

## JAMAICA

### Family Patterns

"The diversity of family forms, and the extent to which some of these differ from the types traditionally associated with European communities, do not mean that a wholly chaotic family situation prevails.... On the other hand, it is equally inaccurate to deny altogether that instability is characteristic of many West Indian family forms". These quotations from 'The Population of Jamaica' by the demographer George Roberts highlight the difficulty of giving a clear picture of the patterns of family organisation and the ways in which they function in that island.

To understand why some of the people organise their family life in the way that they do it is necessary to bear in mind certain characteristics of the society. Jamaica is a small island with limited resources and a large and growing population. None of the population is indigenous. It is racially very mixed, though about ninety percent show their origin from the slaves brought from Africa to work the sugar plantations in the eighteenth and nineteenth centuries. Later waves of East Indians, Chinese, people from the Middle East, Europe as well as the British plantation owners, overseas, traders and ruling groups have all contributed to the mixture. It is a society that has been formed by migrants, willing or unwilling. Perhaps this, taken together with a fairly constant high level of unemployment since the end of slavery, has meant that people were ready to migrate in search of employment wherever within reach it was available. Movement within the island, as well as outwards to Panama, Costa Rica, Cuba and the USA, and more recently England and Canada have all had to be accommodated somehow in family living. Perhaps it is the necessary adjustments which have to be made to an unpredictable economic situation that leads to the conclusion of observers that "instability is characteristic of many West Indian family forms."

It has been the view of most West Indian commentators on the state of West Indian family - a view unsupported by evidence - that the present mating patterns derived from the economic and social conditions of slavery. Social conditions have certainly changed very markedly since those days. As for the economic, Roberts and Sinclair in their discussion of mating patterns in their book "Women in Jamaica", based upon census material supplemented by special research work on females of child bearing age, stated their view in these terms: "In any event it has been our argument that sufficient economic advance has been made since emancipation to at least expect some shift in mating patterns. The fact that these have not appeared suggest strongly that economic conditions have had little to do with their formation". In a certain limited sense this may be true, but there is also evidence to suggest that when times are good and jobs that pay well can be had, unions, whether common law or marital, tend to be more stable. But the waves of migration, and the patterns that these follow, are probably a more reliable guide to understanding the kind of relationships people enter into during the years when they are having children.

If the accepted norm of family formation is that a man and woman will marry and then have children, then the Jamaican pattern diverges very widely from this. According to the last census in 1970, continuing the pattern shown in previous censuses, less than one-third of family unions began in this way. One of the most generally quoted figures in any discussion of the Jamaican family is that more than seventy percent of children are born out of wedlock. The majority of these are born to people in visiting or common law relationships. For the purpose of this paper the term 'visiting relationship' - borrowed from Roberts - will be taken to mean a relationship in which the partners do not have and have never had a common home. By a common law relationship is meant one in which the partners have established a home in which they may be said to be cohabiting.

Childbearing tends to begin early, while the girl, and sometimes both partners, still live with their parents. Common law unions tend to be formed somewhat later when partners feel that they are able to set up

house together. Research has shown that at this stage one or both of the partners may be working. Very often the woman has a steady but fairly low paid job, while the man may work intermittently or seasonally but earning more money when he works. Again, to quote Roberts and Sinclair: "... the general mating process tends to be a movement from visiting to common law or married; from common law to marriage and from visiting to married". But their study shows that there is a good deal of evidence that more people regard marriage as a goal to which to aspire, and the statistics show that more than half of them attain this by the time their children have all been born. Marriage tends to occur at a high average age, and the numbers in the ever married category increase continuously with advancing age (see pp 263-9 The Population of Jamaica).

#### Women's Attitude to Unions Outside Marriage

Two points of interest emerged from the sample of women studied in depth by Roberts and Sinclair in their "Women in Jamaica". The first is the impression they formed that a significant number of women in visiting and common law relationships found that these looser unions suited their situations better than marriage and were not anxious to change them, at least while young and earning. It was clear that their economic affairs were easier to handle, particularly in visiting relationships, where whatever money was contributed by the father could be spent wholly on mother and child, and living expenses were easier to meet when living at home, very often supported wholly or in part by the family. The looser union bond generally means the maintenance of strong bonds with the natal family of the partners. Help with child rearing is expected, and often asked for, not only from parents but siblings and other relatives.

The second point was that women in Jamaica do not make a large number of changes of partner during their lifetime. Since most of the studies of mating have tended to focus on the women it is not known with any certainty whether the same is true for men. But observation would suggest that this is not so, and the records of the courts and social agencies include many cases with men supporting, or rather not supporting, more than one common law wife simultaneously. The married man with the outside family is also common enough.

A closer look at the age structure of the partners in the various relationships might give some indication of the kind of problems with which the Courts might be asked to deal. George Cumper in his study of "The Fertility of Common law Unions in Jamaica" based on the 1960 census figures describes the pattern of relationships - a pattern which holds good for the 1970 census also. "... in the age group 15-19 the main form of mating is non-residential. Commonlaw unions increase in importance up to the age group 25-29, when 34 percent of women are living in such unions, and at least 41 percent have experienced a commonlaw union at some time. Thereafter commonlaw unions decline in importance, while legal unions continue to increase and in the age-group 40-44 the proportion ever married is 55 percent. Commenting on this state of affairs Roberts points out that instability is a "cardinal element" in the family situation of many of those bearing children in the younger period of the reproductive span. This confirms the experience of the social agencies working with children in need and in trouble.

Where there can be said to be any firm relationship between the young partners it is most likely to be of the "visiting" kind. One of the most important issues arising from such relationships will be provision for maintenance of any children that may be born to the partners. To determine the question of the liability of the male partner, the finding of paternity is crucial. Since some at least of the male partners are very young and others may stand in such relationship to the girl and her family that they will be reluctant to press any claims, the provision of maintenance through court-related proceedings raises many problems. If to these is added the likelihood that for at least some periods in any year the father will be unemployed and unable to pay maintenance, the difficulty of ensuring that many of the children born to such partners are regularly maintained by their parents can be seen. This is a problem that courts have regularly to face. The problems are, if anything, compounded

by the fact that there has not yet been any statutory amendment of the common law by which imprisonment for the non-payment of arrears due on orders made under the Maintenance and Affiliation Acts extinguishes liability to pay them. Legislation to remedy this is being contemplated and is obviously urgently needed.

