Family Law: the Commonwealth Experience

A survey of some Commonwealth Jurisdictions

Commonwealth Secretariat

Family Law: the Commonwealth Experience

BY GLORIA CUMPER BA (TOR) LI.B (CANTAB)

This paper looks at a sample of Commonwealth jurisdictions chosen to illustrate the main facets of the Commonwealth experience.

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ERRATA

1. The last two paragraphs on page 42 should be the last two paragraphs of the Introduction on page v.

2. On page 9, para 2 line 5, the word "structures" should read "strictures".

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C O N T E N T S

P R E F A C E

This study has its origins in the Commonwealth Law Ministers' Meeting in Winnipeg in 1977. There, Law Ministers expressed concern at increasing delays over a broad front in the administration of justice. In their deliberations they canvassed a wide range of approaches, including legal advice and counselling which they saw as having the potential, if made available at an early stage, to resolve disputes before they reached court. The field of Family Law in particular offered potential for greater use to be made of special courts and procedures, including conciliation. As a consequence of the discussions, this study was commissioned by the Commonwealth Secretariat.

The author was chosen in the light of her wide experience in the field of Family Law. As Co-ordinator of the Family Court Project in Jamaica her work was largely instrumental in the establishment there of the Family Court System, which arose directly from the realisation of the limitations of the existing juvenile courts system which tended to treat the problem of juveniles in isolation from the family setting.

This study brings together the experience in a sample of Commonwealth jurisdictions selected to illustrate differing aspects of the Commonwealth experience.

We are most grateful to Mrs Cumper for undertaking this work, and to the many persons in the jurisdictions discussed who provided much of the material and responded so readily to requests for assistance.

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INTRODUCTION

Interest in the reform of family law was one of the ways in which the optimism of the Sixties expressed itself in a number of the countries of the Commonwealth. Buoyant economies and a new-found interest in the rights of the individuals who make up the family - in particular children and women - helped to fuel the demand for reform.

In most of these countries, the laws which became the subject of scrunity seemed remarkably alike. The oddity in this circumstance arose from the fact that the societies to which these laws applied could be very different from each other. The connecting link was the system of English family law which formed their legislative base.

So far as the older dominions were concerned, English settlers had taken their family law with them, and under the English crown it became the basis not only of the law relating to these settlers but of all who came under the jurisdiction of their courts. In the island colonies and those later established in Africa the system of family law was introduced mainly as a result of the policy of successive governments administered through the Colonial Office in Whitehall to introduce so far as was possible a uniform family law in the colonies. This was modelled on the English law at the time that legislation was being drafted, and would be modified only where there were established local customs that the government were prepared to recognise.

In territories like the Caribbean islands where the population was mostly immigrant and from different parts of the world, the legislation introduced would follow closely the English law. Places like India, for example, presented a very different situation. Where there were well-established systems of family law, with the kind of ample scholarship and documentation that existed in India, English family law was only made applicable to the English and to those in the English-governed portions of the country who fell outside the local systems. In Africa where the customary law lacked, for the most part, documentary backing, there was some ambivalence about accepting them fully, and a greater effort was made to introduce English law in the colonies though not in the protectorates.

Even after the achievement of their independence, the influence of English law has remained strong in the countries of the Commonwealth. In part this is because the legislation of pre-independence times continued to be operative. But of equal importance is the fact that English-styled courts and methods of administration and practice had taken root. The influence of English-trained lawyers and judges cannot be discounted, and probably helps to account for the circumstance that law reform - at least in the early stages - seemed to wait upon a lead from England. The earliest to break away were those countries which had established their own schools of law. It is perhaps a not unconnected matter that these were countries with a written federal constitution which meant that constitutional law and practice had to develop independently. Law reform movements are strong in Australia and Canada. Both Both at any rate in the field of family law, have undertaken reforms well in advance of English law and practice.

Law reform in the more recently independent territories is still very much influenced by developments in England, though there is now discernible a greater willingness to call upon the experience of Australia, Canada and New Zealand.

INDIA

Introduction

"Because India is large and contains multitudes, because her people are old and carry over stubborn traditions, they tend to live in many centuries at one and the same time." ..."There is no generalisation so sound that startling and significant exceptions cannot be found to invalidate it; no area so large within the sub-continent that it provides a base for generalisations about the country as a whole". These sentences appear in the opening essay of a YWCA study (1971) of the Educated Women in Indian Society Today. They are useful reminders of the hazards that face anyone writing about any aspect of Indian life, and apply most particularly to the area of family law and its relation to the way people order their lives.

The large population of India is made up of Hindus (defined now by law to include persons who are Sikhs, Buddhists and Jainas by religion) Muslims, Parsis, Jews, Christians and those members of the Scheduled Tribes who have not been brought within the operation of Hindu personal law. Each of these groups have their own personal law, defined by their religious affilation, though provision for cross-communal marriages and their consequences have been made through Acts like the Special Marriage Act and the Indian Succession Act. These have also given some freedom to choose matrimonial and family regimes to those who wished to opt out of adhering to the customs and practices of their communities. Since the purpose of this paper is to look at the ways in which family functioning and family law and practice inter-relate, especially in the handling of family problems, it seemed most useful to deal here only with Hindus, without discounting the influence of the presence of other groups within the country with other ways of functioning and other solutions to the same problems.

Historical Background

Some historical background is necessary if the way family law has been developing in the last thirty years is to be comprehensible. The British presence in India has had a marked, and still continuing, influence on this development. This has been evident in a number of ways. The manner in which the British took and held India called less for subjugation than for accommodation wherever law and order considerations made this possible. In these circumstances the religious basis of the personal laws of the various groups in India probably assured their preservation. The infinite variety of custom and usage found throughout the regions and among the castes confronted those with the responsibility for the administration of justice with the need to bring some order into this field.

The claim is made that Hindu Law "has the most ancient pedigree of any known system of jurisprudence" (Mulla). Commentaries and Digests have over time played a critical role in its development, but it was the role assigned to custom that gave it its vitality and enabled it to survive the passage of time and changing circumstances. The law was based on ancient custom but allowed practices and usages that had been followed for so long that they achieved the status of custom, also to be included. The role of custom in creating law was fully accepted and this provided the kind of flexibility that a system of law needed if it were to meet the needs of so diverse a collection of regions, religious groups and castes. Under the rule of the British, an element of rigidity was introduced. The judges and District Officers they appointed were required to administer Hindu personal law in matters relating to marriage, family rights and obligations, succession and the like in the matters which came before them. They took the advice of

those they considered to be leading authorities in the field in making their decisions. By reason of the operation of the principle of judicial precedent, their decisions in particular cases became effective law for whole of the Hindu community. Thereafter changes could only be made by legislation. The proof of custom was still an important element, but the role of custom had changed. It would no longer be possible for new customs to emerge to meet new situations. The whole process of change and reform had to take a different course.

Reform through legislation in this field, applicable to the whole of India, was, in the early years of British rule, confined to property matters and the removal of some civil disabilities arising from caste rules and customs. The abolition of suttee in 1829 is a well-known example. The Caste Disabilities Removal Act of 1950 provided that any law or usage which required that any person forfeit rights to property by reason of exclusion from the communion of any religion or as a result of being deprived of membership in a caste was to cease to be enforced in India. The Hindu Widows' Remarriage Act was passed in 1859, and Christians and Hindus were permitted to contract a valid marriage by the Indian Christian Marriage Act of 1872. It is of interest that no action was taken on the emotive, for the British, question of child marriage until 1929 when the Child Marriage Restriant Act was passed. Its failure, and that of subsequent amendments to it, to materially change popular attitudes towards the practice illustrates the ineffectiveness of attempting to achieve reforms by legislation where this conflicts with religious and economic considerations.

To administer India the British needed Indians educated in English and in the British way of doing things. The success of this educational programme was undeniable but it had effects that had not been foreseen. Conflict between Indian and British values could not be avoided. To the British perception, much of Hindu social and family life bore hardly on individuals, and some of the harsher aspects were unacceptable. The responses of the Indian elite, created by the educational system, to these criticisms was to acknowledge the need for reform, but there was no agreement as to what shape these reforms should take or how they should be achieved. The result was that there were two main reforming streams - the Western - oriented and the traditional. Though both combined to lend strength to the Nationalist movement, these two streams of thought are still evident whenever any matter of law reform is under discussion.

Population Characteristics

In spite of the impression left by the many large and heavily populated cities of India, the majority of its people live in the rural areas. Roughly speaking, for every person who lives in an urban area, four live in the country. The census tables (1971) on marital status confirm that everyone expects to be married at some time or another in their lives. Considering that some prejudice still exists against marrying someone with a physical or mental defect or deformity, the small percentage of those never married recorded from middle age onward must include many of these. The figures also record the continued existence of child marriages. Of the persons between 10 and 14 who are shown as married, 4.49per cent of the boys arein that age group and as many as 11.53 per cent of the girls. In the age group 25-29, 84.95 per cent of the girls are recorded as married. The peak among men is reached ten years later, in the 35-39 age group. On the evidence of the tables also, widowhood is far more of a problem than divorce. The disparity between the number of widows and of widowers in the higher age group suggests that widowers find no difficulty in re-marrying, but that it is otherwise with widows.

The importance that independent India attached to education can be seen in the words of the Constitutional directive that laid upon the State the duty to "endeavour to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years".

Thirty years on, participation in full time education is still a privilege of the minority of young persons. Though this statement reflects the overall position, it conceals much variation between the State, from the very high literacy levels of Kerala to the very low in such states as Bihar, Rajasthan and Uttar Pradesh. The majority of those in schools live in the urban areas, and not surprisingly more boys than girls get the benefit of an education. This imbalance is however, rapidly righting itself in the middle and upper classes. Much has been written about the changes in family life that have been and are still being made as a result of the better education of women and their entry into jobs and professions that were once exclusively male. Though as a percentage of the population of India they are relatively few in number, the influence they have been able to exercise in areas such as law reform has been remarkable.

Castes and the Economy

A good deal of attention has also been paid since Independence to the re-structuring and the development of the economy. In spite of a great deal of investment in heavy industry and manufacturing and considerable growth in the public service sector, the majority of people work in the traditional sector, being engaged mainly in agriculture, trading, craft work and construction. In this sector caste and custom still play a large role in determining what jobs are done by them. Among the lower castes there is an equality between men and women not enjoyed by the higher castes. The jobs they do may differ by sex, but both contribute to the economic support of the family. For example, divorce by caste custom has long been permitted to them, as is re-marriage either upon death of a spouse or divorce.

In the modern section of the economy caste considerations also play a significant part, but not in the same way as in the traditional. It is true that new industries have opened up new avenues of employment of education and training. The mobility it has offered to those employed within it both in terms of movement within the country and of change in status where this depends on the job held, has had its effect on patterns of family living and on the influence of caste. But there is very little evidence that either has been substantially weakened, though there is evidence of some change.

The framers of the Constitution evidently intended to outlaw caste - to take away from it any legal recognition as a factor in the organisation of society. Its function as an effecitve method of organising the working of a large and diverse population was discounted or perhaps not properly understood. It was proposed instead to weld into one nation all these different ethnic, language, religious, regional and functional groups using the Western political theory of individual rights, duties and freedoms. In trying to make sense of this concept in the Indian situation, it was felt that some attempt should be made to redress the evils of caste through positive discrimination. Quotas for education, training and employment for members of the Scheduled Castes were introduced. The competition for these places has encouraged persons to seek such classification, and may have at that level encourageed the perpetuation of a system that the Constitution had intended to outlaw.

On the wider scale what has happened is that the need for the political organisation of groups which is one aspect of a functioning democracy provided a new role for the caste groupings. Caste associations have sprung up throughout the country. Where these represent the interests of propertied classes, they have had considerable success in protecting their vested interests, been a vehicle for the exercise of patronage in such matters as the securing of jobs and contracts, and have provided social services for their members on a bigger scale than heretofore, with excursions into housing, the provision of schools and some welfare services. Attention to religious and family matters still formspart of their duty, though some of the caste influence in family matters, particularly among the higher castes, has been eroded by the existence of the possibility of both economic and legal independence

from it. Caste associations of groups like harijans tend to function in a much more overtly political fashion. Regionally as well as nationally, the appeal to caste interests is widespread at the time of elections, and there seems little doubt that democracy Indian style will guarantee a continuing role for castes in the country.

Certainly no one who has seen the pages of matrimonial advertisements that continue to appear in the local, regional and national press, and read the accounts of the annual betrothal and matrimonial fairs of some castes will doubt that caste considerations continue to loom large in family matters. There is plenty of evidence that even though both are illegal, child marriages continue to take place and dowry is offered and bargained about in the matrimonial arrangements of the upper castes. Clearly the law and social practice are out of step, and as is usual in this area of life, when this happens the law is ignored. In order to understand why this situation obtains today, and is unlikely to change much in the future, it is necessary to look at the way the family is expected to function and the different roles it fulfils in Indian society.

Importance of the Family

Tradition has assigned the family a central role in both religious and secular matters. The interlinking of these is neatly expressed in the Hindu theory of the three debts that if a man dies without paying he must be born again. These are firstly, attention to ritual and worship, secondly learning and teaching, and thirdly, founding a family and raising children. In his life as a member of a family he pays these debts by obeying his elders, learning and practising his craft, trade or job, attending to all the ceremonials and rituals that his religious and family duties prescribe, marrying and having children especially a son, who is necessary to ensure both his spiritual wellbeing after death and the continuation of his family on earth. Though marriage and family customs vary widely all over India, they do have certain basic characteristics in common. One is the importance attached to marriage.

To most Hindus still, marriage is a sacrament and no normal man or woman should die without receiving the sacrament. The importance attached to this can be seen in a practice still used among some castes of including in the burial ceremonies of a dead spinster a ritual marriage. Marriage in the Hindu tradition is an alliance between families, and has an economic base. In spite of attempts by the central Government to try and minimise this aspect of it, there is still the custom among the poorer castes of the giving of a bride price, and of giving dowry to the family of bridegroom among the higher castes. Both these practices arose from the duty of the family to provide for the maintenance and welfare of all its members - the bride becoming on marriage a member of the bridegroom's family in most areas - and reflecting the different economic circumstances of the higher and lower castes.

