SOME ANOMALOUS FEATURES IN THE LAW OF MAINTENANCE OF HUSBAND AND WIFE IN SRI LANKA

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1. Introduction

The obligation to privide one's spouse with the necessities of life such as food, clothing and a home to live in is indeed a fundamental duty which derives from the fact of marriage. Traditionally, this duty was thought to vest solely in the husband because, apart from the notion that the husband was the head of the family and consequently the primary provider for the family, marriage in early law entailed harsh consequences for the wife who suffered several legal disabilities.[1] Although she could not contract in her own right she could avail herself of the right to pledge her husband's credit for necessaries thereby enforcing his duty of support.[2] This was a Roman-Dutch common law right which was an invariable consequent of marriage.[3] Although the primary obligation of support was vested in the husband, the wife too was obliged to support her hsuband but an important distinction must be noted. While the husbands's duty of support was independent of and unconnected with the financial status of the wife, the duty to support a husband came alive only if the husband was in indigent circumstances.[4]

The common law right to pledge the husband's credit for necessaries encompassed within its ambit two separate rights founded on two distinct principles.[4a] While the spouses were living together in the matrimonial home the wife had the right to pledge her husband's credit for household necessaries in her capacity as manageress of the common household. This right, which was exercisable only during the tenure of the common household was totally dependent on the existence of a common establishment.[5] Consequently, if the spouses separated, provided the wife was not guilty of matrimonial misconduct, she could continue to pledge his credit but, it must be pointed out not for household necessaries, the common establishment now being non-existent, but rather for personal necessities for herself and her children, if any. In this latter situation her authority to contract on his behalf was 'co-extensive and co-terminous with his obligation to maintain her.'[6] One of the fundamental consequences of this distinction is the impact of these different circumstances on the liability of the husband to the wife's creditors. In the latter situation, the right being founded on the husband's obligation of support, the husband could disclaim liability to the wife's creditors if she was guilty of matrimonial

(1) In the early Roman-Dutch law the wife was under the husband's marital power and was akin to a minor. See Grotius 1.4.6; 1.5.19.20; Voet 1.7.13; 23.2.23.41.
(2) Voet 23.2.46; Van der Keesel 1.5.23.
(3) *ibid.*
(4) *Lyons* v. *Lyons* 1935, T.P.D. 345; *King* v. *King* 1947, (2) S.A. 517.
(4a) *Whelan* v. *Whelan* 1972 (4) S.A. 306 at 307.
(5) *Oelofse* v. *Grundling* 1952, (1) S.A. 338.
(6) H.R. Hahlo, *The South African Law of Husband and Wife*, (4th ed. Cape Town, 1975) 178.

misconduct and he was not.[7] Alternatively, even assuming that he was the guilty spouse proof that he had provided his wife with sufficient maintenance was an adequate defence against liability to his wife's creditors.[8] The essential point is that both the above factors are such that a trader could not be expected to acquaint himself with these facts prior to giving credit facilities to the wife. Consequently the right available to a deserted wife will in all probability remain a theoretical right because it is most unlikely that she will find herself a trader sufficiently adventurous to take the risk of trading with her.[9] In view of this, therefore, the statutory right to maintenance conferred upon a married woman in Sri Lanka assumes considerable importance.

II. The Maintenance Ordinance

The husband's duty of support was for the first time given statutory recognition in Sri Lanka in the Vagrants Ordinance of 1841.[10] The significant shortcoming of this statute was that it did not contain suitable methods of enforcing the husband's common law obligation. Punitive sanction was imposed on a defaulting husband and as such he was liable to imprisonment, fine and lashes, none of which would have relieved the indigent circumstances of the needy wife.

This Ordinance was repealed by the Maintenance Ordinance No. 19 of 1889 which provided that if the husband had sufficient means and neglected or refused to maintain his wife, unable to maintain herself, the Magistrate could order that a monthly allowance be paid.[11]

The scope of applicability of this Ordinance warrants analysis. It has been judicially accepted that the statute governs not only those subject to the Roman-Dutch law, but deserted wives under the Kandyan[12] and Muslim[13] law, too.

Kandyan customary law recognises a diga-married husband's liability to maintain his wife.[14] However, there is no authority for a corresponding duty vested in a binna-married husband.[15] This is presumably becasuse of the cogent differences between the two types of Kandyan marriages.

(7) *Excell* v. *Douglas* 1924, C.P.D. 472; *Behr* v. *Minister of Health* 1961 (1) S.A. 629; *Bing and Lauer* v. *Van der Heever* 1922, T.P.D. 279; Voet 24.2.18; Van Leeuwen *Cen. For.*, 1.1.15, 19.

(8) *Gammon* v. *Mc Clure* 1925, C.P.D. 137.

(9) Agency of necessity, as it was called in the English law has been abolished by the Matrimonial Proceeding and Property Act 1970, s. 41.

(10) No. 4 of 1841.