It is obvious that entry into common law unions is greatest during the age of greatest fertility. Such unions are usually undertaken when one at least of the partners is employed, and there is some means to support a household. As with married unions, claims for maintenance usually arise when the partnership is disrupted. Such disruption is easier and conceivably more likely to happen than to partners who are married. As Roberts and Sinclair point out (p.170, Women in Jamaica) "Child support assumes considerable significance in Jamaica because of the presence of visiting and, to a lesser extent, common law unions". Also significant is the extent of the reliance for such support on relatives and friends, particularly of the woman partner. Roberts and Sinclair found that when there were only one or two children involved, fathers in a visiting union contributed to child support in about 43 percent of the cases, but when such families got larger this dropped to about a quarter. As the mother got older the main burden of child support moved to her and census material showed a rise in the proportion of households headed by single women at advanced age in the family cycle though not many of them remained in an active visiting union.

#### The Economics of Bringing up Children

The labour force statistics throw some interesting light upon this. The 1970s have been a period of increasing economic hardship. Employment has been declining, but the labour force increasing. In general, males account for the decline in employment, females for the increase in the labour force. As well as looking for work, more females have set up as own account workers, turning their hands to whatever they could in order to support their children. But the statistics also show that unemployed heads of household tend to migrate, most of these being men though including a fair proportion of women. Unemployment, or the fear of it, seems to have been a powerful incentive to migrate for those with children to maintain and educate. Such a response to the problem would be widely understood, for it has long been accepted in the society that one of a parent's most important duties is to provide economically for a child's maintenance and education, even if this meant not having the child living with the parent. There had often to be a choice between the provision of day to day care and earning enough to feed, clothe and educate a child, and the second was accepted to be the more important. It still is, in spite of the efforts of social agencies to stree the need of the child for parental affection and care. Indeed, where substitute care could almost be said to be the norm, this may be less important than the theories suggest, particularly if there are persons such as grandparents or other family members who accept responsibility for the child's upbringing.

#### Increased Expectation of Life

One of the most important, and under-rated, influences on family life and changing family patterns has been the considerable increase in expectation of life that has taken place during the last century. In 1880 the expectation of life for men was 37.02 years, for women 39.8. By 1969 this had reached 66.7 years for men, 70.2 for women. Today both men and women can normally expect to live into their seventies. The average age of marriage tends to be high and this means that by the time they die most persons in Jamaica will have been married.

A small but steadily increasing number will have been married more than once. The figures on divorce indicate this. More than half of those married in their teens and early twenties divorce, and nearly 14 percent of all divorces involve those who have been married for twenty-six years or more. It is as though the prospect of longer active life encourages the resort to changes in marriage partners or may be life styles. The current statistics do not indicate what proportion of marriages recorded are second marriages for at least one of the partners, but if the

experience of other countries which have a similar pattern of divorce is taken into account it is likely that second marriages could become a significant feature of family life in Jamaica. This would mean that in addition to matters concerning the maintenance and custody of dependent children, problems involving the division of property would assume much greater importance in the work of the courts. The financial implications of second marriage and second families would in such matters have to be given far more weight than they are at present.

As we shall see the present rules which govern distribution of property on the dissolution of unions, whether married or not, bear little relation to the reality of the situation of most couples and are urgently in need of change. Such change is being considered and it is hoped that opportunity will be taken to frame new rules that will take into account the emerging patterns of family life.

### Fostering and Adoption

No description of family life in Jamaica would be complete if it did not include the part played by fostering and adoption in its working. Until the passage of the Adoption Act in 1956 neither word had the meaning that now attaches to it. Indeed 'fostering' was hardly used at all though a great deal of it was done, and what began as fostering often passed over into the informal adoptions that were, and to some extent still remain, a feature of child rearing in Jamaica. Parents with large families, or who are unable, because of poverty, ill health or the like, to maintain and educate their children, would place their children with family members who were willing to undertake their care and upbringing, or with persons better placed in life who showed interest in any child. With family members it was usually on the basis that such placement was temporary until circumstances improved, though this often meant that a child would spend all his growing up years with that relative, or be passed on to another, the parents rarely resuming responsibility for him. If the child was "taken" by a non-relative, this was usually regarded as an "adoption" though it had no legal status, and difficulties sometimes arose when the child turned out well and was reclaimed by the parents.

Since 1956 this kind of informal adoption had almost disappeared, but fostering by family members, most often grandmothers, sisters and aunts, is still as strong as ever. It acquired added importance with the large waves of migrations to the United Kingdom, the United States and Canada that have taken place since the Second World War, where wage earners went first to establish themselves with the idea that families should follow. Sometimes they did, more often they did not, and this was reflected in the growing numbers of children who had to be taken into care where placements with family or friends broke down, often because no money for maintenance was forthcoming.

Adoption, too, has played its part in the migration process, particularly in recent years. During the seventies, the United Kingdom, the United States and Canada, the main areas of post war migration from Jamaica, made the rules governing entry much more restrictive. Immigration is now virtually closed to all except those with special skills and jobs to go to, and dependent family members of these and of persons who had already legally settled in those countries. From the description of Jamaican patterns of mating and child bearing given above it will be obvious that a number of those who migrate will have had children born out of wedlock. It is understandable that officials administering an immigration policy designed to limit access to their country should insist that dependents should have a proven legal relationship to those asking for their entry. Where it was a father, or a mother who had married, who sought to have a child born out of wedlock join them, legal adoption seemed the simplest way of meeting the requirements. Adoption by natural parents, is provided for in the legislation and has been used when it seemed to meet the needs of those wanting legal evidence of a relationship. But the importance of this to fathers of children born out of wedlock has been lessened by the provisions of the Status of Children Act (No. 36 of 1976) which provides procedures for the legal recognition of paternity. There has been some evidence that immigration officials are not happy with

the use of adoption as a means of qualification for migration of a dependent, but have equally not been willing to recognise status acquired under the provisions of the Status of Children Act. The difficulties and misunderstandings that arise when mutual recognition of family law provisions does not exist between countries where there is a considerable flow of migration, can very easily damage relationships, not only between people, but between the countries themselves.