Since the rules of inheritance depend upon marriage, the legitimacy of offspring is an important concern. This, taken with the fact that until recently, the expectation of life was very short, dictated marriage for a girl at or about the age of puberty, and early marriage for boys. While virginity is still important, the fact that expectation of life for both men and women is increasing, that more men and women are being educated and that more men and women are being educated and that new opportunities for employment are opening up for both, means that the old ways are being subjected to new strains, and changes are being made amongst those groups most affected.

The key social role generally assigned to marriage by Indians is in part due to the importance family life and organisation has necessarily assumed in a country which, as well as being heavily populated, has always lacked strong central religious, cultural or political control. Even at the height of British power, overlordship was shared with the Portugese and the French, and Indian rulers were recognised in some of the regions. Individuals functioned through their families, and the social and economic groups formed by like families in association, their interaction with other groups being formalised on that basis. The joint family, or the Hindu

undivided family as it is more formally and correctly known, can be seen to be a logical adaption to the circumstances of life in the Indian sub-continent. It is of interest that its pattern of functioning has been copied by other religious groups living alongside them, a measure of its success in meeting the needs of people living in that environment.

A look at the development of the country since Independence does not suggest that for a majority of persons the need for the protections afforded by the joint family will soon disappear. Centre and States are constitutionally locked in a long-running power struggle. In the social and economic sectors the struggle is between the modern and the traditional. Having declared itself a secular state, India cannot look to religion for unity. To survive one has to use the networks available, and the family, immediate or extended is still one of the most important of these.

The Joint Family

Since some kind of joint family arrangement is common to most groups in India, it is necessary to look in some detail at the way the joint family is structured and how it, in general, functions. This has implications for the way marriages are made, the expectations of marriage partners and their relationship with other family members, how marital breakdowns are dealt with, and the difficulties that can arise in making decisions about such consequential matters as the custody of children, divorce and the maintenance of the divorced spouse. Research on the Indian family has in recent years enjoyed some vogue among sociologists, but it is in the nature of the work they do that this tends to be restricted to particular groups in various parts of the country. There is some measure of agreement, however, between them as to the basic structure of the joint family, and what it takes in terms of economics and social adjustment to make it viable.

The actual composition of a joint family can vary quite a lot from time to time, but basically it is formed around three generations. The crucial link is between father, sons and their wives and the children of these. The father's wife, as mother-in-law, has an important role to play in its functioning. Daughters belonguntil marriage and may be received back upon widowhood or divorce, though they have no claim to this. The father's younger brother(s) may form part of the household, if there was no partition when their father died.

A joint family is "ordinarily joint ... in estate ... in food and workshop...." (Mulla, Hindu Law) but as the cases cited go on to show it can remain joint in law even though there is no estate, or even though the separate families which comprise it do not eat or even live together, or do not worship together. If however a family has been joint, and has become separate, in estate, it ceases to be a joint family. Whether a family is joint or not seems in the end to be largely a question of fact. The senior male member is usually head of the family and manager of its property. He normally has overall control of income and expenditure and can spend the income for "family purposes", which are the maintenance, education, housing and welfare needs of family members, provision for marriage expenses and dowry and for religious ceremonies and other such necessary matters. The direction and control of family business, where there is any, is often also in his hands.

The extent to which the lives of members of a joint family are under the control of the manager (karta) can be inferred from looking at the powers he can exercise. Both men and women brought up in these surroundings have to be taught values without which the system would be unworkable. Obedience and submission to the will of the elders and the welfare of the family as a whole has to come before the satisfaction of individual desires and plans. For women, the care of the family and related members come first. To receive respect from others they should show themselves pliable, self-sacrificing and obedient to the will of their husbands and parents-in-law. In such circumstances individual choice of marriage partners is unthinkable and in practice unworkable. Marriage is regarded as an alliance between families, and as such is often negotiated and

undertaken for famly reasons, and when this fails to work out for economic or other reasons, could be broken at the direction of elders. Both men and women accept that the husband's parents will have a good deal of influence over the arrangements of their married life, particularly in the early years, and their expectations of happiness are very low. Girls, in particular, who become members of their husbands' families on marriage expect to have to make considerable adjustments so as to fit into their new family, and do not usually resent the interference of relatives and parents in seeking solutions to any problems that may arise.

In a country that has no social security or welfare provision, except for the small minority who are in the upper ranks of the public service, or who can afford personal insurance, the shelter that the joint family can provide is of importance. For women, especially, the claim to maintenance and shelter is worth protecting and most will put up with a lot before breaking away from it. As will be seen when this problem is looked at in more detail later, divorce does not always offer an acceptable way out for the parties and families involved. The plight of young widows with small children can be equally difficult of resolution. If there is seen to be a choice it is nearly always between degrees of hardship.

Whether in a family or not, most young people still expect that their marriages will be arranged by their parents or relatives. This aspect of marriage continues to attract a lot of attention from sociologists and social investigators, and their findings show that in the urban areas parents are showing themselves increasingly inclined to allow their children to express preference among those presented as suitable mates, but this is still very far from the free choice permitted in most western countries and which forms the basis of their marriage laws. The attraction of what the West has to offer India in material things, in education and in wider opportunities for employment and travel has not meant that western social values and standards of behaviour have been widely accepted, and this is particularly ture insofar as relationships bteween the sexes is concerned. The family has a great deal of control over the socialisation of the young so that the basis for arranged marriage still exists. But it would be wrong to say that the spread of education, the struggle for and achievement of Independence, the spread of the public service and large new industrial developments had been without influence on the family life of Indians. Physically, family members have moved out of the joint family and established homes in other parts of the country in the course of employment. But this has not necessarily meant that they have ceased to share in the family estate or are excused from their part in family obligations. The passage of the Hindu Gains of Learning Act in 1930 provided a way of tackling one of the problems which arose when one member of a family felt he was being unduly penalised because of his greater earning power. He could claim some of his won earnings for himself and still share in the estate of the joint family.

Education, especially for women, has put considerable strains on the functioning of the joint family. As men became more educated they tended to postpone marriage until their education was completed. They tended also to place some value on the educational level of the women chosen for them as brides. Better education of women opened avenues of employment for them. While this could be of value to their new families, it also meant that they were no longer the very young, pliable, self-sacrificing persons that the difficult adjustment to living as a bride in a joint family required. Studies on changing family relationships such as those by Jurian, link them with economic development as well as the rise in the level of education, but underline the point that families ties usually remain strong even when there is household separation. Gupta suggests in his Introduction to Family and Social Change in Modern India, which he edited,that the family was undergoing two types of development which sounded antithetical but were in fact complementary. The first he described as nucleation, the second extension. The first resulted from the wish of individuals to seek economic independence from their families and possibly, separate residence. A number of factors could lead to such a decision, including a desire to pursue personal goals, for which it might be necessary to abandon

the traditional constraints on women and be free to decide on the education of their children. This he calls "functional nucleation" rather than the establishment of western-style nuclear household, and points out that it ofen does not lead to a disruption of family ties. In fact, family obligations might be more willingly honoured when there is less personal stress in daily living. The other side of the establishment of these small units is that they both need support form and extend support to, other such units in their kin group. This kind of support may be received from and give to kin beyond that of the members of the joint family. He concludes that "Industrialisation, considered to be a major agent of family disintegration in the West, has, in fact, reinforced family ties in India in several ways." There is no guarantee, of course, that this will continue to be the case as new strains and pressures emerge from changing conditions, but there seems little reason to doubt his conclusion that "... though the family is changing it may be too early to say that it is losing its functional unity". If that is the situation for the foreseeable future, it must affect planning for the effective handling of matrimonial causes.

Economic Considerations

It has been pointed out above that to be viable a joint family has to have an economic base. The possible long term effect of the Hindu Succession Act 1956 on the economic viability of the joint family will be looked at later. But it would seem appropriate here to look at one of its economic aspects - the situation of women in relation to joint family property. Normally all property matters are the concern of the male manager. Male members may contribute to the family estate, but a female owning property cannot add this in her lifetime to the property of the joint family into which she has married. She cannot be a coparcener, as she cannot by birth acquire an interest in joint or coparcenary property. Only males enjoy this right. But she can be a member of a joint family and claim to be maintained, educated, and married out of joint property assets as well as succeed to her husband's share in it. This does not imply that she cannot contribute in other ways. She may be allowed to work, and it seems usual in these circumstances that what she earns is not hers but the property of the household.

Marriage is one way in which a woman can contribute to the economic resources of the family of which she becomes a part. The matter of dowry is an important part of the negotiations which accompany an arranged marriage. It is hard to conceive of marriage by choice fitting into the framework of joint family functioning. Though the Dowry Prohibition Act was passed by the Central Government in 1961 it has had little or no effect on the practice of offering and accepting dowry as a routine part of marriage arrangements among the higher castes. Rama Mehta writing in 1974 about the results of her research on the Divorced Hindu Woman reported that those being interviewed had either never heard of the legislation or else dismissed it as irrelevant. Effectively, implementation of the Act depends on initiatives taken by the States, and few have shown any willingness to undertake this thankless task.

To women the matter of dowry is important in a number of ways. Fathers accept that they will have to provide a dowry if they want their daughters to be married. They also accept that it is a parental duty to find a husband and thereby a settled future for their daughters. The amount of dowry will perhaps be the crucial factor in finding her a suitable husband, though her appearance and the level of her education will also be taken into account. Daughters accept that once they have been married, and the negotiated dowry has been paid, they have no more claim upon their parents. It is only in very exceptional circumstances that a divorced or widowed daughter will be accepted back into her natal family, and she knows that she cannot claim such consideration.

The adequacy of her dowry may be quite literally a life and death matter for a bride. The hardships endured by her in her new family if her dowry is thought by them to be less than it should have been are a matter of common place knowledge. Ill-treatment can be physical as well

as mental, and may be increased if it is felt that her parents can thereby be induced either to part with more, or pay in full what had been negotiated but which they found themselves unable to pay. The suicide rate of young brides has for some time been a matter of concern, but in recent years there has been public protest about the number of them who die by burning in circumstances where suicide is unlikely. The majority of these incidents appear from press reports to have two things in common - there have been disputes about dowry and a joint family is involved. In Delhi alone between 1977 and 1981 the annual rate of such deaths alleged and reported has been between three and four hundred. In other larger cities, there have been similar numbers, though prosections are few and far between and convictions can be numbered in single figures. Clearly, there are situations that the Divorce Act does not provide a way of dealing with, even taking into account the amendment of 1976 which appeared to offer "easier" divorce. The existence and size of the problem casts doubts on the relevancy and effectivess of the divorce laws. It seems likely that the very individual basis of their provisions does not fit with the needs and circumstances of joint family living.

The joint family has been described in some detail because it appears from looking at a range of studies on the family in India that there is agreement that it continues to be a most important influence on the formation of attitudes about family living. These include the duties and obligations that attach to being a member of family and patters of conduct between the generations and between the sexes that are acceptable. It is difficult to access, using census returns based upon numbers in households, how many persons behave as though they were living in a joint family. Joint family life is not always co-incident - if indeed it ever was - with living in one household and eating together. Sociologists refer to joint and to "supplemented nuclear families" (Kolenda) as separate, not because they function differently so far as the way family members behave is concerned, but because it is hard to find a tidy physical definition of a joint family.

Insofar as the law relates to family problems and disputes, the reality would seem to be more important than the accuracy of the definition. Even the evidence of the breaking of joint families may mean no more than the formation of new ones. It is possible that income tax returns would provide a better guide to the existence and persistence of joint families than either sociological research or census data.

Nuclear Families

The importance attached to the joint family should not be taken as denying that there are nuclear families in India and that their numbers are on the increase. Westernization in both social and economic development has helped the process of modernisation and urbanisation. With greater economic and geographical mobility, the establishment of nuclear families is made relatively easy. It has also been helped by an increase in the level of education of men, and more particularly women, and the later age of marriage that seems to follow upon this. It is much harder for a well-educated woman in her twenties to accept her place as a junior member in a family than it would be for a teenaged girl, and the stresses she can experience have been documented in a number of sociological studies. As access to education for women improves, the generational education gap that develops between the members of the group that benefit from it and the older women, undermines the authority of the mother-in-law who occupies such a pivotal role in joint families. The resulting conflicts will have helped along the decision to form nuclear households. As it will be a long time before even basic education is widespread among women, it can be expected that the joint family attitudes will continue to be the dominant ones.

New Patterns of Living and Constraints on them

For people determined to leave, or escape from the joint family, there have been other ways beside formal partition of property by which they could achieve this. For example, the Special Marriage Act of 1872 provided a way. Though this was passed ostensibly to permit Hindus and Christians to marry legally, it has also been used by Hindus either where spouses are of different castes or as a way of declaring independence of the joint family. Marriage under that Act resulted in automatic severance of a person from the joint family. The Special Marriage Act of 1954 retains that provision.

A number of sociologists (e.g. Srinivas, Mehta) have noted hat it is the Brahmins who are most ready to adopt new patterns of living and appear most affected by Western ideas. One of the ways in which the new freedom from the traditional constraints of family and caste begin to show themselves is in paying little or no attention to structures for these groups on matters such as mate selection, marital behaviour and the honouring of family obligations. In short, class considerations become more important than caste loyalty. Since Brahmins enjoy the status of the top social group in the society and their patterns of behaviour are the model for the rest, it can be expected that their change of attitude will have some influence. But since the basis for this freedom of action is usually wealth, inherited or derived from professional or commercial success, their influence is likely to be very limited. They do however have much influence in the making of legislation, and their interests will be the ones to be served by it, when, in the name of progress, it reaches the statute books. The divorce legislation is a case in point. There has always been, and still is, divorce by caste custom in some of the lower castes. It became a mark of a high caste, following the Brahmin lead, not to permit divorce. Now that the idea of divorce is acceptable to them, there has been a lot of effort put into getting very modern divorce laws passed in India. It is not clear that these will benefit other women very much, as for many of them resort to divorce, even in cases of dire necessity, is only possible with support from parents and other relatives. If a wife belongs to a caste community which frowns upon a woman seeking divorce, she cannot expect the social support from them which would make life as a single woman bearable. There is therefore considerable reluctance to seek divorce even when abandoned or turned out by her husband's family. There is, however, not a matching reluctance on the part of the husband or his family to seek divorce, for the social consequences for him and for them are relatively negligible. Remarriage for him is acceptable and even desirable.