(11) See also Maintenance (Amendment) Act No. 19 of 1972.

(12) *Ukko* v. *Tambya* (1863-68) Ram; Rep. 70; *Yadalgoda* v. *Herat* (1879) 2. S.C.C. 33; *Menikhamy* v. *Loku Appu* 1898 I Bal. Rep. 161; (1855) Bel. and Vand. 75; (1899) Koch. Rep. 54; *Meniki* v. *Siyathuwa* (1940) 19 C.L.W.37.

(13) *Abdul Rahiman* v. *Lebbe Pathumma* (1889) 5 C.W.R. 145; *Assa Muttu* v. *Marimuttu* (1863-68) Ram. Rep. 140; *Pathuma v. Bawa* (1863-68) Ram. Rep. 144; (1873) Grenier 48.

(14) F. A. Hayley, *A. Treatise on the Laws and Customs of the Sinhalese*, 286.

(15) *id*, 286, note (d).

Nevertheless, judicial authority makes no distinction based on the form of marriage contracted and has made an order for maintenance against binna-married husbands as well.[16] This is clearly inconsistent with the terms of the Ordinance which presupposes that there is an obligation of support, the function of the statute being merely to provide a speedier and less expensive method of enforcement.[17]

A further anomaly is apparent in the application of the Maintenance Ordinance to Kandyans who have ceased to be husband and wife. The judiciary has declared that the language of the Ordinance clearly restricts its provisions to persons during the subsistence of the marital relationship.[17a] Hence, it has been applied to spouses who have separated *de facto* but not to those whose marriage has been dissolved or annulled.[17b] While the common law of Sri Lanka clearly distinguishes between desertion, separation, and divorce, in the Kandyan customary law the mere cessation of the common life in the matrimonial home amounted to a divorce[18] and the woman ceased to be a 'wife' in terms of the Maintenance Ordinance. Nevertheless the courts have consistently held that a Kandyan woman, deserted by her husband, can have recourse to the Maintenance Ordinance. In *Yadalgoda* v. *Herat*[19] the judgement of Clarance, J. referes to the payment of 'alimony' rather than 'maintenance' thereby inferring that the woman in that case was in fact treated as having been divorced, as opposed to merely separated. In spite of an appreciation of this distinction, however, the remedy available under the Maintenance Ordinance was availed of on an analogy of a Mohammedan wife's right to do so. But as Bonser, C.J. rightly pointed out in *Menikhamy v. Loku Appu*[20] 'For my part I cannot see what the rights of a Mohammedan wife has to do with the rights of a Kandyan wife.'[21] In this latter case, Bonser, C. J. justified the deserted wife's right to relief under the statute on the reasoning that the Kandyan law was silent on the question of maintenance. This proposition, however, is not tenable as it is contrary to both authority[22] and principle.[23]

It is interesting to note that the Maintenance Ordinance was made available not only to a Kandyan woman governed by customary laws, but also to one whose divorce had been granted by statute.[24] In the Kandyan Marriage

(16) (1855) Bel. & Vand. 75; (1899)koch Rep. 54; *Rang Menika* v. *Punchi Banda* (1843-55) Ram. Rep. 61.
(17) See H. W. Tambiah, *Sinhala Laws and Customs*, (Colombo, 1968), 149.
(17*a*) See cases cited in note 64 *infra*.
(17*b*) *Meniki* v. *Siyathuwa* (1940) 42 N.L.R. 53.
(18) F. Modder, *Kandyan Law*, (Colombo, 1914), 354; Sharya de Soysa, 'Selected Aspects of the Kandyan law of Marriage' *The Colombo Law Review*, (Colombo, 1979, vol.5), 77 at 87-90.
(19) (1879) 2 S.C.C. 33.
(20) (1898) I Bal. Rep. 161.
(21) At 161.
(22) See note 14 *supra*.
(23) See note 17 *supra*.
(24) No. 44 of 1952.

and Divorce Act [25] the grounds of divorce were stipulated thereby distinguishing between *de fato* and *de jure* separation, nevertheless there was no provision for the enforcement of maintenance.[26]

In *Sarana* v. *Heen Ukku*[27] the parties, who were Kandyans, had their marriage dissolved in terms of the Kandyan Marriage Ordinance[28] and the appellant was ordered to pay a monthly sum of Rs.2/- to the respondent for her maintenance. Subsequently, the respondent applied to the Magistrate's Court for the enhancement of the rate of maintenance and Howard, C. J. declared that although the relationship of husband and wife no longer existed, 'the Magistrate can exercise his powers with regard to maintenance in the case of a marriage dissolved under Cap.96 as if the parties were husband and wife.'[29] In arriving at this conclusion Howard, C.J. distinguished the judgement of de Kretser, J. in *Meniki* V. *Siyathuwa*[30] where the court refused an application for arrears of maintenance made by a Kandyan woman subsequent to her divorce on the reasoning that the Maintenance Ordinance did not govern those who had ceased to be husband and wife. According to Howard, C.J. in *Sarana* V. *Heen Ukku* the ruling in the former case was not applicable because while that case was concerned with an order for maintenance which had been made for the first time in the Magistrate's Court in *Sarana* V. *Heen Ukku* an order had been made by the Provincial Registrar and the Magistrate was only seeking to enhance the sum awarded by recourse to the Maintenance Ordinance. This distinction, however, is a tenuous one.[30a]