This brief look at the family forms which have developed in Jamaica and the way they function is basic to consideration of the appropriateness of the laws and of the legal system which deal with the problems, the rights and duties, the matters of status and of claims to property and the like which arise out of the way families live their lives. It will be observed that the development of the law and its procedures has followed a very different line from that of the development of family forms within the society - as has so often been the case with colonies, where ruler and ruled differ in origin.

### Courts and Legislation

As conquerors and settlers the British brought with them their laws and those parts of their legal system that could be exported. The basis of the family law was in the Common Law, varied and added to by legislation emanating from Whitehall and in general copying English statutes as on the relevant subjects. The court system evolved into a reflection of the English system, with citizen Justices of the Peace at the bottom, Resident Magistrates appointed to the parishes hearing the bulk of the civil and criminal cases, the Supreme Court headed by the Chief Justice and a number of Puisne Judges with both original and appellate jurisdiction and, after independence, a Court of Appeal through which leave to appeal to Privy Council could be asked for. Most family matters came before the Justices of the Peace and the Resident Magistrates. In 1879 a Divorce Law was enacted in Jamaica based upon the English Matrimonial Causes Act of 1857. Jurisdiction in such matters was conferred upon the Supreme Court. The effect of this was, as in England, to inaugurate two family law regimes to which different standards applied, one in the Magistrates' Courts and one in the Supreme Court.

A look at how the matter of maintenance was handled will make clear how this worked in practice. The Maintenance Law was one of the earlier pieces of legislation. The duty to maintain was defined in very wide terms, so drafted as to underline the fact that maintenance was the responsibility of the family not the state. The section setting out the duty to maintain is still in essence what it was in the latter part of the nineteenth century. It provided that every man was required to maintain his own children as well as every child whether born in wedlock or not, that his wife had at the time of her marriage with him. If he lived in a common law union, his duty to maintain similarly extended to the children other than those which were his which his partner had at the time the cohabitation begun. A woman's responsibility to maintain was limited to her own children. In the description of the family patterns of Jamaica given above, it will be remembered that visiting unions form a significant percentage of the union status of women in their early childbearing years. This relationship fell outside of the terms of the Maintenance Law under which claims to be maintained were based upon cohabitation. In spite of the Law's failure to meet the needs of large numbers of children it was not until 1926 that the Bastardy Law was passed. This made provision for the ascertainment of paternity for the limited purpose of a small weekly payment of maintenance to the child's mother during the first fourteen years of the child's life. Like the Maintenance Law, the Bastardy Law was administered in the Magistrate's Courts.

As in the English legislation, the amount of maintenance that could be got in the Magistrate's Courts was very small, the limit that could be awarded being stated in the law. As late as 1975 this limit was fixed at Eight Dollars per week under the Maintenance Act, Four Dollars under the Affiliation (formerly Bastardy) Act. The inconvenience of these small awards was balanced by the ease of access to the Courts and the fact

that the process was free. It was intended to meet the needs of the poor, and of wives without income property of their own, when husbands refused or failed to maintain them and any dependent children they might have. Women who cohabited outside of marriage had, and still have, no claim to be maintained, though the children who are part of the family of the partners do. Following also the English pattern, a higher standard of conduct is demanded from claimants for maintenance in the Magistrates' Courts than from those who make such claims in the Supreme Court in divorce and other matrimonial causes. Any evidence of adultery, for example, will extinguish a wife's claim to maintenance in the lower courts, it will only be one matter to be taken into account in the deliberations of the judges in the upper court.

#### Maintenance and Affiliation in Resident Magistrates' Courts

The number of applications to the Magistrates' Courts under the Maintenance and Affiliation Acts has always been large, particularly so under the latter Act. As a result two practices developed which brought the proceedings into public disfavour. First, the applications were made direct to the office of the Clerk of Courts. The very public disclosure of one's most private affairs to a rushed and frequently junior clerk tended to put off all but the most desperate or the most hardened. Secondly, in order to prevent the volume of these cases swamping the work of the Court, the habit of setting aside one day in the week, usually Fridays, for the hearing of these suits established itself. As hearing had to follow service of summons - which frequently took some time, if it ever got served at all - the applicants were often in fairly desperate straits and speed of despatch if the matter was important. The few minutes which it usually took the magistrate to dispose of the matter meant that no real consideration could be given to its merits, and this was made worse by the fact that in most cases there had been no investigation of the circumstances of the family. There was no idea as to whether the decision about maintenance met the need of the family or indeed whether or not it would even be obeyed.

Those who brought cases under the Maintenance Law were slightly better off than those who had to bring suit under the Affiliation Law. If there seemed to be evidence that violence either had been or would be involved in the collection of maintenance, or it was clear that the respondent had no intention of paying such maintenance, the Court could upon application order the money to be paid to the Clerk from whom it could then be collected by the application. No such procedure was available under the Affiliation Act, and the plight of children used to try and enforce court orders for their maintenance became a matter of considerable concern to the social services. It was their experience that the way the law dealt with maintenance problems tended to compound rather than solve family problems. Understandably therefore they were in the forefront of the movement to get established a Family Court system. They pressed for a Court which could deal with the whole range of family problems including divorce, with the kind of organisation which would integrate the work of the services with each other and with the Court. They wanted an end to the confusion often suffered by families in need and/or in trouble, faced with the different and sometimes conflicting solutions offered by the various services and the various courts before which matters could be heard. The shortcomings of the way in which family matters were handled were so widely experienced that the call for a Family Court attracted a good deal of public support.

#### Establishment of the Family Court

In 1974 the Government decided that the Family Court experiment should be tried. After consultations and a good deal of debate it was agreed that a prototype court should be set up in the capital area, its jurisdiction confined to that area. The limits of the jurisdiction of courts that could be created by Act of the Jamaican Parliament had been the subject of controversy, judicial hearing and appeal right up to the privy Council during 1974-75 as a result of the Government's decision to create a special Court for the hearing of offences relating to the possession and use of firearms. Parts of the jurisdiction exercised by

the Magistrates' Courts and by the Supreme Court were given to the Gun Court. In brief, the finding of the Privy Council was that such part of of the legislation as attempted to do this were outside the power of Parliament as laid down in the Jamaica Constitution. Though the proposed Family Court would not be on all fours with the Gun Court which was the subject of the appeal, it was decided that divorce, annulment and other related matrimonial causes within the jurisdiction of the Supreme Court would not be assigned to the Family Court. Most other family matters were or could be dealt with in the Resident Magistrates' Courts. It was agreed that the status of the Family Court would be effectively at that level for the time being, though the Government policy statement announcing this acknowledged the desirability of having one court deal with all family matters and indicated that this end would be pursued.