How a divorced woman is to be maintained, in the absence of her own resources, is a very considerable problem. Where her husband is a member of a joint family, the amount and payment of maintenance is a family matter and ways to delay or avoid or avoid payment are often resorted to, increasing the difficulties of a divorced woman, and posing problems that the courts are ill-equipped to solve.

Also to be borne in mind when considering how marital problems could be constructively dealt with is the very strong mother-son tie which seems to be a fairly consistent feature of the Indian arranged marriage. This seems to be the emotional feature which most affects the son's married life particularly in the early years. Mediation and conciliation patterns borrowed from western-type family counselling to match western-type legislation would seem to be of limited utility in circumstances such as these.

Before looking at the considerable legislative changes that have been made in Hindu personal law since Independence, it may be useful to look back at the social and demographic information referred to above and see what family law problems are likely in the future to come before the courts. In this way it will be possible to make some sort of assessment as to how well the laws will meet the needs of litigants.

Possible future developments

To recapitulate - a longer expectation of life, an economic climate continually changing under the impetus of vigorously pursued industrial and commercial development, the growing numbers of educated persons, both men and women, and the increase in the number of working women, mostly wives - all indicate that there will be growing stress in the kind of family described above. Though there seems to be very little indication that the majority of women will cease to give marriage a central place in their lives and will continue to make strenuous attempts to preserve their position as married women, resort to divorce can be expected to grow. There is nothing now in the law to prevent an erring husband, or simply one desirous of marrying again, from seeking a divorce. That there are now less onerous grounds for divorce are likely to mean that in India as elsewhere when this happens, the lesser remedies of restitution of conjugal rights and judicial separation will be used less and less. As it is now they tend to be used as steps on the way to divorce.

With an increase in divorce, the number of custody and maintenance matters can be expected to grow. Courts have notoriously found such matters difficult to deal with, and in the case of maintenance, enforcement can be a considerable problem. This suggests the need for mediation, reconciliation, and the legislative provisions referring to these will be looked at in some detail. It is also likely that there may be need to develop rules on the distribution of matrimonial property between spouses on the breakup of marriage where the wife has been a wage earner and contributed to the purchase of goods. Derrett remarks in "Death of a Marriage Law" (128) that in many of the matrimonial causes that come before the courts, property problems were the real cause of contention, and that not infrequently the husband and wife were pawns in the quarrel between their families. It will be seen how appropriately the legislation deals with problems of this sort which are unlikely to reduce in number so long as the system of arranged marriages continues.

Legislative Changes to Hindu Personal Law

The progress of legislative change to the customary personal law of the Hindus can be seen as a response to British influence in India. The British decision to administer what they ascertained to be the personal law of the Hindus in all matters coming before their courts where this was relevant, did not necessarily imply approval of its provisions. Indeed the earliest legislative changes to the personal law were an attempt to change practices that seemd shocking to them. The Caste Disabilities Removal Act of 1850 and the Hindu Widow's Remarriage Act of 1856 were examples of this. Further modifications were made by the conferring of certain civil rights on native converts to Christianity, and by the various enactments relating to property, succession and the guardianship of minors.

The setting up of a judicial system under the authority of various Acts of the British Parliament meant not only that the administration of the courts followed the English pattern but also the way that the laws were interpreted in them. The introduction of the principle of stare decisis in reaching decisions when applying Hindu law led inescapably to some confusion. Regional variations have always been, and still are, a fact of life in India, and it is not surprising that the High Courts of the various States reflect this. A mass of case law, often contradictory, resulted. So far as Hindus were concerned, then, there seemed to be a need to have a coherent system of personal law, one that would be applicable to all Hindus without recognising differences related to their various religious beliefs and practices. The large minority of the population who were Muslims already had such a Code of personal law.

Proposed Codification of Hindu Personal Law

The whole question of the codification of the Hindu personal law was a subject for much argument and debate, many traditionalists being

firmly against such tinkering with such a venerable system of law. The movement in favour of it gained some impetus from the struggle for independence. An influential and articulate group of those in that struggle, in which women's organisations played a prominent role, were convinced that a Hindu Code which gave some rights to women and eliminated considerations of caste would help to show the British that Indians were capable of managing their own affairs as a nation in the modern world. The first start on the project in 1941 came to nothing. In 1947 the Rau Committee presented a draft code in which it sought to embody the most progressive elements from all the various schools of law throughout the country. It was intended to be passed into law as a whole and to be applicable to all Hindus. There was never any real chance of this Bill being passed into law. In addition to those who opposed the whole project, there was considerable opposition to the sections on marriage and divorce and some of the proposals relating to succession.

The passage of the Hindu Women's Right to Separate Maintenance and Residence Act of 1946 had dealt with one serious problem. The Special Marriage Act of 1954 gave to Hindus who were willing to use it a way of avoiding some of their difficulties over marriage, divorce and succession. But these only addressed particular problems.

It was expected that the Hindu Code as a whole stood very little chance of getting through Parliament. It was decided instead to separate it into sections and bring these, one at a time before Parliament. The Hindu Marriage Act was first. It was passed in May 1955, followed by the Hindu Succession Act in June 1956, the Hindu Minority and Guardianship Act in August of the same year, and the Hindu Adoptions and Maintenance Act in December. These enactments will be looked at separately below. These Acts brought a measure of order into Hindu personal law insofar as the matters convered by them were concerned. They applied to all Hindus by religion, to Buddhists, Jains and Sikhs - indeed to any person dominiciled in all those parts of India to which these Acts extended who was not "a Muslim, Christian, Parsi or Jew by religion..." The Scheduled Tribes fell outside this definition but some have from time to time been brought within their terms.

Hindu Marriage Act

This Act, first passed in 1955 has been amended in 1956, 1964 and 1976. It established the rule of monogamous marriage and provided matrimonial relief by way of divorce for Hindus to whom dissolution of marriage by custom had not been available, and adding lesser relief by way of suits for restriction of conjugal rights and judicial separation. Women as well as men could claim matrimonial relief, and succeeding amendments have made their positions nearly equal before law. Since this equality is not reflected in their position in society nor in their economic situation, the amount of benefit that women get from this equality in law may be questioned.

Because this is an Act of the Central Government and is applicable throughout most of the country, it has to provide for the recognition of customs and usages which may be contrary to its own terms. Customs and usages will be upheld if they are certain, not unreasonable and not opposed to public policy. Also, matters such as providing for the registration of Hindu marriages are left to State Governments to handle. The States are not required to do this; they "make the rules" [sec. 8(1)] but can make these rules compulsory. This has been largely ignored by the States, and in recent years there have been other initiatives by the Central Government but so far without positive result. For Hindus married otherwise than under the Special Marriage Act, there is no easy proof of marriage.

The form of marriage contemplated by the Hindu Marriage Act is clearly ceremonial. A marriage may be solemnized in accordance with the customary rites and ceremonies of either party to the marriage. The Act has adopted the English distinction between void and voidable marriages

though the grounds are not the same. Bigamy, and the parties being within the prohibited degrees of relationship or sapindaship (if not allowed by custom) will make a marriage void, lack of capacity by reason of age does not have this effect. There have from time to time been Acts passed with the aim of revising upward the age of marriage. The latest in 1978 raised the age of marriage for girls from 15 to 18 years, for boys from 18 to 21. It however stopped short of making marriage entered into by persons under those ages void. There is relief afforded to a woman whose marriage was solemnized before the age of fifteen. She may present a petition for divorce if she can show that she repudiated the marriage after she attained the age of fifteen and before she became eighteen. The possibility of this relief being widely used appears remote.

Marriages where one at least of the parties has been incapable of giving valid consent, or where consent has been obtained, either from the party or from a guardian where such consent is necessary, by force or fraud, are voidable and can be ended by a decree of nullity. The incapacity alleged has to be either unsoundness of mind, or mental disorder so great as to make the party unfit for marriage and the procreation of children, or the existence of recurrent attacks of insanity or epilepsy. The fraud that must be alleged in order to avoid the marriage has been spelled out in the latest amendment. It must be a fraud "as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent", a clause wide enough to provide some necessary protection for those whose marriages are arranged with parties whose circumstances may be difficult to ascertain. No-consummation due to impotence and the pregnancy of the wife by some other person than the husband at the time of the marriage, unknown to him also make a marriage voidable. In all the circumstances listed above, the marriage will be treated as valid unless steps are taken to end it. Where force or fraud is alleged, the petition will have to be made within one year of its cessation or discovery. Where pregnancy other than by a spouse is alleged, the petition must be made within one year of the date of the marriage, and there must have been no marital intercourse with the consent of the petitioner after the discovery took place.

Restitution of Conjugal Rights

The amending Act of 1976 has retained the matrimonial relief of restitution of conjugal rights but has substantially changed its nature and effect. The grounds for application for such relief are no longer essentially the same as those for divorce. The sole ground now is that a spouse "has, without reasonable excuse, withdrawn from the society of the other..." The burden of proof of the reasonablness of the withdrawal lies on the person who left. If the court is satisfied of the truth of the matters alleged in the petition, it may, if there is no legal reason which prohibits it, grant a decree of restitution of conjugal rights. Resort to this remedy in addition to making it possible for a wife to obtain an order for maintenance from her husband, now leaves the door wide open to an action for divorce. If there has been no resumption of cohabitation for a period of one year after the marriage of the decree, either party may apply for a divorce. Previously, only the party who had successfully applied for restitution could sue for divorce, but this is no longer so. A wife who only wants to be maintained and does not want a divorce would be well advised not to use the remedy of an application for restitution of conjugal rights.

Judicial Separation

The grounds for an application for judicial separation are now the same as those for divorce for cause. But, unlike a decree of divorce, judicial separation is not final, and a court may, on application of either party, rescind the decree if it considers it just and reasonable to do so. Judicial separation is also a remedy that can be used at the option of the court in certain cases where a decree of divorce is applied for but denied. It may not however be used when the ground of the application is that the respondent has ceased to be a Hindu by conversion to another religion, or has renounced the world by entering any religious order or

has not been heard of as being alive for a period of seven years. In none of those circumstances would it be possible to keep a Hindu marriage alive. The passage of a year after a decree without resumption of cohabitation would, as in the case of a decree of restitution of conjugal rights, leave it open to either party to apply for a divorce. It is not clear whether this applies even when the decree was made at the option of the court when divorce had been applied for. The Act certainly contains no restriction to this effect.

Divorce

The Hindu Marriage Act retains the principle of matrimonial fault as a ground for a decree of divorce though it now also provides for divorce by mutual consent. Adultery, now defined as "voluntary sexual intercourse with any person other than his or her spouse" without the addition of having to prove that the offender was "living in adultery", cruelty, desertion for two years or more, mental disorder such "that the petitioner cannot reasonably be expected to live with the respondent", suffering from a virulent incurable form of leprosy or from venereal disease in a communicable form are all good grounds for divorce. In addition, there are religious reasons that are recognised as acceptable grounds. These are ceasing to be a Hindu by conversion to another religion. The Hindu religion is here taken in the widest sense to include Sikhism, Buddhism and Jainism as well as a variety of other sects. In effect, it means that becoming a Jew, Christian, Parsee or Muslim will provide one's partner with good grounds for an application for divorce. Renunciation of the world by entry to a religious order will have the same effect. A decree can also be asked for on the ground of presumption of death after a seven year absence without being heard of.

Even though matrimonial relief for cause remains an important part of the Hindu Marriage Act, the amendments of 1976 have introduced far more liberal provisions for applying for a divorce. The failure to resume cohabitation for at least a year after the passage of decrees of restitution of conjugal rights or of judicial separation leaving it open for either party to sue for divorce has already been referred to. There is also now provision for an application for divorce to be made by both parties together on the ground that they have been living separately for a period of a year or more, that they have not been able to live together and that they have "mutually agreed" that the marriage should be dissolved. There has in these circumstances to be a six-month delay before the petition can be heard. No motion for the hearing of the matter can be made if more than eighteen months has elapsed since the initial petition by the parties; they would have to begin the proceedings all over again.

When a petition for divorce is by mutual consent the court, in addition to listening to the parties may also make such inquiry as it thinks fit before deciding the matter. This would give them the opportunity to determine whether pressure has been brought on either or both of the parties to seek a divorce. One of the matters that the court may inquire about is whether or not a marriage had been solemnized. The wording of the section makes it obligatory on the court, once it is satisfied that there has been a marriage and that the matters contained in the petition are true, to dissolve the marriage. Since the petition will have been jointly presented, there is no need to wait for time for an appeal to elapse, so that the decree takes effect from the date it is made. It is true that in this, as in other matters under the Act except in the cases where mental disorder, physical illnesses or religious reasons are alleged, that the court has the duty to "make every endeavour to bring about a reconciliation between the parties" - (sec. 23(2)). Such attempts at reconcilation may be made whether the parties desire it it or not, if the court thinks it just and proper that the attempt should be made.

In order to allow this to be done, the matter may be adjourned for up to fifteen days, for a person nominated either by the parties or by the court to attempt reconciliation and report to the court whether or not the attempt was successful. This would appear a very reasonable provision if the reconciliation to be attempted were between the husband and wife alone. Since in the large majority of cases the marriages will have been arranged, and particularly if divorce is sought in the early years of marriage, it would seem that mediation would have to be between families as much, if not more, than between spouses. As Derrett points out in his "Death of a Marriage Law" the dispute is more often about property than whether the couple can get along with each other. It would seem that any person or agency attempting reconciliation should be equipped to deal with this aspect of the problem, and that families as well as parties should be necessarily included in any real attempt at reconciliation. Even conciliation, where maintenance and property matters may have to be decided on the breakup of a marriage, should involve family members as well as spouses.