While conceding the merit of treating the Maintenance Ordinance as a statute of general applicability, governing all sections of the community and providing an effective enforcement of the fundamental obligation of support; it is submitted that the tenor of the statute is not indicative of an intention to encompass within its ambit persons other than those governed by the Roman-Dutch Law.

Morever a significant inconsistency of judicial attitude is manifest. While on the one hand the court has stressed that the Maintenance Ordinance is applicable only 'while the conjugal relationship exists'[31] a woman who has ceased to be a wife has been given relief under the statute.

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(25) *ibid.*

(26) According to the Act if the parties to the marriage had agreed upon any compensation to be paid to either or both of the parties the District Registrar may embody the terms of the agreement in his order granting a dissolution of the marriage. Moreover, if there was no agreement between the parties the District Registrar could make provision for the payment of maintenance. There was, however, no provision for its enforcement. See s. 33(7). See also *Menika* v. *Naide* (1916) 19 N.L.R. 351; *Punchi Amme* v. *Mudiyanse* (1920) 21 N.L.R. 477.

(27) (1944) 45 N.L.R. 196.

(28) (Cap. 96) s.20.

(29) At 198.

(30) (1940) 42 N.L.R. 53.

(30*a*) In *Meniki* v. *Siyathuwa* an order for maintenance had been made prior to the divorce.

(31) *per* de Kretser J. in *Meniki* v. *Siyathuwa* (1940) 42 N.L.R. 53.

It must be pointed out that there is a strong current of authority in support of the view that persons professing the Mohammeden faith, too have recourse to the Maintenance Ordinance. Thus the Kathi Courts and the Magistrate's Courts were said to have concurrent jurisdiction to determine applications for maintenance.[32] However, it has now been accepted that the Muslim Marriage and Divorce Act[33] vests exclusive jurisdiction in the Quazi to decide questions of maintenance in respect of Mohammedans.[34] Indeed this is the better view since it averts the anomalies that arise in extending the Maintenance Ordinance to persons of the Muslim faith. For instance the Ordinance states that an allowance for maintenance will not be awarded to a wife who without any sufficient reason refuses to live with her husband.[35] Consequently a wife who leaves the matrimonial home because her husband is living with another woman has been held to have had sufficient reason to leave the matrimonial home.[36] Nevertheless the same criterion was held not to apply to a Muslim woman who refused to live with her husband who she claimed was 'living in adultery.' In *Mammadu Nachchi v. Mammatu Kassim*[37] the court held that since the Mohammedan Code[38] entitles a man to keep as many concubines as he is able to maintain, the mere fact that the husband keeps an unmarried woman in addition to his wife is not sufficient to justify the wife's refusal to live in the matrimonial home.

It is submitted that the adoption of different criteria between Muslims and non-Muslims in interpreting the Maintenance Ordinance would no longer be necessary in the light of the more recent decisions.[38a]

Likewise it would be desirable if persons governed by the Kandyan law too were excluded from the ambit of the Maintenance Ordinance. In this way it could be ensured that the award of maintenance took into account the distinctive features of a Kandyan Marriage. Of course it must be pointed out that the Kandyan Marriage and Divorce Act does not provide for the enforcement of maintenance of a needy wife either during marriage or on divorce.[38b] Hence a necessary prerequisite to the exclusion of this section of the community from the Maintenance Ordinance would be the enactment of alternate provisions as an amendment to the existing statute.

(32) *Abdul Rahiman Lebbe* v. *Pathumma* (1889) 5 C.W.Rep. 145; *Pathumma* v. *Bawa* (1863-68) Ram. Rep. 144; *Assa Muttu* v. *Marimuttu* (1863-68) Ram. Rep. 140; (1873) Grenier Rep . 48; *Sooriyaumma* v. *Sathukeen* (1937) 8 C.L.W. 149; *Abdul Gafoor* v. *Joan Cuttilan* (1956) 61 N.L.R. 88 *cf. Jiffry* v . *Nona Binthan* (1960) 62 N.L.R. 255; *Jainambo* v. *Izzadeen* (1938) 10 C.L.W. 138

(33) No. 13 of 1951 s. 48

(34) *Jiffry* v. *Nono Binthan* (1960) 62 N.L.R. 255; *Ismail* v. *Muttu Marliya* (1963) 65 N.L.R. 431; *Ummul Marzoona* v. *Samad* (1977) 79 N.L.R. 209.

(35) S. 2.

