(i) the husband,  
(ii) the children of the marriage, or  
(iii) the husband and the children of the marriage; and

(c) an order providing for the custody, care and upbringing of the children of the marriage."

49. *Family Law Reform Act*, S.O. 1978, c. 2, s. 15.

50. *The Family Maintenance Act*, S.M. 1978, c. 25, s. 2(1), which provides as follows:

"Spouses have the mutual obligation to contribute reasonably to each other's support and maintenance."

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

concept that has been long enshrined in the Common Law. In fact, many legal commentators would say that fault is the very cornerstone of our legal system. After the revolution, Soviet jurists were presented with the opportunity of writing on a clean slate. Presumably they did so, freeing themselves of all the constraints formerly imposed by a supposedly corrupt capitalistic system. The old-fashioned doctrine of fault is rapidly falling into disfavour in the Western legal world. This is true not only in the field of negligence, where the legal manifestations of fault are displayed at their most obvious, but in the area of family law as well.

One of the prime areas of contention during the nascent stages of marital property law reform in Canada was the adamant stance of certain segments of society, particularly in the women's movement, to the effect that "fault" was an entirely inequitable concept. It is incompatible with modern societal mores, and as such could play no beneficial role in any modern family law scheme. In Manitoba, for example, many objections are still being voiced as regards certain provisions of the recently enacted *Family Maintenance Act*, which stipulates that the mutual support obligation of spouses, can, in certain instances, be modified by fault.<sup>52</sup> This particular legislation, in its present form, was a legislative compromise; presumably its rationale was to obviate the worst aspects of fault, and yet retain fault to a limited degree where there is a marked deviation from what could be considered normal conduct in a marital relationship. As of the date of this article, there are no judicial pronouncements on what exactly constitutes a "gross" repudiation of the marital relationship in Manitoba. However, there are a few English decisions which could presumably act as a guide in this regard.<sup>53</sup>

We note that there are three conditions which could operate to release a spouse from the obligation to pay maintenance in the U.S.S.R.<sup>54</sup> In the first instance, this would include circumstances which would be the cessation of conditions which in the first place led to the award of alimony. This, I would presume, would be somewhat similar to the Canadian practice of allowing a variation in maintenance where a marked change of circumstances could be established to the court's satisfaction. The second category, the fault concept, includes circumstances which could comprise "immoral behaviour." Professor Luryi gives us examples of such

52. *The Family Maintenance Act*, S.M. 1978, c. 25, s. 2(2), which provides as follows:

The obligation under Subsection (1) [the mutual support obligation] exists without regard to the conduct of either spouse and in determining whether to make an order under this Act for support and maintenance of a spouse a court shall not consider the conduct of the spouses in respect of the marriage relationship but may, in determining the amount of the support and maintenance, have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the marriage relationship (*italics added*).

See R. Elson, "Marital Misconduct in the Assessment of Maintenance in Manitoba" (1979), 10 Man. L.J. 79.

53. There are approximately a dozen English decisions which have construed s. 5 of the *Matrimonial Proceedings and Property Act* c. 45 (U.K.) and s. 25 of the *Matrimonial Causes Act*, 1973, c. 18 (U.K.).

The cases include *Campbell v. Campbell* [1976] Fam. 347, [1976] 3 W.L.R. 572, [1977] 1 All E.R. 1; *Cuzner (formerly Underdown) v. Underdown*, [1974] 1 W.L.R. 641, [1974] 2 All E.R. 351 (C.A.); *Dixon v. Dixon* (1974), 5 Fam. L. 58 (C.A.); *Griffiths v. Griffiths*, [1973] 1 W.L.R. 1454, [1973] 3 All E.R. 1155 (Fam.), [1974] 1 W.L.R. 1350, [1974] 1 All E.R. 932 (C.A.); *Harnett v. Harnett*, [1973] Fam. 156, [1973] 3 W.L.R. 1, [1973] 2 All E.R. 593 (Fam.), [1974] 1 W.L.R. 219, [1974] All E.R. 764 (C.A.); *Jones v. Jones*, [1976] Fam. 8, [1975] 2 W.L.R. 606, [1975] 2 All E.R. 12 (C.A.); *Martin v. Martin*, [1976] Fam. 167, [1976] 2 W.L.R. 901 (Fam.), [1976] Fam. 335, [1976] 3 W.L.R. 580, [1976] 3 All E.R. 625 (C.A.); *Rogers v. Rogers*, [1974] 1 W.L.R. 709, [1974] 2 All E.R. 361 (C.A.); *Trippas v. Trippas*, [1973] Fam. 134, [1973] 2 W.L.R. 585, [1973] 2 All E.R. 1 (C.A.); *W. v. W.*, [1976] Fam. 107, [1975] 3 W.L.R. 752, [1975] 3 All E.R. 970; *Wachtel v. Wachtel*, [1973] Fam. 72, [1973] All E.R. 113 (Fam.), [1973] Fam. 81, [1973] 2 W.L.R. 366, [1973] 1 All E.R. 829 (C.A.); *West v. West*, [1978] Fam. 1, [1977] 2 W.L.R. 933, [1977] 2 All E.R. 705 (C.A.). 705 (C.A.).

behaviour: hooliganism, cruelty, 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.<sup>54</sup>

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.<sup>56</sup> 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.<sup>57</sup> and pay at least some credence to "no-fault" divorce in that the concept of "marriage breakdown" is also utilized.<sup>58</sup>

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,"<sup>59</sup> while in California it is "irreconcilable differences."<sup>60</sup> It is obvious, however, that in the U.S.S.R., as in the bulk of western jurisdictions, the "right" to divorce is not untrammelled. Although Lenin specifically stated that "one cannot be a democrat and socialist without immediately demanding freedom of divorce. . . ."<sup>61</sup> 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

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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.