One of the ways the bias of courts in favour of marriage has been expressed is in its unwillingness to entertain a plea for divorce until a period of time, usually three years, has elapsed since its solemnization. This period has now been reduced to one year, though the mitigating circumstances of exceptional hardship and exceptional depravity are still allowed to support a plea for a hearing within the period. In general, the tenour of the Act seems to be that a year is enough to determine whether or not a marriage has broken down, and that justice lies in obtaining a relatively speedy determination of the matter. The target set in Sec. 21B(2) is six months from the date of the service of notice of the petition on the respondent for determining the issue; for appeal, the conclusion should be within three months. If this sort of timetable could be kept to, it would prevent the acknowledged scandal of hearings artifically prolonged in order to avoid the payment of maintenance or the return of property unjustly retained. The settling of time limits pinpoints the responsibility of the court to prevent this sort of thing happening.

Prolonging hearings is a way of bringing pressure to bear on the economically weaker party in a marital dispute. Legal aid is not available in such cases. The way in which the Act addresses what must, in the nature of the way families organise their finances, be a fairly usual problem, is by giving the court the power to order the party with the means, either husband or wife, to pay to the other the expenses of the proceeding and monthly maintenance during the proceeding. It is a method of proceeding which, given the acrimonious nature of most matrimonial disputes which have reached the stage of court action, must be most difficult ot enforce.

Maintenance

The right of a Hindu wife to be maintained during her lifetime by her husband has always been an important principle of Hindu personal law. The passage of the Hindu Married Women's Right to Separate Residence and Maintenance in 1946 gave statutory recognition to the practice of upholding her right to be maintained even though she was not living with her husband if she could show that she had good justification for leaving. This right to maintenance has been reaffirmed by the Hindu Adoptions and Maintenance Act 1956. In spite of an increase in exposure to education and entry in growing numbers into employment outside the home, the economic state of the married woman has not changed enough to lessen the importance of the right to be maintained by her husband, or in joint families, by her husband's family.

It is interesting to observe that one of the grounds for divorce limited to wives concerns maintenance. The Code of Criminal Procedure (sec. 125) and the Hindu Adoptions and Maintenance Act (sec.18) both provide ways in which a wife living apart from her husband for cause can be awarded maintenance to be paid by him. If the spouses have not resumed cohabitation since the award of maintenance to her after a year or more, the wife may present a petition for dissolution of the marriage. It is not made clear whether a wife may exercise her right even if maintenance is paid though there is no resumption of cohabitation. Divorce of course would enable her to apply for permanent maintenance which could be available either as a gross sum or as a monthly or periodical payment for her lifetime or until remarriage - likely to be a much more satisfactory arrangement, especially as payment may be secured, if necessary, by a charge on the immovable property of the respondent.

Except for this one acknowledgement of the possible financial status of a wife involved in matrimonial problems, the Hindu Marriage Act treats wife and husband alike in requiring the party with means to support the other during the hearings, pay the expenses incurred for the hearing and provide for their maintenance after dissolution. The court has wide discretion in fixing the amounts to be paid and will take all the circumstances of the case into account, including the means of the parties and their conduct. It is interesting to observe that for both parties sexual misconduct may be pleaded by the other in support of an application to vary, modify or rescind an order to pay maintenance. It is no longer only the woman who must behave circumspectly.

Custody

During the hearing or after the resolution of any proceeding under the Hindu Marriage Act, the court may make orders concerning the custody, maintenance and education of minor children. Since the Act does not provide any guidance on the way custody matters should be dealt with, except to say that weight should be given to the wishes of the children where this is possible, the provisions of the Hindu Minority and Guardianship Act relating to custody must be taken to apply. Section 6 of that act affirms the long recognised principle that the father is the natural guardian of a son and unmarried daughter. If the child is under five years the custody is normally with the mother - which in effect only really means that she exercises guardianship over the young child. If for some reason the father does not have custody, then it passes to the mother. But Section 13 of the Act makes it clear that regardless of claims to custody, the welfare of the minor is the paramount consideration determining the appointment of a guardianship.

The Hindu Minority and Guardianship Act also makes it clear that for a girl at least, marriage does not, as it generally does in other countries, confer the status of adulthood upon her. Her husband becomes the guardian of a married minor girl.

Property

The power of the court to make decrees ancillary to matrimonial causes relating to property is limited to property "presented, at or about the time of marriage, which may below jointly to both the husband and the wife" (sec. 27). It is clear that the wife is not regarded as having a share in any property acquired during the marriage jointly used by them. Her contribution by way of the running of the household and the care of its members could be seen to entitle her to a claim for maintenance, but it will be more difficult to exclude her from a share in the goods acquired during marriage if she is gainfully employed and has contributed to the purchases of goods and property. In the division of marriage gifts between the parties, the court has, as elsewhere in the Marriage Act, wide discretion. Such division may be made as is deemed "just and proper".

The fact that courts dealing with matrimonial cases have no jurisdiction to deal with the property rights of the parties or to direct the disposal of any property owned by them must make it difficult to arrive at a just solution of the problem of the amount of maintenance to be awarded. All that can be done is to order it to be secured by a charge on immovable property.

Hindu Succession Act

Though purporting to deal only with succession, this Act affects a number of other areas of personal law. In particular, the increase in the property rights of women, and new rights to alienate by will a share in a co-parcenary have had a marked effect on the joint family.

The Act provides for all Hindus a uniform and comprehensive system of inheritence. In effect it abolishes the difference between the two main systems of law, the Mitakshara and Dayabhaga, preferring the rules of the latter to that of the former. All property of a male Hindu, whether separate or an interest in joint family property may be the subject of a gift, devised by will, or pass to his heirs on an intestacy. The law provides that in succession there shall be equitable distribution between male and female heirs. This has further improved the rights of women to property which had earlier been established by the Hindu Women's Rights to Property Act of 1937. This Act had established what was known as a Hindu woman's estate, limited to her life, in a share equal to a son's in her deceased husband's separate property, and her husband's share in joint family property as at the time of his death, where the Mitakshara rules applied. Where the Dayabhaga rules applied, the widow's share was the same as a son's in all her deceased husband's property, separate or joint. This woman's estate was enlarged by the Hindu Succession Act to full ownership without any distinction made between separate and joint property. This did not mean that upon her husband's death she could take his place as co-parcener, but it did mean that she could ask for partition. This placed her in a much stronger position so far as ownership of property was concerned, and would clearly affect her claim to be maintained by her husband's family. Where the property was enough that she could maintain herself, there would be no problem, where it was not, there clearly could be considerable problems if she insisted upon ownership rights.

Also partition can tend to weaken the economic base of the joint family, and understandably there was considerable argument about whether agricultural property should or should not be exempted from the provisions of the Hindu Succession Act. Some States have legislated for their inclusion, other for their exclusion. Where immovable assets such as agricultural property are included in an estate, a female heir may find it more prudent not to insist on getting a share equal to her brothers and thereby forfeiting any claim to their help or support in the future. The practical disadvantages may outweigh the value of the legal right.

With the enlargement of women's property rights has come changes in the devolution of their estates. The Act abolishes all the complicated rules relating to the devolution of woman's property - stridhana - upon her death. As she could make no will, all her property followed rules which depended upon her status at death and the source of the property she had acquired. The Hindu Succession Act confers upon her the right to make a will and in this way dispose of all property of which she is full owner. Upon intestacy, the Act lays down rules for succession to her property, but keeping the distinction between property inherited from her mother and father, and property inherited from her husband and father-in-law.

It is clear that in Hindu law the right to own property and the duty to maintain dependants are seen as complementary. A Hindu woman is now liable, under the Hindu Adoption and Maintenance Act (sec 20) to maintain her legitimate or illegitimate minor children and her aged or infirm parents. She may also be liable to pay maintenance to a divorced husband if she is the party with means, as was pointed out above.

The liability to maintain members of a joint family out of joint family property has been preserved, even if in a rather limited form. Though a co-parcener has the right to will away his portion, this disposition is subject to the rights to claim maintenance of those who can be shown to be dependants. Indeed the Hindu Adoptions and Maintenance Act provides that where a dependant has not received a share of the estate of the deceased, whether by will or upon intestacy, the dependant is entitled to maintenance from those to whom the estate passed. This general principle applies whether the deceased is male or female. Throughout the legislation passed in the 1950's there has been an attempt to balance new rights and old claims, even though it seems that in the long run the new rights will be destructive of the old claims by making them less important than they once were and more difficult to enforce.

Conversion to another religion and loss of caste were at one time grounds for the forfeiture of property and resulted also in exclusion from inheritance. The Caste Disabilities Removal Act of 1850 changed this situation, but succession to the property of the converted person followed the personal law of the religious group that he joined. This rule has been retained by the Hindu Succession Act. A descendant of a person converted from Hinduism to another religion is disqualified from inheriting the property of any of their Hindu relatives unless at the time when they should succeed they are themselves Hindus. Children born to the convert before conversion are unaffected by the rule. In the nominally secular country of India conversion to another religion has far-reaching legal consequences, not only for the convert but for family members and descendants.

Hindu Adoptions and Maintenance Act 1956

Maintenance

References have already been made to those provisions of this Act which refer to the claims of wives and of dependants to be maintained. The purpose of the Act is stated as both codifying and amending the law in these areas. The duty of the Hindu male to maintain his wife, children, parents and other dependants has long been a central part of Hindu personal law. This Act reaffirms and spells out this duty in detail, and adds to it the duty of a Hindu woman to maintain her children and elderly parents. As in the other Acts referred to, Hindu means every person who is not a Parsi, Muslim, Jew or Christian, or any member of a Scheduled Tribe excluded from its operation.

A Hindu wife is entitled to be maintained by her husband during her lifetime. Normally this entitlement is dependent upon cohabitation. There are however certain circumstances in which she is entitled to live separately without forfeiting her claim to maintenance, If he deserts her without reasonable cause, wilfully neglects her or treats her with such cruelty as to make her fear injury to herself if she remains, these will be good grounds for separate residence. The same is true if he suffers from a virulent form of leprosy. Bigamy or the keeping of a concubine by her husband, whether at home or elsewhere will justify her living separately,

she must remain chaste and must remain a Hindu by religion. It will be observed that these grounds would entitle her to other matrimonial relief, such as judicial separation or divorce, but she may choose this lesser alternative without forfeiting the right to proceed later to make application for divorce. As was pointed out above, an order against her husband for maintenance which did not result in a resumption of cohabitation a year or more after, would leave her free to seek a divorce.

A wife's claim against her husband for maintenance is a personal one, arising out of the relationship between them, and subsists whether or not he has any property out of which it can be satisfied. If he dies before her, she has a claim for maintenance against her father-in-law. But this claim is not absolute. It can only be sustained if she is unable to maintain herself out of her own earnings or property, or is unable to obtain maintenance from the estates of her deceased husband or deceased parents or from her children. In addition, her claim against her father-in-law is only enforceable if he has in his possession coparcenary property out of which she has not, on the death of her husband, obtained any share. Her new rights of inheritance to a share of both her husband's and her parents' property has much reduced her claim to be maintained by the family of her husband during her lifetime or until she remarried. This must have introduced into the lives of many widows a considerable degree of economic insecurity.

Both mother and father have the duty to maintain their children, whether legitimate or illegitimate so long as they are minors. An unmarried daughter has the right to be maintained, even though she is no longer a minor, unless she has the means to maintain herself out of her own earnings or property. In her case maintenance includes "the reasonable expenses of and incident to her marriage" (sec 3(b)(2)). Both men and women have the obligation to maintain their aged or infirm parents if they are unable to maintain themselves out of their own earnings or property. A childless stepmother is included among such parents.

In addition to those referred to above, the list of dependants who may claim maintenance from the estate of a deceased Hindu male include the son and daughter of a son who has died, where these minor children are unable to get maintenance from the property of either their father or mother. Also included is a widowed daughter who is unable to obtain maintenance from either the estate of her husband, from her son or daughter or from her father-in-law. The widow of a son or of a grandson, as long as she does not remarry, provided she is not able to obtain maintenance from her husband's estate, from her children or otherwise, an illegitimate son so long as he is a minor, and an illegitimate daughter so long as she remains unmarried are dependants who can claim maintenance from the estates of both their deceased parents. The claim to be maintained can only be sustained if the dependant has not received any share, whether by will or by intestate succession, in the estate of the deceased person, and it lies against those who took the estate, to be shared proportionately between them according to the amount of the shares. Only minors whose share would, if they so contributed, become less than the amount they would be entitled to get in maintenance, are exempt.

In general, maintenance means the provision of food, clothing, residence, education, medical attendance and treatment. The Act gives a wide discretion to the courts to determine whether any, and if so, what amount of maintenance are awarded under its provisions. But in reaching their decisions, the judges are directed to take into account a number of factors. If it is the amount to be paid to a wife, or children or aged or infirm parents, they must consider the position and statuts of the parties, the reasonable wants of the person(s) claiming, whether the claimant is living separately and is justified in doing so as well as any income or the value of any property the claimant might have. Also to be borne in mind is the number of persons who can claim entitlement to be maintained out of the same property. Where the claim of other dependants is being considered, out of the estate of a deceased person, the value of the estate after the payment of debts, any provision for the claimant under the will of the deceased, the degree of relationship between them,

their past relationships and the reasonable wants of the claimant, have all to be taken into account. Balanced against these are the value of any property owned by the claimant, or any earnings from any source, as well as the number of dependants entitled to maintenance.

A claim to be maintained under the provisions of this Act can only be made so long as the claimant is a Hindu. If a person receiving maintenance is converted to another religion, he or she forfeits his right to it, and the court has the power to rescind any such order that it may have made. Whether the amount of maintenance payable to a dependant has been fixed by court order or by agreement between the parties, it may be varied, modified or discharged by the court upon application if there has been any material change in the circumstances which might justify such action.

Adoption

Adoption as a way of providing a home and family for a child in need, or homeless or an orphan, is not looked upon with favour in India. It was permitted when there was need to supply the lack of a son, and it is males who were principally involved in the adoption process. A woman could sometimes adopt, but only as representative of her deceased husband when there was no lineal male descendant who was a Hindu. The Hindu Adoption and Maintenance Act of 1956 amended and codified the law relating to adoption. The provisions relate only to Hindus in the wide definition given to that term in the other legislation looked at above. Persons other than Hindus are not covered by legislation permitting them to adopt, with the change of family and status that this involves. If such persons wish to take responsibility for a child not of their own family they may only do so under the provisions of the Guardians and Wards Act. This gives them custody of the child who stands in the relationship of a ward to them, and they become responsible for his support, health and education and general upbringing.