The main objective of the plans for the Court's design and functioning was to provide an integrated approach by judicial and social services to the handling of family problems. This, subject to the constitutional limitations outlined above, determined the jurisdiction of the Court, what services would be made available inside the Court building, and the stages at which such services would be available to people seeking help. Government policy statements emphasised that the aim was to prevent family breakdown where this was possible, and if it could not be avoided, so to deal with it that the welfare of all its members, particularly the children, were protected.

As a result of the analysis of information from the Courts, the social services, both government and voluntary, and other relevant sources, the Court was given jurisdiction over matters arising under the Affiliation Act, the Children (Adoption of) Act, the Children (Guardianship and Custody) Act, The Education Act, the Juveniles Act, the Maintenance Act and the Married Women's Property Act. To these have been added the Status of Children Act which came into effect in 1976. The information and consultations also revealed a need and a demand for preventive work with families. The main government agencies, the Probation and Child Care services, were not empowered to do preventive work, and the few voluntary agencies engaged in it could not meet the demand, limited as they were by money and geographical location. It also emerged that families in need or in trouble frequently needed the services of more than one agency, and referrals to widely separated services tended to defeat clients who just dropped out of sight.

It was quite clear from the beginning that the services needed within the Court could only be provided through collaboration with the existing agencies. The financial constraints on planning were considerable. The Child Care and Probation Services which worked so closely with the Courts under the Juveniles Law agreed to have offices at the Court, as did the Adoption Service, Public Assistance and the voluntary body doing counselling and preventive work with the families of young children. One of the Legal Aid clinics agreed to help. The Ministry of Health was asked for the services of a Public Health nurse to facilitate referrals to doctors, specialists and clinics as well as provide family planning advice and first aid which was sometimes necessary. The police were accommodated, and an extended Court Service which included a unit to deal with the collection and paying out of monies for maintenance. The Court was given its own bailiffs. There was no service providing marriage and family counselling as such and arrangements were made, with considerable help from the churches, for trained persons to offer this service on a sessional basis.

The two important aspects of the design of the Family Court that enabled it to function - though not without some hitches - as a unit were the Intake Service to which those seeking help went first and the co-ordination unit, whose head\* had the responsibility of ensuring that the services which were offered to the public or which experience showed were needed

---

\*There was resistance to including the post of the Co-ordinator in the Family Court Act. Now after seven years of operation, consideration is being given to amending the law to include it.

would be delivered at as acceptable a standard as finances would allow. Liaison with existing services was important as was the capacity to stimulate new services where there were gaps. But the real crucial job of liaison was with the Judges of the Family Court and the Court staffs who worked under them. Both Judges and Court staff were people who had been working at very similar jobs in Resident Magistrates' Courts. As was pointed out above, the social workers and other agency personnel working within the Family Court came mostly from senior workers within established services. A training and orientation programme was organised for all those recruited to the Courts. In spite of this old work habits and attitudes kept reasserting themselves, and this required the constant attention of the co-ordination unit. Though it was recognised from the beginning that all new recruits should have a course of training before beginning work in the Court and that a constant programme of in-service training was necessary to keep it functioning well, the training programme has been a casualty of the tight financial situation in which the island has found itself.

The intake procedure is the key of the new approach in the handling of family matters. All persons bringing new matters see first one of the Intake Counsellors. These are trained and experienced social workers whose job it is to listen to clients and help them clarify the matters at issue, to deal themselves with those that do not need referral and to refer the rest to the appropriate agency. Most of the referrals go to agencies that are represented in the Family Court building, but referrals may also be made to outside agencies. This method of approach has had such success that the Court has found it difficult to cope with the flood of people who came at its opening and have continued to come. The emphasis has from the beginning been on trying to bring the contending parties together and to try and reach some measures of agreement as to how their difficulties might be tackled. The pros and cons of a resort to legal proceedings are discussed. Predictably many of the cases concern maintenance and, where this appears likely to succeed, conciliation is offered. Experience has shown that when such arrangements are understood and agreed upon by both parties they are most likely to be honoured even if, or in some cases especially if, there is no court order. Reconciliation work, where this seemed called for, was undertaken by the Family and Marriage Counselling unit. Referral to this unit was sometimes made by the Judges and supervision by them could be requested either by the Judges or by clients themselves.

The proposal to set up a Family Court had been met with the objection that there was very little to be gained by improving the way in which family matters were handled when the laws themselves were oppressive. This was acknowledged, but as it was clear that the laws needed to be comprehensively amended and this would take some years in the doing, a compromise was reached. The areas in which the greatest hardships were being experienced were identified. It appeared that these could be corrected by relatively minor amendments to existing legislation and it was agreed that these amendments would be presented to Parliament at the same time as the law setting up the Family Court. For example, amendments were made to the Maintenance and Affiliation Acts raising the age to which juveniles would be entitled to be maintained to sixteen and Judges had the discretion to extend this to eighteen years. The limitations to the amount of maintenance that could be awarded under these Acts (referred to above) was removed and the Judge was given the discretion to determine the amount of the award taking all the circumstances into consideration.

The Judicature (Family Court) Act was passed in December 1975 with the accompanying amendments to other Acts referred to above. The court began operation in January 1976. There were now three court systems handling family matters. At the lower level there was the Family Court in Kingston and St. Andrew, in other parishes of the island the Resident Magistrates' Courts continued as before with the one difference that the amendments to the laws which had been made applied to them also. At the upper level, the Supreme Court functioned as before.