(36) *Richard* v. *Anulawathie* (1971) 72 N.L.R. 383.

(37) (1908) 11 N.L.R. 297.

(38) S.101.

(38*a*) See note 34 *supra*.

(38*b*) See note 26 *supra*.

III. Matrimonial Fault and The Maintenance Ordinance

The obligation of support, being a consequence of marriage is dependent on and remains alive only so long as the applicant for maintenance is free of matrimonial misconduct.[39] Thus, in the law of Sri Lanka the statute provides that: 'No wife shall be entitled to receive an allowance from her husband under section 2 if she is living in adultery, or if, without any sufficient reasons, she refuses to live with her husband...'[40]

The Ordinance moreover declares that if the husband is living in adultery or if he has habitually treated his wife with cruelty, the wife is justified in living away from the matrimonial home.[41] Consequently, the matrimonial fault of the wife would vitiate her right to maintenance, while fault on the part of the husband would justify a wife, who *prima facie* appears to be the deserter on account of her refusal to live in the matrimonial home, making a successful claim for support. The matrimonial fault of the wife is also relevant in cancelling an order for maintenance already made.[42]

It is indeed an interesting feature of our law that the judiciary has adopted different criteria in determining the effect of adultery as a matrimonial fault in relation to the husband and the wife. Proof of the husband's adultery, sometime in the past, has been held to be sufficient to warrant the wife leaving the matrimonial home.[43] In *Ebert v. Ebert*[44] De Sampayo, J. was of the view that 'the stain of adultery cannot be obliterated by reform, nor can a wife be expected to overlook the fact in regulating her own life. Adultery strikes at the root of the marriage relationship and its consequences both legal and social continue.'[45] A far more benevolent attitude, however, has been adopted in relation to the adultery of the wife, which may vitiate her right to maintenance. In *Arumugam v. Athai*[46] Basnayake, J. held that the phrase living in adultery 'refers to a course of guilty conduct and not to a single lapse from virtue.'[47] In other words, it was essential that the defendant proves that his wife was leading a life of continuous adulterous conduct in order to justify a refusal to support her. This was also the view of Pereira, J. in *Reginahamy V. Johna*[48] who declared that 'if a husband chooses to let the marriage tie remain in spite of adultery on the part of his wife, and the wife

(39) Maintenance Ordinance No. 19 of 1889 s. 4; Voet 24.2.18; Van Leeuwen, *Cen. For.* 1.1.15, 19.
(40) S.4.
(41) S.3.
(42) S. 4. See *Bisso Menike* v. *Abeysekera* (1961) 60 C.L.W. 108 where a maintenance order was cancelled retrospectively to cover a period during which the applicant was living in adultery.
(43) In *Marihamy* v.*Weerakodie* (1908) 2 Leader L.R. 39 at 40 Wood Renton, J. held that 'past adultery may well justify a woman's refusal to return to her husband.'
(44) (1925) 26 N.L.R. 438.
(45) At 440.
(46) (1948) 50 N.L.R. 310.
(47) At 376.
(48) (1914) 17 N.L.R. 376.

from choice or necessity returns to an honourable life, the husband's liabilities unquestionably revive.'[49] In *Sinno Nona v. Melias Singho*[50] Jayewardene, A.J. was of the opinion that the wife was entitled to maintenance 'although she may have left her husband and lived in adultery some time ago.'[51] This lenient attitude is reflected in several judicial decisions.[52] A whittling down of the importance of matrimonial fault in the sphere of maintenance is also manifest in the cases pertaining to the cancellation of a maintenance order. In *Wieysinghe v. Josi Nona*[53] The Supreme Court held that our order for maintenance can be cancelled only on proof that at the time of the application the wife was living in adultery or was living the life of a prostitute. In this case the husband who deined the paternity of a child born to his wife was not permitted to cancel the order for maintenance although the birth of the child was evidence of an act of adultery about a year previous to the application. This view was reiterated in the recent case *Pushpawathy v. Santhirasegaraspillai*[54] where de Kretser, J. held that the fact that a child was born to the wife about four years previous to the application, the husband denying its paternity, might well be the result of a single lapse from virtue. In the absence of proof of continued adulterous conduct the maintenance order was not cancelled.

Indeed, a salient characteristic of the judicial approach to the impact of matrimonial fault on the claim for support is an obvious partiality towards the wife whose adultery has been condoned unless the woman was living in adultery at the time of the claim or was living the life of a prostitute. Consequently, the husband has been compelled to maintain an unfaithful wife while the slightest taint of guilt on his part has been frowned upon and treated as being sufficient justification for the wife living away from the matrimonial home. Although *prima facie* the fact that the wife is living apart from her husband might appear to be immaterial to his obligation of support, it is submitted that in fact it has far reaching consequences. It has been generally accepted that the innocent spouse is entitled to be maintained at a style of living coequal to that enjoyed by the spouse against whom the maintenance order is made.[57] Consequently, the payment of maintenance to a wife is bound to be a financial burden on the husband. While this would not be objectionable if the husband and wife were treated alike in the application of the statutory