Though both males and females may adopt and be adopted, the Hindu Adoption and Maintenance Act lays down very strict rules about who may adopt, who may be adopted and the circumstances in which adoption is permitted. A Hindu male adult may adopt a son, who must also be a Hindu, so long as he has no son, grandson or other lineal male descendant who is a Hindu living. The consent of his wife to such adoption is necessary if she has the necessary mental capacity to consent, is a Hindu and has not renounced the world. He is also permitted to adopt a girl with exactly the same qualifications as those applicable to the adoption of a son, including the consent of his wife. It is clear that these adoptions are intended to replace family members who could in normal circumstances be expected to exist.

A female Hindu who is a single woman, that is unmarried, a widow or a divorcee, can adopt either a Hindu son or daughter. If she is married, she cannot do so unless her husband is of unsound mind or has renounced the world. She may only adopt if she has no son or daughter or other lineal descendant of the same sex as the person she seeks to adopt. Only the parents of the child, or any testamentary guardians appointed by them may lawfully give a child up for adoption. In all other circumstances the court would have to sanction the child's availability for adoption.

From the date of the adoption the child is deemed to be the son or daughter of the adopted parent, and neither may renouce the status of the relationship it brings into being. Property rights in both the natal and the adoptive families are fixed as at the date of adoption. There is one remaining tie, however, to the natal family. A child may not marry within the prohibited degrees of relationship of his or her natal family.

The limitations placed upon the adoption process in Hindu personal law emphasise the important place the family is perceived as occupying in both religious and social life. To introduce strangers who could also be rivals of one's sons and daughters would therefore not be acceptable, and adoption as a way of ensuring the welfare of children in need would be alien to the spirt of Hindu adoption. It is not clear however why other

religious groups should not be permitted legally to adopt in their own way and for their own ends, the welfare of the child being always the paramount considerations.

Minority and Guardianship

In a country in which the expectation of life is still relatively low and the birth rate is high, the question of the guardianship of the person and the property of minors is of importance. The main enactment dealing with this subject is the Guardians and Wards Act of 1890 with its subsequent amendments. That Act did not, however, deal fully with the subject. It expressly permitted the personal law of a minor to apply to the appointment of a guardian of his person or property, though laying down the duties, rights and liabilities of guardians and ways of regulating their conduct in the exercise of their duties. The Hindu Minority and Guardianship Act of 1956 states the personal law of Hindus in this respect.

The Act confirms the supremacy of the father as head of the family, and he is the natural guardian not only of his minor children but of his wife if she happens to be a minor. His right of guardianship over property does not however extend to any undivided shares in joint family property held by his wards nor may he, if he is a minor, exercise guardianship over his ward's property. If the father is unable or unwilling to exercise guardianship of his children, it passes to the mother. When the child is illegitimate, the positions are reversed, the mother having the prior claim to guardianship. As pointed out earlier, the custody of a child under five is normally with the mother unless there is good reason why this should not be so.

The position of the mother as the guardian of minor children in succession to the father has been improved by the provision that she cannot be displaced by a guardian appointed by the father in his will. If on her death she appoints no testamentary guardian for them, then the appointment made by the father in his will would revive. Different rules concerning guardianship apply to the minor's interest in joint family property.

Genesis of Personal Law Statutes

Looking back over the legislation that has been reviewed in this section, it can be seen that those parts of the projected Hindu Code which have been passed into law have gone a long way to providing the basis for a personal law for all Hindus. The Acts show a certain consistency of approach. Where there existed a number of conflicting customs - as in succession - the purpose was to try and take from amongst them what was most just and equitable and enact that into law. Though established customs in families, gruops or communities could be retained, it was obvious that the legislation set out what was desirable, and could be expected to be accepted in the future as model by those whose practice deviated from it. This approach would accord well with the nature of change in Hindu law. The aspirations of independent India and its hopes for its future development required that its citizens should be seen to be treated justly and equitably. Therefore it was important to increase the legal rights of women, and make them as nearly as possible equal with men before the law. At the same time, the increase in individual rights was not intended to devalue the importance of the family. The primacy of the father as head of the family is preserved, and the property rights of the joint family protected though with some diminuation because of the new right given to women to share in the succession and to hold property in full ownership. In dealing with matters long the subject of Hindu law, the legislation shows the attempt to find a balance between old customs and new rights.

In matters such as divorce and other matrimonial causes, where there was no long history of custom and usage relating to the upper castes,- the pattern has been to follow the English legislation. This was not new, because English laws had already been followed in the Special Marriage Act and other legislation applicable to the English and to Christians in India. But in some ways the Hindu Marriage Act is, unexpectedly, more liberal in approach. The endeavour to treat men and women as equally as possible before the law combined with the developments in English law resulting from the view that it was desirable to shorten and simplify the process of getting a divorce, has resulted in a Marriage Act that is of doubtful relevance to the majority of Indians. It is true that most of the grounds for matrimonial relief depend upon a finding of matrimonial fault on the part of one of the spouses, but this does not necessarily protect the other, when following upon a decree of restitution of conjugal rights or of judicial separation, without cohabitation resuming, either party, the guilty or the innocent, can apply for a divorce. The introduction of divorce by mutual consent, after effectively eighteen months separation (a year plus six months delay before hearing) would seem to provide a sufficiently easy way for those wanting to avoid the long and bitter litigation which so often accompanies cases in which fault must be alleged, to make further changes in the law unnecessary at least for a time. However, consultation is now going on about the introduction of the principle of irretrievable breakdown replacing all the others as the sole ground for divorce. This of course is an appropriate way of handling the breakdown of a contractual arrangement entered into between adults as a result of individual choice. Its relevance to an arranged sacramental marriage, the result of an agreement between families where dowry and property arrangements often form an integral part, is less obvious.

Need for Support Services

It is not always realised that the kind of legislation dealing with matrimonial causes which is being copied in India works only where it has the support of a variety of services offering both economic and counselling aid. Legal aid enables spouses without financial resources to exercise their rights under the law. Without this the existence of the rights are of no help to them. Counselling and conciliation services in order to be effective must be available at a number of stages in the dispute and should be, and be seen to be, disinterested if they are to be at all useful. Emergency help with housing and maintenance should be available. Services like these do not exist in any general way in India. A person with a problem is far more likely to seek the advice of elders within the family or the community before taking any decision or embarking on any course of action, especially if it concerns matrimonial or family matters. Such advice is not likely to be disinterested in the western sense. A woman can normally expect that she will be the one asked to make sacrifices; social attitudes are not supportive of a woman taking action in defence of her rights except in very extreme cases. It is unlikely that without family help she would be able to do so anyway. On the other hand, this situation may make it impossible for her to withstand her family if they wish her to seek a divorce, and men too can find themselves similarly manipulated for family reasons. The very limited reconciliation provisions in the Hindu Marriage Act do not leave scope for such situations to be satisfactorily addressed. Intervention for reconciliation purposes during the course of a hearing has, in any case, only a very slight chance of success.

For a law to be effective people must know that the law exists and relief under it must be accessible to them. In a country like India, with a federal constitution, much will depend on the determination of the State governments to make the law effective. There is plenty of evidence that laws will be ignored if they are felt to be irrelevant. The Child Marriage Restraint Acts and the Prohibition of Dowry Act are good examples. The Committee on the Status of Women reported that its

investigators found that thirty years after the passage of the Hindu Succession Act women in many areas did not know that they had rights to share in their husband's property on his death.

The interest in law reform at the top is not matched by a similar interest at other levels in the legal and judicial system in improving the administration of the laws so that relief is easily accessible to those who need it, and, most important in family law matters, that is dispensed without undue delay. Here and there throughout the country voluntary special interest groups, acting mostly in the interest of women, have undertaken the responsibility of informing people of their rights and helping them by mediation or legal aid. They recognise that without this aid the system is likely to work most unjustly for large numbers of people. Though there have been committees who have discussed the provision of legal aid to the poor it is unlikely that in the foreseeable future there will be throughout the country a properly set up and adequately funded system working as a part of the administration of justice in family law matters.

Conclusion

The demographic and sociological material looked at in the first part of this paper suggested that resort to divorce would be likely to grow, but much more slowly than it has in other countries with broadly similar types of matrimonial legislation. The speed of growth in the numbers of educated women cannot be expected to be rapid, and their employment in the modern sector of the economy is likely to follow a similar path. The review of the law suggests that only the most westernised of Indians will feel that it meets their needs adequately, and, as Rama Mehta points out, even some of these women are reluctant to claim the rights it gives them. This suggests that the increase in divorce is likely to come from the greater numbers of men seeking to end a marriage, perhaps for the purpose of contracting another. The way the laws are administered work unwittingly in favour of the economically stronger party - more often than not, the husband. There is obviously need to find ways of making the parties more equal before the law.

The role that legal aid could play in achieving this has already been referred to. That awkward relief - restitution of conjugal rights - used often as a first step to an application for divorce, could perhaps acquire some real usefulness if the parties were required before or during the hearing to submit to professional counselling and/or conciliation in which family members as well as spouses would be included. The importance that services of this kind can have in all areas of family law has already been mentioned, but they can only function effectively if they have a clear administrative relationship with the courts.

There are two matters usually of central importance in family law about which the laws reviewed have very little to say. One is the division of property acquired during the marriage which is not joint family property, and to the acquisition of which the wife may have contributed. The other is the enforcement of maintenance orders. One omission is interesting in the light of the importance placed on the having of children, particularly a son. While impotence makes a marriage voidable, there is no mention of sterility having a similar effect.

Potentially the legal changes likely to have the greatest effect in the long run are those which concern the increase in the property rights of women and the equal sharing of property between sons and daughters upon succession. It is obvious that at present only those women who know their rights can claim them, and not all of these do. Should it become the usual practice that property on an intestacy is divided as provided, and that women exercise their rights of full ownership, including their shire in joint family property as representatives of their deceased husbands, then the joint family's economic base could be so weakened that it would be unable to discharge many of those welfare functions that it now undertakes. If this happened new family patterns could begin to emerge, and new claims on public resources made. The seeds of the change of direction for the future may lie in the legislation which created a a personal law for all Hindus.

Notes for the Chapter on India (Hindu Family Law)

The statistics quoted were taken from The Census of India (1971) Social and Cultural Tables.

As background material the study by Irawati Karve on Kinship Organisations in India Asia Publishing House 1965 edition was found most useful.

For general information:

Towards Equality - Report of the Committee on the Status of Women in India (1974) Department of Social Welfare, Delhi

The Educated Woman in Indian Society Today - YWCA of India (1971)

There are a large number of sociological studies on various aspects of the family in India. Use was made of the following:

Main Currents in Indian Sociology: Vol.II on Family and Social Change in Modern India Vikas 1976 which provided a good introduction to the literature - Gupta G.R., Editor

Urbanization and Family Change - M.S. Gore - Popular Prakashan Bombay Bombay (1968)

Family in India - a Regional view - G. Kurian - The Hague Mouton (1973)

Divorced Hindu Woman - Rama Mehta - Vikas (1975)

On the laws, the following were helpful:

Hindu Law - Mulla 14th edition ed. by S.T. Desai Tripathi

Death of a Marriage Law - J.D.M. Derrett - Vikas (1978)

Legislation

Constitution of India as amended to 1981
Caste Disabilities Removal Act 1850
Child Marriage Restraint Act No. XIX of 1929
Guardian and Wards Act No. 8 of 1890 as amended to 1976
Hindu Adoptions and Maintenance Act No. 78 of 1956
Hindu Gains and Learning Act No. XXX of 1930
Hindu Inheritance (Removal of Disabilities) Act No. XII of 1928
Hindi Marriage Act No. 25 of 1955 as amended to 1976
Hindu Minority and Guardianship Act No. of 1956
Hindu Succession Act No. 30 of 1956
Hindu Widow's Remarriage Act 1856
Hindu Women's Rights to Property Act No. XVIII of 1937
Hindu Women's Rights to Separate Maintenance and Residence Act No. LXXXV III (1946)
Special Marriage Act No. XLIII of 1954

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 characterists 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 lar e 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 mean that a child would spent 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 hav 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 maitain 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 inthe 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 Court. 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 artifically 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 brough 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.

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* 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 Australiah 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 cohabition 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 probems 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 supervicion 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 thd 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 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 concilation.

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 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 violance. 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 violance, 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 follcwing publications have been found most useful:

The Population of Jamaica	George Roberts Camb. Univ. Press for the Conservation Foundation
Women in Jamica	G. Roberts and S. Sinclair KTO Press NY
The Fertility of Common Law Unions in Jamaica	G.E. Cumper Soc. & Econ. Studies Vo. 15 No.3 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 Chidlren Act 36 of 1976

ONTARIO

CANADA

Background

Among the waves of immigrants who have settled in and developed Canada, the British have been the ones to stamp their language and institutions most effectively upon the country. Perhaps the centre of their influence is Ontario though it is also the province that has attracted the largest and most diverse groups of immigrants from other places. It seems therefore the province which would offer the best insights into the working of family laws and procedures. In addition to this consideration, its choice was influenced by the fact that in the last fifteen years a great deal of work has been done in this area, spearheaded by the Ontario Law Reform Commission. Its Reports and legislation which has resulted in acceptance of some at least of their recommendations give a clear picture of the legal view of the family and its workings, and this will be looked at in some detail later.

Elsewhere the view of the family and how it is expected to function is much less clear. Observers and planners from other disciplines and other points of view give a good deal of attention to the multi-racial, multi-cultural nature of Canadian society, and indeed the pursuit of 'multi-culturalism' has become a significant policy objective in recent years. A paper published by the Ministry of Social Development of Ontario in May 1979 entitled "The Family as a Focus for Social Policy" began by stating that "..... the concept of family entertained by each of us is a function of our age, sex, ethnic origin, language, economic position and even the region where we live". That it takes many forms in Ontario and includes complex family establishment within various cultural and ethnic groups and that these had to be acknowledged and protected as a matter of policy was accepted. But it is obvious that if the support, strengthening and protection of the family is to be a focus for social policy there has to be some general agreement about its nature and the kind of functioning public policy considerations should accept and promote. The paper does not deal with these very difficult questions but instead turns first to description through statistics.