## Response to Family Court Approach

A number of things resulted from the establishment of the experimental Family Court. Most noticeable was the flood of persons who came to take advantage of the facilities offered by the Court. Ten thousand nine hundred and forty three were interviewed by the Intake Counsellors during the first year of operation. The majority of these were maintenance matters, the response stimulated by the removal of the limitations on the amount of maintenance that could be awarded. It is also fair to note that a similar response was not recorded in the other parishes where the old procedures for dealing with these matters were still being followed. In addition, it was noted that a number of people either changed or attempted to change their addresses so that they would fall within the geographical field of jurisdiction of the Family Court. It was anticipated that the initial heavy numbers of people using the Court would represent a backlog of matters which for one reason or another persons might not have thought it worth their while to pursue. But this seems not altogether to be the case. In the seven years of the Court's operation the number resorting to it have continued to rise. But there has been no money to provide more staff - and they were never enough to function adequately from the beginning. The result has been that a limitation has had to be placed on the number seeing the Intake Counsellors daily, though every attempt to respond to emergencies is made.

In response to public pressure for the extension of the Family Court system to other areas, a second Court was opened at the Western end of the island. But the grave financial problem of the country has made further developments impossible at a time when the need for such services are possibly greatest.

## Legal Disabilities of Child Born out of Wedlock: Status of Children Act

Concern for the improvement in the handling of family law cases was only a part of the campaign to make the law and legal practice and procedures related to families more responsive to the needs of people. The legal disabilities suffered by children born out of wedlock were seen to be an important part of the cycle of poverty and instability that affected so many families. It was felt that discrimination in the legal treatment of children born in and out of wedlock should be abolished. Parental rights and duties should belong to those who could be identified legally. Though it was not ready in time to be part of the legislative packet that accompanied the Family Court Act, the Status of Children Act was passed in November 1976. It described itself as 'An Act to remove the legal disabilities of children born out of wedlock and to provide for matters connected therewith...' The central section of the Act dealt with evidence re parenthood. Where the child was born to married parents or within ten months after the ending of the marriage by death or dissolution the usual rebuttable presumptions applies. Where this is not the case, the Act details what evidence of paternity will be acceptable either as prima facie evidence of as conclusive proof of paternity. As one of the most important pieces of prima facie evidence is the presence of the name of the father on the birth certificate of the child, amendments have recently been made to the Registration (Birth and Deaths) Act to widen the scope of the very restrictive provisions which had up to now governed this process.

One of the important changes brought about by the Status of Children Act is that applications for declaration concerning paternity can now be made either to the Family court or the Supreme Court by the father, the child, and any person "having a proper interest in the result" as well as the mother.

Legal recognition of paternity means that, among other things, the father may make claim to the custody and guardianship of his child and the welfare of the child becomes the deciding factor in determining which parent should be awarded custody.

Piecemeal amendment of legislation of the kind that has been described above is never satisfactory as there are always gaps and anomalies left. The International Year of the Child provided both the impetus

and the funds for work to begin on a comprehensive Children's Act, which it is hoped will be ready for presentation to Parliament early in the nineteen-eighties.

#### Divorce and Matrimonial Causes

As described above, divorce and other matrimonial causes fell outside the scope of the work on the Family Court, but it was recognised that changes were needed in this area of the law also. Fears had been expressed that married women whose husbands had children outside of wedlock would suffer from the improvement in the status of such children, in particular where property was concerned. Better rights to maintenance and the right of such children to inherit equally with children born in wedlock could be seen to threaten the very ill defined property rights of wives, especially upon breakup of the marriage or upon the death of the spouse. The concern of wives in this matter is probably sharpened by the fact that a lot of them have jobs and contribute to the family income, and may help to pay for assets such as the family home.

Statistics on the population of Jamaica show that by the time they are in their fifties most women in Jamaica have married. The number of marriages shows a slow but steady increase during the last thirty years. In 1951 the number was 6,408. It reached a peak in 1975 of 10,188. It has fallen a little since then, but not very far. It may not have matched the population explosion that the island has experienced during the fifties and sixties, but since the bulge is barely coming to marriageable age, the disparity in percentage is no ground for asserting that marriage is becoming outmoded. The divorce figures show the other side of the picture. In 1951 the number of decrees absolute awarded was 189. By 1966 it was 663 and by 1978, 748. The jump recorded in 1966 was effectively the result of legal aid for persons wishing to get a divorce who had very little or no income or property. The entitlement to aid was set very low - at present no one earning over 50 Jamaican Dollars per week can qualify for legal aid - so that it is effectively limited to wives who did not work or had no property and the unemployed. The cost of divorce proceedings is rather high - somewhere between 500 - 1,000 Jamaican Dollars - though it may be more if complicated custody, maintenance and property matters have to be worked out. In effect this means that between those who qualify for legal aid and those who can afford these fees there must be a large number of people who need but cannot get resolution of their problems. In this sense the divorce figures are perhaps artificially low.

#### Family Law Committee

As a result of the changes that were taking place in other family law areas because of the establishment of the Family Court, a Committee was appointed in October 1975 "to examine the existing laws relating to Divorce and other areas of Matrimonial and Family Law, and to make recommendations for changes where this is deemed necessary." After preliminary discussions which ranged generally over the field, the Committee felt that the feeling of the public ought to be sought on matters which so nearly affected them, and formulated these topics under four heads. These are quoted from the Interim Report on Divorce and Matrimonial Law issued by the Committee. They were as follows:

- "(i) Whether the single ground for the dissolution of marriage should be irretrievable breakdown and what should be the evidence thereof;
- (ii) All questions dealing specifically with property owned by spouses;
- (iii) All questions dealing specifically with the matrimonial home;
- (iv) What special provisions ought to be made for dependent children in respect of the matrimonial home."

## Profile of Petitions for Divorce

Examining the evidence it had collected the Committee found that the pattern of divorce had certain outstanding features. Over 70 percent of divorces since the passage in 1969 of the Divorce (Amendment) Act were filed on the five-year separation ground which that Act made available to petitioners. The majority of petitions were filed in cases where the parties had been married for five to ten years. They also observed that marriage occurred in the majority of cases between ages twenty-one to thirty. The only other significant statistic appears to be that about fourteen percent of all divorces occur in marriages that have lasted for twenty-six years and over.

The approach to divorce seems to be fairly summed up in the words of the Committee. "We recognise that persons seeking the assistance of the Divorce Court so order their affairs that the contested divorce in Jamaica is a rarity. It is an expensive procedure, may encounter numerous delays, is subject to a multiplicity of interlocutory proceedings, has special rules as to costs between husbands and wife, and may terminate with both spouses very much married".