(49) At 376.
(50) (1923) 26. N.L.R. 61.
(51) At 62.
(52) See *Samaratunga* v. *Samaratunga* (1936) 15 C.L. Rec. 198; *Kiree* v. *Naida* (1910) 5 S.C.D. 28; *Ranmalhamy* v. *Appuhamy* (1916) 4. C.W.R. 326.
(53) (1936) 38 N.L.R. 375.
(54) (1971) 77 N.L.R. 353.
(57) *Roberts* v. *Roberts* (1968) 3 W.L.R. 1181; *Kershaw* v. *Kershaw* (1964) 3 All E.R. 635; P.R.H. Webb 'An Outline of the English Law of Maintenance of Spouses During the Subsistence of the Marriage' in *Parental Custody and Matrimonial Maintenance. A Symposium* B.I.I.C.L. Comparative Law Series 13 (London 1966) 138.
For the South Africa Law see *Young* v. *Coleman* 1965 (4) S.A. 213 at 218; *Gammon* v. *Mc Clure* 1925 C.P.D. 137 at 139; *Shanahan* v. *Shanahan* (1907) 28 Natal L.R. 15; *Oberholzer* v. *Oberholzer* 1947 (3) S.A. 294 at 297.

provisions, it savours of injustice when an obvious discriminatory policy is adopted. In an age where women have won the battle for equality with men in many spheres, it is incumbent that women shoulder the responsibilities that must necessarily accompany such parity of status. Consequently, if a single act of adultery by the husband is a suitable defence to a wife who is told that food and shleter is waiting for her in the matrimonial home, then equally it should be an effective defence to a husband who would otherwise be obliged to maintain an unfaithful wife.

IV. Consensual Separation

Although there is nothing contrary to public policy in a husband and wife agreeing to live separately when life together is intolerable the Maintenance Ordinance declares that no wife shall be entitled to an allowance from her husband under section 2 if they are living separately by mutual consent.[58] The vexed question then is whether the effect of a consensual separation is to render the husband's obligation of support dormant for the period during which the parties agree to live apart or whether, notwithstanding any subsequent change of *animus* by either spouse, the original intention to separate totally obliterates the husband's marital obligation. This latter alternative was favoured by Wood Renton, J. in *Micho Hamine v. Girigoris Appu*[59] according to whom 'where a husband and wife agree to live separately by mutual consent, the wife cannot thereafter compel the husband either to take her back as his wife or to pay her maintenance. He opined that the phrase 'if they are *living* separately by mutual consent' in the statute meant 'if they have *separated* by mutual consent.'[60] Fortunately, however, this stringent interpretation of the statute was not followed by subsequent judgements which have held that mutuality ceases when the wife offers to return to her husband and consequently her disqualification to obtain relief also disappears. If then the wife wishes to return to the *status quo ante* and the husband refuses to take her back, he becomes the deserter and is bound to provide her with maintenance.[61] It is submitted that the effect of this offer to return on the husband's obligation of support necessitates the exclusion of a situation where the wife makes a pretence of a change of *animus* merely in order to reap a monetary benefit.[62]

It is clear then, that in the event of a consensual separation, a wife in the Sri Lanka legal system will be effectively denied financial support. While her counterpart in the English law will be allowed maintenance if an agreement to this effect can be expressly or impliedly established.[63] The wife of an

(58) S.4.
(59) (1912) 15 N.L.R. 191.
(60) Italics added.
(61) *Goonewardene* v. *Abeywickreme* (1914) 18 N.L.R. 69; *Fernando* v. *Fernando* (1939) 40 N.L.R. 241.
(62) See *Maliappa Chetty* v. *Maliappa* (1927) 29 N.L.R. 78 at 80; *Fernando* v. *Fernando* (1939) 40 N.L.R.
(63) P.M. Bromley, *Family Law*, (5th ed. London, 1976), 164.

extra-judicial separation in the South-African law is in the most favoured position because the husband's obligation of support is unaffected by a mutual separation.[64]

It is indeed unfortunate that in a situation where the spouses genuinely find that life together is intolerable, but where, due to family and social, pressures they are unwilling to ventilate their domestic quarrels in open court they will be left with no other alternative because if they should agree to live apart the wife would be in grave danger of becoming destitute. Although the object of the statute in disallowing maintenance when parties mutually agree to live apart might have been to deter spouses from breaking up the matrimonial home, this provison is in fact counter productive in that it leaves unhappy couples with no viable alternative but to enter into a judicial separation, which will, in all probability, bring to a definite end a relationship which might well have survived if they had been allowed to live apart for a while.