The family in Ontario: the statistical view

The statistics quoted show that there is no decline in the popularity of marriage, though the figures include a steadily increasing proportion of second marriages. Over the last twenty years there has been a marked fall in the birth rate, though the figure conceals some large families in some of the ethnic groups. Families based on marriage with children are still the main group

in the population though there has been some growth among the number of births to mothers who are not married. Most of these latter are under twenty, but what is perhaps of greater significance is that a sharply increased number of these are keeping their children rather than offering them for adoption.

Working habits have changed too. In more than half of the number of families husband and wife both work outside the home, and this includes roughly 45% of those in which there are children of school age. Life expectancy has lengthened significantly throughout this century and a man can now expect to live to 72, a woman to 78. Not only has this implications for the care of the elderly, for the state as well as for families, but the growing contribution by older couples to the rate of divorce has been noted.

Reform of family law is often sought by persons and by groups who wish it to embody "enlightened" or "progressive" ideas. Family law has, however, a fundamental role that concerns such as this may distort. The way families function depends upon many things - geography, economics, health and sanitation for example, to name but a few of the things which influence the way life is lived in any country. There is evidence from both history and anthropology that family law has developed by legitimising practices which have grown up in response to the circumstances of life at a particular time in a particular place. There are very few countries where this connection can be clearly seen today, but this does not mean that it does not still exist and still has importance. There is some negative evidence for it in those countries where the law, being perceived as irrelevant to the needs of people, is ignored.

It is in this context that the family law of the following sample of Commonwealth jurisdictions is considered, bearing in mind the influence of English family law on their development and their efforts to achieve reform. It should be made clear at the outset that an acquaintance with English family law is assumed. Consequently interest is centered on the difference from, rather than the likenesses to, the English model where these have arisen from social or constitutional differences or, in some cases, a combination of both.

The sociological view

Even so cursory a reference to these statistics about families has highlighted a number of the problems to which the law, the courts and the social services will have increasingly to find solutions. Solutions acceptable to the people involved depend upon an understanding of the way families function. But in spite of the way public interest in changing family patters has led to discussion, controversy, the setting up of new institutions for research and education like the Vanier Institute of the Family as well as considerable research undertaken by univeristy departments, public and voluntary social service agencies, the nature of the Canadian family remains elusive. However, the periodical literature, social agency reports and the media comments on the working of these, and on family problems generally. suggest that the generally acceptable model of the Canadian family is that of the dominant group in the society - formed by British and American attitudes. These are admirably set out in Shorter's "The Making of the Modern Family". In his view, three things underlie the functioning of the modern family - romantic love as the basis for marriage or other pair formation, the importance attached to the mother-child relationship (now becoming more parent-child) and the boundary that exists between the family and the surrounding community, expressed in a very real sense of family solidarity. This is not to underestimate the influence of peer group association and pressure, and the growing assertion of independence by women both in the economic and social fields.

Other studies, collected in "Canadian Society: Sociological Perspectives" largely agree with these emphases though some stress is placed on the view that home and the male career still jointly provide the base from which the family articulates with the community. The importance of what are seen as 'good' child rearing practices is also underlined. These are geared to the freeing of the child to develop individual goals and patterns of living. It is the duty of the family to see that the child is equipped to use whatever means are available to better himself. In an essay on 'Family and Socialization in the Upper Class Community' stress is laid on the importance of the individual in Canadian society. The conclusion is 'The democratic norms require that whatever the training given by the home, the child must be treated as having rights and privileges because he is a human being." The author of another paper remarks that the Canadian patter of the egalitarian society is very attractive to immigrant children. He find that 'immigrants are rather indifferent to the Canadian status system, but it is not so with their daughters' - a comment with which many social workers would agree.

The status system is only one aspect of the social system that the children of immigrants learn well in schools. The public school system is a most effective means of teaching the emphasis that the society gives to individual rights, as well as approving group pressures on conformity in social and mating habits and behaviour. Many of these conflict with the family norms of some immigrant groups and the resulting family stress has been a growing matter of concern.

Discipline

It is interesting that in the light of the acceptance of multi-racialism and of the fact that there are cultural differences in the ways families function, that there was no discussion in the pamphlet "The Family as Focus for Social Policy" about the problem of discipline and what would be socially acceptable forms of it.
Emphasis was laid on the socialization of the young and the maintenance of social order and continuity as important roles for the family in the community. Each of these imply the exercise of some form of family discipline. Discussion about discipline has in general concentrated on the forms of discipline, but it would seem more important to understand what kinds of behaviour attract discipline within the family and why.

The ends of discipline are surely as important as the means, and their inter-relationship is crucial to an understanding of the things that a family feel are important in the functioning of their communal life.

The view underlying the Report on Family Law

The six volumes of the Report on Family Law - the work of the Ontario Law Reform Commission - also embody a view of the family in Ontario and the way it functions. In passing it may be observed that by far the largest amount of space is given to the consideration of family property and support obligations - these being factual matters capable of both legal determination and solutions. In these reports generally the emphasis is on the economic rather than on the moral basis of marriage. The husband and wife relationship is seen as approaching an equal partnership with joint management of family affairs and possibly also joint ownership of family assets. Freer personal relationships outside marriage are tolerated and the expectation is that each spouse should be capable of self-support. However it is acknowledged that the factual situation falls some way short of this. For example, on page 4 of the report on Family Property, it is stated "... the dependency of the wife is still very much a fact in twentieth-century Ontario .... On a secular basis, marriage can be characterized as an economic arrangement that assumes this dependency .. with a legal framework that is designed to provide a remedy for the wife if the husband's obligation to maintain is not properly discharged".

The volume that deals with Marriage also underlines the importance of the economic basis of marriage. It states positively (p.11) that "the stability of the marital union is and will continue to be of vital importance to Canadian society". The idea of marriage on whch its proposals are based is set out in the following terms - "Marriage represents the creation of a new family unit by persons who have detached themselves from the homes of their own parents. The fundamental considerations must therefore be whether the maturity and economic independence of the spouses is consistent with the successful founding of such a unit and whether there exists the basis for a viable family group which can provide care and protection for dependents". This point of view is particularly stressed in the discussion on the age of marriage. But it may be questioned whether it represents a generally accepted point of view. For example, the booklet on Family Law Reform issued by the Ministry of the Attorney-General in 1976 contained the following statement - "A 16-year old is entitled to quit school, drive a car, apply for a social insurance number, get a job, apply for unemployment insurance or welfare, leave home or join the armed forces". It seems clear that for most young people growing up in Ontario this is fair statement of what they expect. If there is added to this the freedom of association between the sexes and the greater tolerance of sexual activity among the unmarried, it is unlikely that the view of the meaning of marriage on which the Commission based its proposals has much meaning for many of them. It is rather than any question of economic viability that will lead to the formation of pair relationships and sometimes marriage.

Here in Ontario, as elsewhere, early marriage because of pregnancy often leads to early divorce and in turn to second marriage. There are a number of indications to suggest that the question of second marriage will grow in importance, If, as is suggested above, economic viability is important in achieving stability in marriage, a good deal of thought will have to be given to the economics of second marriages and the way these affect support obligations arising from the first marriage. The Report on Family Law hardly dealt with this topic at all, though perhaps the importance it attached to the notion that upon separation the dependant spouse should be "restored to self-sufficiency" inidcates what would be their preferred approach to the problem. It suggests there may be something of an urban bias in their way of looking for solutions. It could also seem neither fair nor just to a number of ethnic groups in the province.

Legislative Reform

The work of the Law Reform Committee initiated a very active period of discussion and consultation about the way family law should be changed. The legislative programme which resulted could be said to have begun with the passage of the Unified Family Court Act in 1976 which enabled the setting up of an experimental court exercising the full range of federal and provincial jurisdictions in family matters in the Hamilton-Wentworth area. Between 1978 and 1980 a number of Acts dealing with various aspects of family relationships were passed. These Acts will be referred to in more detail below. In general, the aim of the programme was so to alter the concepts about family relationships and obligations that the law would reflect the social and economic realities of life in Ontario in these days, and would take into account the expectations, the rights and responsibilities of all family members. Procedurally, it brought within the jurisdiction of the Provincial Court (Family Division) all those matters with which it was constitutionally able to deal, eliminating some of the confusion caused by the pursuit of similar remedies under different statutes and in different courts.

The Family Law Reform Act which came into effect in Ontario on the 31st of March 1978 is based largely upon the recommendations in the Family Law Report and the public reactions to these. In its preamble it states that "in order to encourage and strengthen the role of the family in society it is necessary to recognise marriage as a form of partnership". In the body of the Act this is reaffirmed in sec.4 (5) "The purpose of this section is to recognise that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets ..."unless this would in the particular circumstances of a marriage be inequitable. Clearly a claim to an equal share of the family assets is dependent on assumption of family responsibilities unless there is any particular reason why a spouse should be excused from carrying these out. Upon divorce the fact of marriage will not be enough to support a claim to maintenance. This basic change in the way the law regards the relationship of husband-wife is underlined by the repeal of a number of Acts, such as the Deserted Wives' and Children's Maintenance Act, the Dower Act, the abolition of the right to alimony and any action for the loss of consortium. It is noteworthy, too, that the individuality of husband and wife recognised by the Act extends to the matter of the acquisition of domicile, and its provisions apply to marriages which are either actually or potentially polygamous.

The other important change embodied in the Act is the recognition that a man and woman who cohabit, but do not marry, have not only a claim to be regarded as a family but merit some protection from the law in this relationship. While not treated as spouses for the purpose of the division of property acquired during their relationship, they are so regarded for the purpose of support obligations. It is of interest too to observe that among the circumstances to be considered in determining the amount of support there is included "a contribution by the dependent to the realisation of the career potential of the respondent". So far as property sharing is concerned however they may, like any other two persons, enter into an agreement about this which may cover either the time of their cohabitation, or upon their ceasing to cohabit or upon death.

The new Marriage Act, the Children's Law Reform Act and the Child Welfare Act taken together with provisions concerning support in the Family Law Reform Act has brought up to date the law concerning children. Perhaps the most far-reaching change is embodied in the provisions of the Children's Law Reform Act which set out the ways in which parentage is to be determined, and effectively abolishes the old distinction between legitimate and illegitimate children. The Act declares that so far as Ontario law is concerned, a person's right will be determined without references to whether his parents were married or not. Since the establishment of the mother-child relationship is usually a straight-

forward matter, the Act deals in some detail with presumptions of paternity. Cohabitation, whether within or without marriage is a strong presumption of paternity, and this extends to a birth within three hundred days of the cessation of such cohabitation. Acknowledgement of paternity can be presumed by either subsequent marriage, or by registration as a father under the provisions of the Vital Statistics Act. Previous court proceedings in which a finding of paternity was made will also be enough to found a presumption. But presumptions may always be challenged and can be refuted upon evidence. The Act also provides that applications for declarations either of paternity or of maternity may be made to the courts, but since this is a matter of status, jurisdiction is confided to the Supreme Court of Ontario, or to the Unified Family Court in Hamilton-Wentworth which has been given jurisdiction in some matters not enjoyed by other provincial Family Courts.

The arguments of the Law Reform Commission against permitting early marriage appear to have been accepted. The law had permitted marriage at the age of fourteen years on the ground of the desirability of preventing illegitimate births. Since the illegitimate no longer suffer disabilities under the law the main reason for permitting very early marriages seems to have disappeared. Now, as in most other countries and jurisdictions, a person under sixteen years of age may not marry in Ontario. The age of eighteen is the age of majority and therefore consent is necessary for persons under that age to marry. Normally it is the consent of parents that is needed, though if such consent cannot be got or is unreasonably refused, application may be made to a judge for an order dispensing with such consent.

The Family Law Reform Act sets out the support rights and obligations as between parents and children. These do not depend upon the marital status of the parents but on the established parent-child relationship. To the extent that he or she is capable of doing so, every parent has an obligation to support an unmarried child under the age of eighteen according to the needs of that child. The obligation to support a child between the ages of sixteen and eighteen, however, depends on whether or not that child is still under parental control. If not, there is no obligation. The child's obligation to support a parent depends not only upon the relationship and the need of the parent but upon whether the parent had cared for and provided support for the child while he or she was a minor.

The whole approach to the determination of which of the parents who no longer cohabit should be given custody of the children has been changed. "The best interests of the child" (sec.35(1) Family Law Reform Act) now determine who shall have custody, whether it be mother, father or any other person. This approach conflicts in some measure with the handling of custody matters under the Divorce Act. The grounds for divorce usually influence in a great measure how decisions regarding custody matters arising from divorce are handled. The 1969 Act retained the usual matrimonial fault ground but added one which was not based on fault - separation of between three to five years duration depending upon the circumstances. In spite of the fact that a large number of persons took advantage of the new ground, the majority of the cases still require the proof of matrimonial fault. The finding of guilt in such cases usually has a considerable effect on determining which of the spouses gets custody and even rights to access, though the interests of the children are taken into account. The need to harmonise the different appraoches to custody matters is discussed later.

The constraints on reform

With the passing of the Family Law Reform Act, the Marriage Act, the Succession Law Reform Act and the Children's Law Reform Act the Ontario government has done a notable job of tidying up the laws directly relating to families, so far as this lay within the competence of its legislation. But there are still two major areas of concern. The first arises out of the constitutional split between the federal and provincial governments of powers to legislate in the family law area.

The second is that, because of the division of power in the appointment of judges there are still procedural difficulties in the way of the smooth handling of family matters by the courts, even though some attempt has been made to tackle the most obvious problems by the setting up of an experimental Unified Family Court in the Hamilton-Wentworth area.

Constitutional division of legislative powers

The fact that Canada is a confederation of provinces and territories, each with marked local loyalties and a desire to solve their problems in their own ways has to be borne in mind in looking at developments in the family law area. The division of legislative power between the federal government and the provinces, and the differences between the provinces as a result of the manner of settlement, the time at which they joined the confederation and the circumstances under which they did so, are reflected in the difficulty of harmonising the administration of family law in a country in which people move freely between provinces and between jurisdictions.