While legal aid may, as pointed out above, be obtained for divorce, it is understandable that most of those who apply for the aid tend to be those whose petitions are based on the five-year rule and who do not expect the divorce to be contested. Though the availability of legal aid may have increased the numbers of petitions, it does not seem to have increased the numbers of failed marriages. The findings of the Committee outlined above that a significant majority of marriages where the partners seek divorce fail in the early years\* suggests that if more help in the form of counselling and advice were available some at least of the distress caused by the early breakdown, in particular where there are young children, could be avoided. These figures also suggest that in these cases the wives had some means of maintaining themselves so that they can wait out the five-year period. For one of the reasons for early resort to divorce, up to very recently, is that the amount of maintenance available during and after proceedings was substantially more than could be obtained by petitions under the Maintenance Act in the Resident Magistrates' Court.

It will be interesting to observe over time whether the removal of the financial restrictions in these lower courts will affect the bringing of petitions for divorce, or whether the higher standard of sexual conduct demanded still from wives under the Maintenance Act will prevent a significant amount of applications from being brought there. It has also to be borne in mind that lawyers have not taken readily to the opportunities offered for maintenance settlement by the Family Court, so far apparently preferring divorce and the Supreme Court.

## Existing Grounds for Dissolution of Marriage

The likely effect of resort to divorce on those involved - husband, wife, dependent children if there are any - can be visualized by looking at the existing grounds for dissolution of marriage. Until 1969, when a petition could be presented on the ground of five years separation immediately preceding it was introduced, the grant of a decree was dependent on a finding of matrimonial fault. Even with the five year separation ground the Divorce Act provides that where a petition based on this is opposed, the Court must dismiss it unless satisfied on the evidence that the separation was wholly or substantially due to the wrongful act or conduct of the respondent. The element of matrimonial offence is also present here. In addition to this, the existing grounds for dissolution of marriage available to both husband and wife are adultery, desertion without cause for three years, cruelty, and if one of the partners is of unsound mind for at least five years immediately preceding the presentation of the petition. Additional grounds are available to a wife who can show that since the marriage her husband has been guilty of rape, sodomy or bestiality.

---

\* This is also borne out by Table 1 in article on "Fertility of Common-law Unions in Jamaica" - Cumper - which shows that of those married in the 15-19 age group 30% of them were no longer with their partners five years later.

## Recommendations of Family Law Committee

The concept of matrimonial fault still underlies the legal approach to divorce. On this matter the Committee stated: "We are of the view that the concept of 'matrimonial wrong' or 'fault' ought not to be the basis for divorce. Factors such as cruelty or adultery on the part of one party are only the indicia of the breakdown of the marriage. In most cases both parties bear some degree of blame for this breakdown. The need to establish that the respondent has been at fault has led to widespread collusion and fabrication of evidence in divorce proceedings. The indignity, bitterness and hostility and un-edifying publicity which usually attend such proceedings are in general harmful to parties and children alike, and in particular inhibit the amicable settlement of financial and other arrangements such as custody and visiting rights in respect of the children of the marriage". This statement recognises that in most cases relationship between the divorcing parties has to continue after the dissolution of the marriage, and that the way in which such dissolution is dealt with is often a crucial factor in determining the kind of relationship that ensues. When there are children, particularly young ones, involved, it is clear that every effort should be made to achieve as amicable a relationship as is possible in the circumstances.

The Committee therefore recommended that all the existing grounds of divorce be abolished and only one ground - the irretrievable breakdown of the marriage - be substituted. In considering what kind of evidence would be required to satisfy the Court of this, the Committee observed that in legislation such as the United Kingdom Matrimonial Causes Act, the fault theory still had a place since the kind of evidence which was relied upon were the old grounds of adultery and desertion as well as the later one of separation with or without consent. They would prefer to rely upon evidence of the fact of breakdown as in the Australian Act where the Court need only to be satisfied that there has been separation for the necessary period of time and that it is unlikely that cohabitation will be resumed. This approach means that any avenue of possible reconciliation must be explored.

### Support Service

It is clear that if divorce is to be handled in the recommended way, three kinds of support service should be made available. The first has been indicated above - counselling and advice leading to reconciliation. Where this is not possible, two further problems may arise for settlement - custody of dependent children and division of the matrimonial assets. Both the parties and their children and the Courts would benefit from skilled help in coming to a decision about custody and access which give more weight to the long as well as the short term interests of the children involved. In addition a good conciliation service would be perhaps the most effective means of handling problems arising from the dividing up of property between the spouses. Because of the nature of and the end result aimed at, the approach to all three problems must be different and they cannot effectively be combined without confusion.

The Committee did recognise (p.ii of the Report) that acceptance of their recommendations would involve the provision of "adequate counselling services" so that the Court could be satisfied before granting a divorce that all reasonable efforts at reconciliation had been made. They pointed to the use of Family and Marriage Counsellors in the Family Court and recommended that such counsellors should be assigned to the Supreme Court with the following functions:

- "(i) to assist the parties to a marriage in their efforts at reconciliation;
- (ii) to provide counselling in relation to divorce problems and generally to assist the parties in resolving such problems whether before or after a divorce;
- (iii) to provide counsel, assistance and supervision in relation to questions of custody and access to children of the family.

(iv) to make reports to the judge on any of the matters at (i) (ii) or (iii) and generally as to matters affecting the welfare of the parties or the children of the family or as to the prospects of improvement of the marital relationship."

In considering these proposals there are a number of things that have to be borne in mind. For example, as indicated above, the skills needed for reconciliation and for conciliation work are different. The essence of the set of problems facing the marriage and family counsellor is the emotional relationship between the parties. The conciliator on the other hand must act as an impartial arbitrator mainly in financial and property matters, and should have special knowledge in these and tax matters to be effective. Custody matters raise a different set of problems in the solution of which interests of the child are paramount. It may be appropriate here to ask whether, in the light of the ways Jamaican families tend to function as described above, consideration should not be given to including the claims of grandparents to the custody of children who have been effectively brought up by them. At present the parents' preeminent right to custody blots out claims by other family members.