V. A Divorcee's Claim to Maintenance

The current of judicial opinion favours the view that the Maintenance Ordinance which gives a Magistrate the power to make an order for maintenance against any person who 'having sufficient means neglects or refuses to maintain his wife.....' denies relief under this provision to a woman who is legally divorced from her husband.[64a]

In *Meniki v. Siyathuwa*[65] although the appellant had obtained a Maintenance order against her husband the order was not enforced. Subsequently she divorced under the Kandyan Marriage Ordinance[66] and although it was open to the Registrar to make an order for support under the statute he did not do so. When the wife applied to the Supreme Court for arrears of maintenance, de Kretser, J. declared that she did not have *locus standi in judicio* to claim maintenance under the Maintenance Ordinance since the marital relationship had come to an end. His attention was drawn to the fact that the Registrar in granting a divorce had not ordered alimony either due to negligence or because a maintenance order was already in existence. However he opined that these factors were irrelevant and whatever the plight of the woman may be the original order for maintenance was ineffective and the Magistrate was *functus officio* and it was thus his duty to refuse to continue the proceedings.

(64) *Meniki* v. *Siyathuwa* (1940) 42 N.L.R. 53; (1873) Grenier 82; *Mihirigamage* v. *Bulathsin hala* (1962) 65 N.L.R. 134; *Subramaniam* v. *Pakkiyalachchumy* (1952) 55 N.L.R. 87.

(64a) *Meniki* v. *Siyathuwa* (1980) 42 N.L.R. 53; (1873) Grenier 82; *Mihirigamage* v. *Bulathsinhala* (1962) 65 N.L.R. 134; *Subramaniam* v. *Pakkiyalacdchumy* (1952) 55 N.L.R. 87.

(65) (1940) 42 N.L.R. 53.

(66) No. 3 of 1870.

This case, however was not referred to by Sinnetamby, J.in *Francis Fernando v. Vincentina Fernando*[67] when he allowed a divorced woman to make an application under the Maintenance Ordinance to enhance an order obtained by her prior to the divorce. He reasoned that while it is incumbent that the applicant be the wife of the husband when she claims maintenance for the first time under section 2 'an order once made in favour of a wife continues to be in force. at least so far as the provisions of the Maintenance Ordinance are concerned, until it is cancelled under section 5 or under section 10.'[68] Moreover, it was pointed out that this section may be advisedly, avoids using the words 'wife' and 'husband' while reference is made to any 'person receiving or ordered to pay a monthly allowance.....' Indeed, the *ratio* of *Francis Fernando v. Vincentina Fernando* was clearly restricted to a situation where the order for maintenance was *first* initiated when the parties were husband and wife and subsequent changes in their marital status was said not to affect the order previously made. It is submitted that in *Meniki v. Siyathuwa.* the order for maintenance was first made at a time when the applicant was the wife of the respondent. Nevertheless de Kretser, J. opined that a decree of divorce *ipso facto* vitiated the maintenance order.[69]

In an overall evaluation of the policy considerations involved in this issue it is submitted that there is no justification for denying a divorced woman relief under the statute in a situation where provision for support has not been made in the divorce proceedings. Indeed, a husband, whose matrimonial fault has culminated in a dissolution of the marriage should not be permitted to resile from a fundamental obligation of support

On an interpretation of the statutory provision, however, there is no doubt that the use of the word 'wife' is an impediment to the adoption of a more liberal view. However, if we glance at the English statute it is clear that although the Act refers to the husband's wilful neglect to provide reasonable maintenance[69a] the courts have consistently held that an ex-wife can claim maintenance from an ex-husband under the statute.[69b]

Of course it is submitted that if an order for alimony has already been made the ex-wife should not be permitted to drive her former spouse to bankruptcy by enforcing his duty of support by two separate and distinct orders.[69c] In fact in the English Law a rule of practice was evolved that normally a divorce court will not make an order for maintenance so long as a Magistrate's order

(67) (1958) 59 N.L.R. 522.
(68) At 524.
(69) See also *Mihirigamage* v. *Bulathsinhala* (1962) 65 N.L.R. 134; *Subramaniam* v. *Pakkiyalachumy* (1952) 55 N.L.R. 87.
(69*a*) Matrimonial Causes Act. 1973 s. 27.
(69*b*) *Wood* v. *Wood* (1957) 2 All E.R. 14; *Bragg* v. *Bragg* 41 T.L.R. 8; P.M. Bromley *Family Law, (5th ed. London* 1976) 519.
(69c) See *Premawansa* v. *Somalatha* (1961) 63 N.L.R. 551.

is in force.[70] But it is indeed the duty of the court to ensure that a woman entitled to support is not denied relief merely because of a technical impediment in the law.[71]

It is interesting to note that while our courts have relied heavily on Indian authority[71a] in restricting the word 'wife' in the Ordinance to a woman enjoying the maritial status, a recent amendment to the Indian Criminal Procedure Code[72] declares that the expression 'wife' includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried.[73]

VI. The Reciprocal Duty of Support

In the Roman-Dutch common law the duty of support on marriage is a reciprocal obligation. According to Voet[74] 'lifelong association directs that a needy wife shall be maintained by her husband and a pauper husband by his wife.' There are it is submitted two aspects of this obligation which warrant separate treatment :

(i) to what extent is the wife's financial status relevant to the husband's obligation to maintain his wife ;

(ii) what are the wife's obligations towards her husbnd's maintenance.