The division of legislative power between the provinces and the federal government weighted the balance in favour of the centre. The British North America Act gave to the federal government the legislative basis for creating a nation state and necessarily included in this was the power to deal with matters such as nationality and status. In the family law area, the federal government was assigned the power to legislate concerning marriage and divorce, the provincial legislatures the subjects of the solemnisation of marriage and property and civil rights. As a reading of the decided cases show there is sometimes only a very fine line to be drawn between, for example, the capacity to marry and the formalities which the licensing procedures stipulate. On which side, for example, does the age at which a person may marry fall? The Ontario Legislature has now taken the step of including provisions about age in the recent Marriage Act. Persons under sixteen may not now marry in Ontario, and betwen sixteen and eighteen parents' consent is necessary unless judically dispensed with. Perhaps a judicial test will be needed to demonstrate whether this has solved one aspect of this problem.

Maintenance is another area in which the split of powers between the federal and provincial governments can create difficulties. In 1969 the Federal Parliament passed a Divorce Act (R.S.C. 1970, c.D-8) which established the grounds for divorce and empowered courts granting divorce to make corollary orders for maintenance of a spouse and children of the marriage. The Ontario Legislature has always exercised the power to make an order for the maintenance of a wife during her marriage. Because of the doctrine of the paramountcy of federal legislation over provincial when dealing with the same matters, upon divorce a provincial order would cease to have effect even if no order for maintenance had been made under the Divorce Act. The confusion this created was considerable, but it has now been tidied up in the Family Law Reform Act sec.20(2) which provides that where a marriage is terminated by divorce or nullity and there has been as a result of the hearing no judicial determination of the question of support, an order made by a provincial court continues in force. The view is still expressed, however, that the provision in the Divorce Act of the power to make an ancillary order for maintenance was an error that unnecessarily confuses the settling of financial matters between divorcing spouses. The consideration of the obligation to maintain and the quantum of maintenance cannot really be separated from other property matters. The division of family assets, the rights to occupation of the matrimonial home are matters for the provincial legislature and are dealt with in the Family Law Reform Act 1978 of Ontario. It would be much tidier legislatively and much easier for divorcing couples if the ancillary powers concerning maintenance could be excised from the Divorce Act, especially as, on the question of the conduct of the spouses affecting the right to as well as to quantum of support, the federal and provincial governments are now much closer together.

Because of the difference of approach to the provision of maintenance which underlay provincial legislation on the one hand and the federal Divorce Act on the other, a spouse in a marriage sometimes felt obliged to seek a divorce so as to have the advantage of the more generous provisions for support available under the Divorce Act. This kind of hard choice is no longer necessary. Under the Family Law Reform Act of 1978, every spouse has an obligation to support himself, herself and the other spouse in accordance with need and the capacity to provide support. Marital misconduct has ceased to have the crucial place it did in determining eligibility for support and it is only considered when "it is so unconscionable as to constitute an obvious and gross repudiation of the relationship." (Sec. 18, (6)). In addition Ontario has adopted a family assets regime based upon equal shares in the family assets, though spouses can contract out of this if they wish. The new provisions, taken together with the change in support obligations means that couples in disagreement are no longer pressed by economic considerations to regard divorce as the only real option they have. There is now the opportunity for counselling, conciliation or even temporary separation to be tried with some chance of being effective.

It should however be pointed out that in adopting a view of marriage as a partnership between spouses and basing its new legislation on this, the Ontario legislation has gone beyond the federal view of the relation between spouses as expressed in the Divorce Act. There are probably some wives who may prefer to apply for maintenance under the provisions of the Divorce Act where in making an order for such a claim during the proceedings there is a rebuttable presumption that the wife is dependent upon the husband for support. In addition, evidence of the existence of a valid marriage will in general be enough to found her claim. A wife's ability to maintain herself has to be established by the husband if he disputes his obligation to support her. It may be only a small interim gain, but it helps to confuse the picture.

The meaning of spouse has been widened in Ontario. So far as the application of the family assets regime to property is concerned it includes persons whose marriages are voidable but have not been annulled, and persons whose marriages are void but who continue to cohabit. So far as support obligations are concerned it now takes in persons who live together without having gone through any form of ceremony, valid or not, and have lived together for not less than five years, or have a child and a relationship of some permanence. The central place of support obligations in the functioning of the family however formed, has been recognised by the law and it can be expected that even more effort will be made by the courts and ancillary services to see that maintenance orders are obeyed.

The special problems of maintenance enforcement

The enforcement of maintenance orders is always a difficult problem, but it is especially difficult in a country like Canada where people move freely across provincial borders and where each province has its own laws and procedures on the subject. The Reciprocal Enforcement of Maintenance Orders Act has gone some way toward meeting the problem, but it does not always help if the order requires to be varied as well as enforced. Judicial decisions about the power to vary in the various provinces have not really helped to clarify the matter.

All across Canada a lot of time and thought has gone into work on the problem of enforcing maintenance orders. There appear to be a limited number of options - attachment or garnishment of wages, payment through court officers with automatic enforcement procedures if there is default, charges against property whether real or personal and, as an ultimate option, imprisonment. But it has been realised that one of these, either separately or together, will guarantee that support obligations will be honoured even when there is no lack of financial resources.

The Alberta Institute of Law Research and Reform has begun to tackle the problem from another point of view. They are looking at why people avoid paying support obligations. In order to carry out their research they had to trace a number of people who use movement as a way of avoiding payment, and in the process discovered that it was not too difficult to find them if one persevered and used the agencies available in the community. The most interesting finding that has resulted from their preliminary report is that support orders are honoured when some obligation is felt to the recipient even if other emotional ties have been formed. Where no obligation is felt, or there is hostility, it is very difficult to secure payment of the amounts ordered. This suggests that, as has been found in other countries, where the amount of support ordered has been the result of agreement between the parties it is more likely to be paid. It also suggests that there may be some ground for thinking that orders relating to spouses should be separated from orders relating to children, as when a marriage breaks up the hostility is more often than not centred on the spouse rather than on the children and it might be easier to get support for the children if this were done. Clearly there is much more work to be done on this problem but it seems a very promising line of enquiry.

Custody

The custody of children is another area in which the division of legislative power between Parliament and the Provincial Legislature may cause difficulties. An application for custody of "the children of the marriage" may be made as ancillary to a divorce petition, and is in these circumstances dealt with under the Divorce Act. All other applications for custody, including those where a divorce is not granted, can now be dealt with under Section 35 of the Family Law Reform Act of Ontario. In discussing the problem of whether nor not one court exercising power to make an order for custody under one Act could have this order overturned by another court exercising jurisdiction under another Act, the Report on Children, a volume of the Report on Family Law by the Ontario Law Reform Commission, referred (p.108) to "the fluid nature of custody disputes". By its very nature an order for custody cannot always be a once for all time settlement of the matter since changing circumstances may require that the matter be reconsidered.

Since the Family Law Reform Act has clarified the law relating to orders for the custody of children, including applications to alter, vary or discharge those orders, the only real difficulty remaining concerns orders made ancillary to divorce under the Divorce Act. Under sec. 92(13) of the BNA Act the provinces have the exclusive right to legislate concerning property and civil rights, and these include custody and access, maintenance and alimony. But in the Divorce Act of 1970 the Federal Parliament provided that ancillary relief by way of maintenance and alimony, custody and access could be ordered. Constitutional challenges in the Papp and Tapson cases failed, and the Ontario Court of Appeal held that federal legislation on these matters was not ultra vires. Other provinces have agreed that such powers are inherent in the right to grant divorces and could not be challenged. But the federal powers are very limited. They cover only matters raised as ancillary to a divorce action, and so far as custody and access are concerned are excercisable only when a divorce is granted. Also it is limited to 'children of the marriage' - not necessarily all children for whom the couple have taken responsibility as parents. But custody applications can arise apart from divorce, and even before application is made for divorce. Under section 35 of the Family Law Reform Act "... either parent or any person..." may apply for the custody of or access to a child. Though the Act provides that agreement between marriage or cohabitation partners on the right to custody of or access to their children is not permitted, these matters can form part of a separation agreement between the partners. However, the right of the court to disregard any such agreement is preserved where in the opinion of the court this would serve the best interests of the child.

It would seem in the circumstances that parties contemplating the possibility of divorce and anxious not to submit their children or themselves to the strain of a custody battle could settle that matter in the way the provincial legislation indicates. It would make no real difference to the custody arrangements whether or not the divorce was granted and prevent the children, however inadvertently, being used as pawns in the divorce battle. So long as divorce proceedings retain an adversarial character it may be difficult to persuade lawyers to adopt this approach to the determination of custody particularly as it is often seen as having a bearing on decisions on maintenance. Indeed, the Regulations 450/77 made under the Unified Family Act 1976 require that applications regarding custody be supported by financial statements, underlining the inseparability of financial considerations and custody matters.

Any approach such as that suggested above to the handling of custody matters in a situation where divorce was contemplated or decided upon, would require that the relationship between the powers exercised by the federal and the provincial jurisdictions in this field be clarified. There has been much discussion on this topic insofar as it relates to cases in which custody has been awarded ancillary to divorce but subsequently the need has arisen for a further custody order under provincial child protection legislation. The discussion has centred around two points, the nature of the application of the doctrine of federal paramountcy in the family law area where there is much overlap, and also the need for clarification of the nature of the power to make custody orders under the Divorce Act. On the paramountcy issue recent decisions in family law cases have strongly indicated that the doctrine applies only when federal and provincial legislation expressly contradict each other, and that so long as this is not the case, both may legislate in the same field within their powers to do so. As to the second point, the extent of the power under the Divorce Act to deal with custody, as already noted, is limited to those cases in which a petition for divorce is granted and limited also to the children of the partners. It may be that in the circumstances it is effectively limited to the consideration of custody as between the parties with the best interests of the children determining the outcome.

A comment in the Report of the Law Reform Commission of Canada 1979 on the topic of economic re-adjustment on the dissolution of marriage shows that there is some recognition of the problem of dealing with custody in the context of a divorce action. It says (p.48) "Custody considerations (under the Divorce Act) sometimes over-emphasise inter-spousal matters to the exclusion of the all-important parent-child relationship". It goes on to suggest that a different timing of the hearing of custody matters in divorce proceedings and a different forum for consideration of it might put the emphasis where it belongs - on the interest of the child, which is often bound up with maintaining a relationship with both parents during minority.

Federal and provincial powers to appoint judges

In addition to the division of legislative powers between the federal and provincial governments, the administration of family law in Ontario is affected by the division of power between them in the matter of the appointment of judges. The source of a judge's appointment determines the jurisdiction which he may exercise. Under sec. 96 of the B.N.A. Act the Governor General is given the power to appoint judges of the Supreme Court and of the County and District Courts in each province. Judges of the Provincial Courts are appointed by the Province. In practice this has been interpreted so as to draw a jurisdictional line between the courts in which federally appointed and those in which provincially appointed judges sit. The test as to which side the jurisdictional divide a matter falls is determined even today by reference to the powers exercised by the judges of the Superior, District and County Courts at the date of Confederation. The court system in Ontario at that time was modelled on that of the English courts, an example of the way in which the English legal past continues to dominate the Canadian present.

How this division of judicial powers works in practice can be seen in the provisions of the Family Law Reform Act. The whole of Part I of this Act deals with the division of property between spouses under a family assets regime, as well as the disposition of other property owned by them which falls outside the definition of family assets where it would seem fair and equitable that this be done. Family assets are defined to include the matrimonial home, usually the most important piece of property owned by spouses. Jurisdiction over these matters falls outside the scope of the judges of the Provincial Court (Family Division). Also their power to make orders for support is limited as they cannot order a lump sum to be paid or held in trust, nor that any specified property be held in trust or that a life interest in it vest in a dependant. They cannot even secure the payment of an order through a charge on property or the like. In effect, all the ways in which an order for support could be secured thereby lessening resort to enforcement proceedings through the court are denied these courts as a result of the constitutional limitations upon their powers. Exclusive jurisdiction, however, is given to them over paternity agreements concerned with arrangements about payments for pre-natal or birth expenses, support of a child or burial expenses of the child or mother, entered into by a man and a woman who are spouses. Generally speaking, then, these courts cannot deal with a very ímportant range of family concerns that often lie at the heart of the settlement of a family's problem.

The Unified Family Court Act (S.O. 1976 c.85) is an attempt to solve the constitutional problem. Because of constitutional considerations, the initiative for this had to come from the federal government. The several studies on family law procedure undertaken during the ten years previous to 1976 had clearly indicated the need both to bring the law into line with the requirements and expectations of families, and reduce the confusion in its administration by reducing the number of courts to which application could be made for a variety of sometimes conflicting reasons Access to the courts needed also to be simplified. On the administrative and procedural side, the most pressing need seemed to be to create a forum which was in the words of the Law Reform Commission of Canada "designed to deal with the family as an organic whole". It would have the power to make final decisions on legal rights and obligations but would also be "capable of dealing with social problems without requiring their translation into legal isuses before anything can be done about them". This implied the provision of a range of services capable of using a number of techniques by which solutions to family difficulties might be reached, especially as the Report stressed the importance of consensual resolutions, where these were possible, in preference to judicial ones. But it was recognised that in the final analysis the shape that the court would take and the services that would be provided would be decided by the provinces. Beyond the appointment of judges and the provision of their salary there was little more that the federal government could do to make these views a reality.

The Unified Family Court Experiment

A unified family court was set up along the lines recommended by the Family Law Reform Committee of Canada by the Unified Family Court Act of 1976 in Ontario. This Act provided for the establishment of a single experimental court in the Judicial District of Hamilton-Wentworth. The problem of combining the federal and provincial jurisdictions in one court was met by giving the Lieutenant-Governor in Council the authority to confer upon a local Judge of the Supreme Court jurisdiction to try matters under the federal and provincial statutes listed in the Schedule. These covered matters such as divorce, nullity, property as well as juvenile and domestic relations cases.