### The Role of Lawyers

In addition to the need for support service, the change from a 'fault' to a 'breakdown' basis for divorce will demand a change in the way lawyers and judges deal with these matters. Lawyers will be faced with the fact that the strictly adversary method is no longer appropriate and much of the long drawn out discovery procedure irrelevant. If there is a statutory requirement that a genuine attempt of reconciliation must be made, then there must be an organised working relationship between lawyers practising in this field and marriage and family counsellors. There can be little doubt that maintenance and property matters are more satisfactorily settled if there is agreement between the parties based on a mutual understanding of their circumstances. This can be far better achieved by a conciliation process though the actual applications to the Court would be made by lawyers. It must be recognised that these procedures will only work if the parties really wish to reach agreement, but there will probably be enough of them with such ill-will towards each other to keep lawyers in employment.

There is some evidence to suggest that many people with marriage problems look for alternatives to a visit to a lawyer's office. This is often regarded, by themselves and by others, as a step towards a breach from which retreat is difficult. The experience of the legal aid clinics which came into existence in the 1970s suggests that many people who are either unwilling or unable to afford to go to a lawyer's office feel that they need some legal advice when contemplating divorce. There is also some evidence to suggest that clinics have been helpful in sorting out matrimonial property disputes which would otherwise have gone unresolved. How much such family law problems tend to dominate the public mind can be seen by monitoring such programmes as "The Radio Lawyer". Clearly to many people resort to legal action is not what they would prefer, though this may largely be a response to the way in which these matters are dealt with if the experience of the Family Court can be taken as a guide.

Lawyers and judges are usually unhappy to be involved in disputes about custody. Only a careful investigation over time with the interests of the child firmly in mind is a good enough basis for reaching a decision. The whole issue is often complicated by maintenance considerations. The Courts have from time to time made use of Probation Officers in very difficult cases, but perhaps social investigations should be the rule rather than the exception in custody matters. Since there are appropriately trained Children's Officers in the Child Care Service perhaps social investigations for the Supreme Court could be one of their statutory duties. At present most custody cases are heard by the Master in Chamber who hears Summonses from all divisions of the Supreme Court. No special expertise or training in this area is expected or provided for. Any disputed matter likely to last more than a day will normally be placed before a Judge in Chambers and this will involve waiting for a date. Custody problems can now be handled in the Family Court where social investigations is

provided for, and earlier hearings are possible. But lawyers are reluctant to use this facility. It may be because where custody is treated as part of a divorce settlement it is easier to handle the whole matter in the Supreme Court even if this involves different hearings.

It has been pointed out above that people having marital difficulties were often driven to start divorce proceedings because it was the only way in which reasonable maintenance could be ordered. This is no longer true since the financial limits on maintenance in the lower courts have been removed. As the really contentious issues in marriage breakdown tend to centre around maintenance and custody, partners having difficulty could take time to look at their marital problems more coolly if interim arrangements concerning maintenance and custody could be asked for from the Family Court without the necessity of starting divorce proceedings. To offer this kind of service to their clients would require from lawyers a considerable change in attitude to the handling of cases of this kind. In other countries there has been discussion about and agreement on the need for special training for lawyers working in the family law field. Such an approach seems to be needed in Jamaica also. This should not be too difficult to achieve since the training of lawyers is no longer tied to the Council of Legal Education, the Inns of Court and the Law Society in England. Somewhere in the legal training provided by the Arts degree programme of the University of the West Indies and the professional Law Schools situated in Jamaica and in Trinidad there should be scope to acquaint students with the information they need on family functioning and the attitudes that the new approaches in legislation and procedure dictate if the purposes of these changes are to be achieved in the better handling of family matters.

The support services, as outlined above, which would be needed to make the recommendations of the Family Law Committee for changes in the Divorce Law work, and which would, if they existed, improve the present system, are the same as those needed in the Family Court. The necessary aid in marriage and family counselling and in custody cases already exists there. The creation of a conciliation service would be very useful. If a Supreme Court division of the Family Court were created, these support agencies could provide the needed services for both courts, and help to give some coherence to the way family problems are handled.

#### First Report of Family Law Committee

In its preliminary meeting, the Family Law Committee identified six general areas to which it felt it should give particular consideration. These were -

- (i) Grounds for the dissolution of marriage
- (ii) Grounds for nullity
- (iii) Other matrimonial remedies
- (iv) Jurisdiction of the Courts and recognition of foreign decrees
- (v) Custody of children
- (vi) Distribution of property consequent upon termination of marriage.

The first report deals with matters (i)-(iv), the important matters of custody and distribution of property were left for latter reports. The effect of the Committee's recommendations is to substitute a coherent legislative approach to the subject of the dissolution of marriage in place of the different approaches that have accumulated through a growing number of amendments over time. The abolition of a number of remedies such as restitution of conjugal rights, damages for adultery, jactitation of marriage, which would either be unnecessary or have fallen into disuse naturally follow from this. Nullity proceedings would be limited to void marriage and the distinction between void and voidable marriages abolished.

Except for the recommendation concerning the provision of adequate counselling services, no consideration appears to have been given to any changes in procedure. It may be, however, that this will form part of the later reports. It does seem that some attention should be paid to this aspect of the matter whatever the area being considered, as the present

handling of all disputed matters, whether this involves the divorce itself, custody or partition of matrimonial property, is not only time-consuming and expensive, but seems designed to maximise conflict between the parties.

#### Importance of time element in divorce cases

As the Committee recognises, time is an important element in the handling of matrimonial problems. Since 1938 there has been a three year restriction imposed on the start of proceedings for divorce, though exceptional hardship or exceptional depravity on the part of respondent gave discretion to the Judges to hear petitions before a marriage had been in existence for that length of time. If, as is recommended, separation for one year without the possibility of reconciliation is accepted as a ground for divorce, the shortening of this period to two years would give time for the "mature and advised reflection" which the Committee felt was needed before embarking on divorce. Discretion to hear a petition within this time should nevertheless be given to the court where there are special circumstances for an early hearing and where reconciliation with the assistance of a marriage counsellor has been considered or attempted. Apart from these special cases, time for reflection and reconciliation before the hearing of a petition or even after the hearing begins would seem to be an improvement in the way cases are handled. Once it is clear that reconciliation is out of the question it would seem to be in everyone's interest that there should be as little delay as possible in handling such matters as the maintenance claims of spouse and dependent children, and the settling of property distribution. It has been suggested above that this could be most quickly and easily handled with the aid of trained conciliators attached to the court. The parties should be able to choose whether they want the type of adversary proceedings offered by court hearings or would prefer conciliation.