(i) When the common household is in existence, it is the husband who sets the standard and style of living, and consequently on the premise that the living standards of a family are a matter of concern to the household and not for the courts to determine, so long as the home is maintained and the parties are living as husband and wife, it is presumed that the husband is legally supporting his wife.[75] This common standard however is determined having regard to the total income of both spouses. Consequently when the parties are living apart, the common standard of living disappears and it becomes necessary to ascertain the criterion upon which one party may be said to be in need of support. In this situation it is inevitable that the standard of living of both spouses will be lowered since now there would be two households to be maintained instead.

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(70) P.M. Bromley, *Family Law*, (5th ed., London, 1976), 502.
(71) See *Fernando* v. *Fernando* (1884) 6 S.C.C. 99; *De Silva* v. *Seneviratne* (1925) 7 C.L. Rec. 58.
(71*a*) *Shah Abu Ilyas* v. *Ulfat Bibi* Indian Decisions (N.S.) 9 Allahabad 33; *In re Mohamed Rahimulla and Another* (1947) A.I.R.Madras 461; *Janni Bibi* v. *Mohamed Abdul Rahaman* (1953) A.I.R. Andhra-1.
(72) Act No. 1 of 1974. S. 125(1) Explanation (b).
(73) See also *S.S. Manickam* v. *Arputha Bhavani Rajam* (Madras) 1980, Cr. Law Journal
(74) 354. Voet 25.3.8.
(75) H.R. Hablo, *op. cit.*, 112.
(76) *Reloomal* v. *Ramsay* (1920) T.P.D. 371; *Kershaw* v. *Kershaw* (1964) 3 All E.R. 635, 636-637; *N.* v. *N.* (1928) 44 T.L.R. 324, 328.

of one.[77] Bearing this in mind the next important issue to decide upon is the relevance of the wife's means in ascertaining the husband's obligation of support. It is submitted that if the 'needs' of a wife are determined from a subjective standpoint, i.e having regard to the wife's ability to maintain herself, then the law would be giving effect to and will be consistent with the reciprocal duty of support. If on the other hand, the duty of support is conceived of as an invariable and absolute duty vested in the husband irrespective of the means of the wife then the element of reciprocity would be ignored.

It is evident from an analysis of the case law that the decisions founded on the Vagrants Ordinance,[78] which was the precursor of the Maintenance Ordinance, and which was largely influenced by the English Vagrancy Act of 1824, took into consideration the means of the wife in determining the existence or otherwise of an obligation of support vested in the husband In *Cadera Umma v. Calendan*[79] the Supreme Court pointed out that when it is clear that a woman is in perfect health and strength and without incumberance and that she can, if she pleases, obtain ample means to support herself, by work suited to her sex and to her past and present condition and habits, such a woman does not require the support of her husband within the meaning of the Ordinance. Of course, the danger of relieving a vagrant husband of his fundamental marital obligation merely because the wife has potential earning capacity was appreciated and consequently the court cautioned that the law on this point should be administered with discretion and humanity and for instance, the woman ought not to be required to prove ineffectual attempts to obtain employment. In similar vein it was declared that 'It is not competent for a husband to throw his wife on her own resources and subject her to menial service for her maintenance, when his means and her position entitled her to exemption from that service.'[80]

In *Gunawardene v. Abeywickreme*,[81] however, a case decided under the Maintenance Ordinance, Wood Renton, J. interpreting the statute declared that the phrase 'unable to maintain itself' in section 2 applied exclusively to the child and as such even if the wife was a woman of affluence she was entitled to support from her husband. This view was followed in *Thankachiammah v. Sampanthar*[82] but

(77) *Kershaw* v. *Kershaw* (1964) 3 All E.R. 635, 636-637; *Ette* v. *Ette* (1965) I All E.R 341; *Schlesinger* v. *Schlesinger* (1960) 1 All E.R. 721, 725.

(78) No. 4 of 1841.

(79) (1863-68) Ram. Rep. 141.

(80) (1873) 2 Grenier 104. See also C.R. Batticaloa 1710 (1870) Vand. Rep. 43; *Punchi Nona* v. *William Appuhamy* (1917) 4 C.W. Rep. 422; (1873) 2 Grenier 92.

(81) (1914) 17 N.L.R. 450.

(82) (1922) 24 N.L.R. 250.

departed from in *Silva v. Senaratne*[83] where Macdonell, C. J. held that the only justification for permitting a claim for maintenance, namely the need to avert the possibility of the wife becoming a public charge, was vitiated if she had sufficient means to live comfortably.

In view of these conflicting decision the matter was referred to a Divisional Bench of the Supreme Court in *Sivasamy v. Rasiah*[84] and the court unanimously held, overruling *Silva v. Senaratne* and following *Goonewardene v. Abeywickreme* that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means of the husband and is unaffected by the fact that she has means of her own. Soertsz, A.C.J. in this case concluded that 'the contrary view would lead to the appalling result that a fickle husband, having enjoyed the consortium of a wife possessed of means so long as it pleased him, may on wearying of it, turn his wife adrift and free himself of all his obligations to her'.[85]

One may, however, doubt the plausibility of the above rationale on the reasoning that it is indeed doubtful that a 'fickle husband' will be compelled to honour his maritial obligations merely by a threat of support on the termination of the relationship. As opposed to this is the very cogent justification for taking into account the means of a woman in an era when it is more usual than not that a woman, though married is self-supporting. Bearing in mind the special problems attendant on a married woman, like for instance the responsibility of looking after a young family and the fact that her job prospects are not comparable to that of her husband, one must nevertheless admit the desirability of apportioning to a woman her share of responsibility for the well being of the family. The essential point to be noted is that at all times the court should endeavour to maintain a balance between the financial status of both parties. In other words, if for instance there is a glaring disparity between the living standards of the husband and wife on account of a substantial increase in wealth of the husband, then even though the wife may have sufficient means to live comfortably, she can demand that her husband share his enhanced income with her.

In the ultimate analysis then it is submitted that the obligation of support should be relative and therefore not capable of being decided upon in a conclusive manner at any given point of time. While there

(83) (1931) 33 N.L.R. 90.
(84) (1943) 44 N.L.R. 24.
(85) At p. 21 This ruling was followed in *Fernando* v. *Fernando* (1961) 62 N.L.R. 550; *Sathasivam* v. *Menickaratnam* (1962) 66 N.L.R. 355; *Nadarajah* v. *Nadarajah* (1966) 71 N.L.R. 16. cf. *Ediriweera* v. *Dharamapala* (1965) 69 N.L.R. 45.

is no invariable duty to support a wife, a husband can be called upon to fulfil this obligation at any given moment when it is apparent that the wife is in need. Moreover, in ascertaining her needs, while her resources should be relevant, the standard of living she is entitled to must be determined by reference to the life style enjoyed by him. The principal justification for this is that although the parties are living apart they are still married and as such they are entitled to enjoy a comparable standard of living, as this is the only alternative to the common life they would have enjoyed if not for the separation. Moreover, while this equalising of standards is sought to be achieved when the marriage is dissolved, it is submitted that there is far greater justification for this when the marriage relationship is still intact.

Indeed the recent amendment to the Maintenance Ordinance[86] reflects to some extent an appreciation of the need to take into account the financial means of the wife. For instance the Act declares that in awarding maintenance the Magistrate should have 'regard to the income of the defendant, and the means and circumstances of the applicant....[87]' Consequently if the Magistrate is expected to consider the financial status of the wife in computing the quantum of maintenance to be awarded, it is most likely that henceforth the wife's means will be treated as relevant in determining the initial question, namely, the existence of an obligation to maintain, her too.

(ii) The wife's reciprocal obligation to support a husband was first given statutory recognition in 1923 by the Married Women's Property Ordinance.[88] It was enacted that 'when a married woman having sufficient separate property neglects or refuses to maintain her husband, who through illness or otherwise is unable to maintain himself, the Magistrate, within whose jurisdiction such woman resides, may, upon the application of the husband, make and enforce such order against her for the maintenance of her husband out of such separate property or by section 2 of the Maintenance Ordinance he may now make and enforce against a husband for the maintenance of his wife.'[89]

While there is a dearth of judicial authority on this statutory provision the two reported cases emphasise the onerous burden vested in the husband of establishing an inability to maintain himself, as a prerequisite to making a successful claim for maintenance.[90] While it has been accepted that a wife is not expected to prove ineffectual attempts to obtain employment[91] a husband is obliged to adduce cogent evidence of abortive efforts at securing employment.[92]

(86) Act No. 17 of 1972. 5. s(1).
(87) *ibid.*
(88) No. 18 of 1923 s.26.
(89) *ibid.*
(90) *Fernando* v. *Fernando* (1929) 31 N.L.R. 113; *Perera* v. *Perera* (1941) 43 N.L.R. 215.
(91) *Cadera Umma* v. *Calendan* (1863-68) Ram. Rep. 141.
(92) See case cited in note 90, *supra.*

Perhaps this significant difference in attitude derives from the terms of the statute which specifically states that a husband qualifies himself for maintenance only if 'through illness or otherwise he is unable to maintain himself' while a corresponding burden is not imposed on a deserted wife.

It is sumbitted that while this provision might have been relevant at the time in which it was enacted, the changed social and economic status of a woman in modern Sri Lanka warrants the recognition of a comparable obligation of support being vested in the husband and wife.