Where there are dependent children, there usually has to be some kind of continuing relationship between the parties and the sooner a basis for this can be found, undisturbed by continuing court conflicts about property and the like, the better it would be for the children for whose welfare the court has a special responsibility. This is currently expressed in the discretion given to the Court not to make absolute a decree of dissolution or nullity of marriage or even a decree of judicial separation unless they are satisfied that satisfactory arrangements have been made for the care and upbringing of dependent children. The Committee recommended that this provision should remain. It would be the sole remaining bar to divorce, as it is recommended that all the present absolute and discretionary bars to divorce should be abolished. Even this might be necessary only in exceptional cases if it became normal practice to consider arrangements concerning the children in the period of "mature and advised reflection" referred to above with the help where necessary of the family counselling service.

#### Bases for the division of property

The close connection between marriage and property law is a recurrent theme in studies in family law done in different countries. The settling of rights to property upon the dissolution of marriage brings this into its sharpest focus. Claims to a share in the matrimonial home, to a share whether by way of maintenance or a lump sum or both in the assets of a couple are based essentially on how society regards the mutual rights and obligations of the parties to a marriage. It is perhaps not surprising that though the Family Law Committee asked for the comments and suggestions of the public or interested bodies on all questions dealing with property owned by the spouses, and the matrimonial home, that very little in the way of response was made. This could have been expected, not because these things were not of interest, but because attitudes were changing so sharply that it was difficult to foresee what would be fair and equitable even in the next five or ten years. There has been a good deal of interest in the way the English courts have been tackling the problem. Two different approaches are discernible. Should the crucial factor be past contribution of whatever kind to the building up of assets, or should future needs dictate the distribution? Or should the courts base their decision on a combination of both? Should it be based on the parties' own

estimation of their needs and rights with the Court making sure that there was full understanding by both parties neither was being taken advantage of by the other with someone holding a watching brief on behalf of the children, if any? It is suggested that in this area the method of reaching agreement may be as important as the basis on which property is distributed, if the important thing is the carrying out without undue friction of what has been decided.

Investigators of the social scene - as varied as past governors, Royal Commissions and more recently sociologists - have all agreed on the importance Jamaicans attach to the owning of a piece of land, however small. Family disagreements over the division of land have been recognised as being major contributors to crimes of violence. It is the experience of some practising lawyers that disputes over property - real or personal - tend to be more bitterly fought than disputes over the custody of children in divorce cases. Since these disputes are costly and really benefit neither party in the end there would seem to be urgent need to find an acceptable way of shortening them and of reaching a decision which both parties could abide by. For this to be achieved, the parties would have to have a clear understanding of the considerations on which the claims of each would be adjudicated as well as machinery such as is indicated above for reaching agreement.

### Summary

Greater understanding of the patterns of family functioning in Jamaica, set out at the beginning of this chapter, has already led to a good deal of critical attention being given to family law and resulted in substantial changes being made. These began in the area in which the law was most out of step with social realities - the status and rights of the child born out of wedlock. Changes in legislation and in the procedures for handling cases have resulted in improvements, but there is still some tidying up to be done, for example in the provisions about who may claim and the conditions that have to be met before maintenance can be claimed for such children. One related question has yet to be considered - that is whether parties living in a common law relationship should have a claim to maintenance from each other. Where this is not the case, women sometimes resort to bearing children - for whom maintenance can be claimed - as a means of securing some maintenance for themselves. More consideration might also be given to another cloudy area - claims to assets jointly acquired by common law partners even though these may be held in the name of one of them.

Practitioners in the legal aid clinics attest to the fact that a new legislative basis is needed for the dissolution of marriage and for dealing with the ensuing property distribution, maintenance and claims to the matrimonial home. There is a great deal of doubt whether the normal adversary method of handling court cases is appropriate. The Family Court model seems to offer a better solution so long as it is supported with adequate counselling and supervision service, and a conciliation service is added. If this kind of service is extended to a Supreme Court Division of the Family Court careful thought would have to be given to its organisation and to the rules which would govern its relationship to the Judges and the Court staff.

Perhaps thought should also be given here, as in other countries, to the need for the special orientation and/or training of Judges, lawyers, court personnel and the staff of support services who are appointed to work in this area. Simplifying procedures, reducing costs and increasing access to legal aid by raising the financial limits might also reduce the kind of stress which too often results in violence, mental strain and other unwelcome social costs.

## Notes on the Chapter on Jamaica

There is a good deal of literature on various aspects of family functioning in Jamaica, much of which can be found in the publications of the Institute of Social and Economic Research, University of the West Indies. For the purposes of this paper the following publications have been found most useful:

The Population of Jamaica      George Roberts Camb. Univ. Press for the  
Conservation Foundation  
Women in Jamaica              G. Roberts and S. Sinclair KTO Press NY  
The Fertility of Common Law   G.E. Cumper Soc. & Econ. Studies Vo. 15 No.3  
Unions in Jamaica              P.189 ISER UWI (1966)  
The statistics were taken from publications of the Department of Statistics,  
Jamaica:  
    Demographic Statistics 1978  
    Labour Force Statistics 1978  
Further information on the Family Court in Jamaica can be found in:  
Planning and Implementing the Family Court Project, Jamaica Gloria Cumper  
    Working Paper No.7 ISER UWI  
Use was also made of information in the following:  
Survey of Social Legislation in Jamaica G.C. Cumper Law & Society in the  
    Caribbean No.1 ISER UWI  
Family Law in the Commonwealth Caribbean Cumper and Daley Dept. of Extra  
    Mural Studies UWI  
Interim Report on Divorce and Matrimonial Law      Government of Jamaica  
First Report of Family Law Committee Government of Jamaica

## Legislation

Affiliation Act as amended by Act No. 40 of 1975  
Children (Adoption of) Act  
Children (Guardianship and Custody) Act  
Judicature (Family Court) Act Act 41 of 1975  
Age of Majority Act 1979  
Divorce Act  
Maintenance Act as amended by Act 38 of 1975  
Marriage Act  
Hindu Marriage Act  
Muslim Marriage Act  
Married Woman's Property Act  
Registration, Births and Deaths Act as amended  
Status of Children Act 36 of 1976