The Rules (Ont. Regul. 450/77) expressed the new approach to family matters that was embodied in the conception of the court. Rule 3, for example, stated that the Rules were "to be construed liberally so as to secure an inexpensive and expeditious conclusion of every proceeding consistent with a just determination of the proceeding". Flexibility in the timing of hearings was provided for, and the power to make interim orders where the matter was urgent. The Court was also given the discretion

to order separate representation for a minor or a person of unsound mind whenever their interests were involved.

The Act (sec.7) provided for the establishment of observation and detention homes, and for a conciliation clinic to be maintained and operated as part of the Court. But by 1978 only the conciliation service was in operation. The observation and detention services had never been established. As the life of the Court under the Act was so short it seemed unlikely that they would ever be established, so that provision was repealed.

It appears that the Court will be given further short extensions of life as it has become apparent that experiments such as these cannot be fairly judged over a short period.

The Provincial Court (Family Division)

The Unified Family Court set up to serve the busy Hamilton-Wentworth area demonstrates both the strengths and the weaknesses of this approach to dealing with family problems. Juvenile, child welfare and domestic problems arise all over the province and the Provincial Court (Family Division) has met this need by providing for sittings throughout the province on a periodical and flexible basis which can be capable of responding to the volume of work. Use has been made of part-time staff, when this seemed appropriate, of a level of expertise that could be lower than that demanded by a Unified Family Court. That it was felt there was little likelihood of the Unified Family Court system extending beyond Hamilton-Wentworth in the near future could be deduced from the intensification of efforts to improve the social service input into the provincial family courts. The Children's Services Division of the Ministry of Community and Health Services in Ontario set up a Task Force on Family Court Clinics in November 1977. The Federal Government has financed projects to try out the effectiveness of conciliation as an aid to settlement in domestic disputes. Both these are looked at below.

Family Court Clinics

Following the initiative of the Clarke Institute of Psychiatry in Toronto, clinics began to be set up attached to the family courts in the larger cities. They were a response to the acceptance of the idea that the social sciences had something to offer the courts when it came to assessing the behavioural problems of the young and recommending appropriate ways of dealing with these. Delinquency, particularly persistent delinquency, was the first concern, and later child welfare and then some domestic cases were included. Assessment and recommendation for intervention upon referral from the courts formed the basis of the clinics' work. The Task Force was set up to look at the role and operation of the existing clinics and to use these as a basis for further development of work of this type more widely throughout the province. The proposals set out in their Report reflect very strongly both the origins of the existing clinics and the fact that the projects was set in motion by the Children's Services Division.

The Task Force recognised that effective operation of such a service was "directly related to how quickly and intensively it can respond to and work with those children and families in need" (p.3). It appeared however to interpret need as arising after matters had become serious enough to warrant appearance before the court, intervention from social services such as the children's aid societies or probation or after-care, or lawyers and other professionals. Referral from such sources was seen as forming the basis of the clinics' work, and assessment and recommendations what was expected of them. This seems to be based on assumption that families wanting somewhere to take their problems at a rather earlier stage than this could find other sources within the community. Perhaps, also, it seemed that the kind of assessment service offered was only appropriate where serious problems had already developed, and the clinics

could not offer the kind of service that would be acceptable at an earlier stage.

The work of the existing clinics is strongly child-centred, and this is reinforced by the guidelines concerning operation set out by the Task Force. There may be some question whether in planning in this way for the future development of family court clinics the Task Force considered the possible effect of at least two changes in public attitudes that are likely to grow. There is no reason to suppose that Ontario will be immune to the increasing scepticism being voiced about the utility of some of these assessments and recommendations based upon meeting the needs of one child in trouble which would have the effect of creating other problems with other family members. The size of Ontario's immigrant population and the many different styles of family functioning that may be found within it suggest that more flexibility than has been planned for will be needed if it is to meet successfully the demands that will be made upon clinic services.

The other change in public attitude that might also affect the planning of court-related services is the greater willingness of people to acknowledge the existence of family problems and to seek help for them early enough to prevent breakdown. The present organisation of court-related services such as legal aid and the family court clinics tend to emphasize in the minds of the public that help is available after matters have reached a serious enough state to warrant an appearance in court. Such appearances in themselves reduce the possibility of finding an amicable solution. Both these services are exceedingly useful at the stage at which they become available, but perhaps also what is needed is to create a service to which people could have recourse at a much earlier stage, and on their own initiative which would be - in the words of the Law Reform Commission of Canada quoted above - "capable of dealing with social problems without requiring their translation into legal issues before anything can be done about them".

It is understandable that much thought went into the relationship between the judges and the court services and the clinics. In an area like this clear lines of communication and definition areas of responsibility lay the ground work for a good working relationship, but in the end success depends upon person relationships and a clear understanding of what each side contributes to the process. What seemed to be missing from the Report - perhaps it was not asked for - was a client's view of the matter - how the delivery of the service could be seen from their side. The change in emphasis that brought the juvenile court within the family court system has not yet found proper expression in this.

Conciliation services

The other initiative, beside the Family Court Clinics, in extending the services available to family court judges, concerned conciliation. With joint funding from the federal and provincial governments, and experimental projects, using conciliation to identify points of disagreement between family members and reach agreements in such matters as maintenance has been tested in four of the larger Provincial Courts (Family Division) in Ontario. The judges to whom this service has been available have welcomed the help it gives in reducing the amount of court time spent on acrimonious disputes between parties, especially spouses, and its effectiveness in getting parties to agree on things like the quantum of maintenance to be paid, and variation in access by the non-custodial parent in custody matters. The existence of the units as well as any future expansion of the service is in doubt. Dependent as it is on joint federal-provincial funding, withdrawal of funds by either government would probably bring it to an end.

It would seem that this kind of approach has much to offer, not only to the judges and court administration, but to the clients who can perceive themselves as taking an active part in the solution of their own difficulties. It is probably too early yet to judge whether maintenance orders, the amounts for which have been negotiated in this way, have a better chance of being honoured. Certainly the Ontario record for

defaulters is not good. In one British Columbia study (Issues in the Determination and Enforcement of Child Support Orders by Butch et al) it was stated that in Ontario around seventy percent of men against whom support orders were made defaulted at some time or other. It would be interesting to know whether there was any indication that the work of concilation units would make any contribution to tackling this very severe problem.

Considerable attention has been given to procedural solutions to this problem - the latest being the automatic enforcement of maintenance orders. It remains to be seen whether this, taken together with the extension of agreements for reciprocal enforcement beyond the provinces of Canada, will reduce the number of persistent defaulters, or whether something like the conciliation units is needed as well. The payment of maintenance generally goes on over a long period of time and only the monitoring of the various approaches over time will indicate which way, or combination of ways, of dealing with problems is likely to work.

Legal Aid

The provision of legal aid has made a good deal of difference to the way matters are handled in the family law area. The large majority of the cases that it handles in the Provincial Court (Family Division) concern juveniles in trouble, as might be expected from its origin in the provision of legal advice and representation for those accused of offences who were unable to pay for these services. In the large provincial centres the legal aid service provides counsel on duty to assist juveniles and parents, and access to the service is provided where possible at other locations such as institutions and welfare clinics. The extension of legal aid to civil matters has also benefitted spouses involved in divorce or other matrimonial causes who have been unable to afford legal help. It is mainly women who have benefitted since, in these circumstances, they are usually the ones without financial resources when there is family discord or breakup. In these matters adequate representation on both sides tends to make for a fairer result, and may well have helped to bring about the change in the attitude of judges towards women which has been noticeable in these cases during the last decade.

Need and the merits of the case determine whether legal aid is given. Need is determined as a result of an assessment by the Assessment Unit of the Ministry of Community and Social Services. The client may be asked to pay some part of the costs, a lien on property may be taken or other financial agreements entered into where this seems appropriate. While final decision on the grant of aid is done within the Legal Aid organisation, clients may choose their own legal representatives within the permissible scale of fees. This is one of the very considerable merits of the scheme in Ontario.

With the passage of the Family Law Reform Act and the extension of rights and obligations under it, not only as between spouses, but also between those co-habiting without marriage, it can be expected that greater demands for legal aid will come from this section of family court work.

In child welfare matters legal aid generally comes from the Official Guardian, though the work of this office is not limited to this. It is the duty of the Official Guardian to act on behalf of people under a legal disability. These may be minors, the mentally incompetent or persons who are out of the province and cannot be heard when they are involved in court actions. In order to discharge the responsibilities of guardian ad litem for children involved in custody, access, abuse or wardship and increasingly adoption cases, a large staff of social workers is employed to do the necessary investigations for reports to the court. Property interests of minors are also protected by the Official Guardian.

The Official Guardian

There has been some discussion in recent years as to the nature of the role that the Official Guardian should play where the matter before the court is custody and access, adoption, wardship and the like. The official view is that he is a reporter to the court rather than an active participant on behalf of the child. It was dissatisfaction with the results of this approach that led the Ontario Law Reform Commission in its report on Children in the Family Law Series to recommend the establishemnt of the office of Law Guardian who would have the responsibility for forming an independent opinion on the best interests of the child and assisting the court to reach its own conclusions on those interests. This proposal has not been adopted. Instead in section 20 of the Child Welfare Act 1978 there is provision for the child to be separately represented if the judge feels that this is desirable in a particular case. But there was uncertainty about the the operation of even this, and proclamation of this section was delayed.

Separate local representation for children

Most provinces seem to agree that in certain cases such as custody proceedings, the child should be separately represented where this seems necessary. But this raises several problems if there is no official body set up to provide this service. The instruction that counsel receives will largely depend upon who retains him. In protecting a child's interests, how much weight should he give to a child's preferences if the child is not of an age or mental capacity to make this sort of judgment? Contested custody matters are conducted adversarially; and it is difficult to see how counsel for the child can function effectively in this atmosphere, especially if it is obvious that the best interests of the child demand that satisfactory contact be maintained with both parents. Custody is mostly about continuing relationships between both parents and children and it does not seem that the introduction of counsel for the child into an adversary proceeding is likely to bring about the desired result. Perhaps what is needed is a fundamental change in the nature of the proceedings and a change in the time in the separation proceedings at which hearings and decisions on this matter are taken. It may then be clearer what sort of intervention on the part of the child would be most helpful.

It is perhaps in child welfare cases that the need for separate representation for the child may most clearly be seen. The Child Welfare Act enumerated the situations in which a child must be so represented, for example, where the parents of the child are disputing the opinion of the Children's Aid Society that the child should be removed from their custody. In such cases the court used to be regarded as the protector of the rights of the child. This seems no longer enough, and the rights of the child have to be seen to be separately protected. It will probably take some time for this to be satisfactorily worked out in practice.

Areas of likely increase in family matters before the courts

At the beginning of this chapter reference was made to some of the demographic changes which affected the way families function. Lengthening life expectancy, a fall in the birth rate, a growth in the number of one-parent families are all important indicators. The fact that both partners in a marriage or other relationship are more likely than not to be working has probably done much to change social attitudes towards the rights and obligations of each toward the other and emphasized the partership aspect of marriage. Attitudes towards children have changed too based largely on an assertion of their rights as human beings, modifying parental rights but not their duties, and making the problem of discipline a much debated but unresolved question. The law reform programme of the Province of Ontario in the family law field is based upon these perceived changes in society and in social attitudes.

Considered together these give a fair indication of the kinds of cases that will come increasingly before the courts in the next decade.

Longer life span, increased expectations of personal fulfilment and marriages, especially among the young, being entered into because of pregnancy, all suggest that the rate of divorce will show a small but steady increase. This would be the likely situation if there were no change in the present divorce law. The law still emphasizes matrimonial fault as the ground for divorce, and the only alternative ground requires separation for so long a period - from three to five years depending on the circumstances - that a person without financial resources would find it difficult to use this ground. Collusion and condonation are still bars and are applied to prevent divorces even though the breakdown of marriage and the couples' wish for separation is obvious, and all they may have wished to do is to lessen the stress by agreement. There is general agreement that the grounds for divorce, and the adversarial nature of the proceedings by which these grounds are established whenever contested, increases the ill feeling between the parties. Even where there is no contest, the person found guilty of the kind of matrimonial fault that needs to be established, is hardly likely to feel co-operatively disposed toward the applicant. Yet in many cases where there are maintenance and custody matters, divorce results in a change in, not an end to, a relationship, and the way it is at present handled does not provide a satisfactory basis for the carrying out of continuing obligations.

If there are changes to the Divorce Act along the lines of the recommendations of the Law Reform Commission of Canada - who seem to favour marriage breakdown as a single basis dealt with by a type of non-adversarial process which emphasized reconciliation, and where this was not possible, negotiation and agreement on justiciable issues - it can be expected that there would be a sharp increase in divorce. On the Australian pattern this increase would be followed by a drop in the numbers after the first couple of years. Any such change in the law would probably increase the number of second marriages, already a significant trend in Ontario. Where maintenance, custody or even property matters still link divorced couples, the impact of a second marriage is likely to be considerable. This is likely to be reflected in increased resort to the courts.

The importance of agreement between the parties in potentially controversial areas has been recognised by the provisions relating to domestic contracts in the Family Law Reform Act. The provisions for marriage, cohabitation and separation agreements give to the partners who use them a considerable say in ordering their own affairs. Agreements such as these have not normally been part of the ways families function in common law jurisdictions. Though it may be some time before parties regularly think of entering such agreements before or during marriage, they obviously provide a most useful tool for family and marriage counsellors called upon to give help where there is family conflict. The utility of separation agreements is even more apparent, though there must be some question how well these will work when divorce is based upon the proving of matrimonial fault and collusion is still a bar.

The legal recognition extended by the Family Law Reform Act to couples living together outside of marriage and the extension to them of support rights and obligations, property and parental rights normally only the prerogative of married partners, will most likely mean an increase in the number of cases brought to court, except, perhaps in the area of child support, some of which may be replaced by custody matters. The Act sets out a long list of circumstances (see 18(5)) which the court should bear in mind in determining the amount of support that a respondent should be asked to pay for a dependant spouse, and these are the same whether the parties have been married or not. The only real difference is that those who are not married will have had to live together for at least five years or have a child and a relationship of some permanence. There will therefore still be relationships from which children are born which will not fall within this category and in these cases mutual obligations to support between spouses will not arise, though child support cases will.

Two of the circumstances set out in sec. 18(5) of the Act are of particular interest. One is "(g) the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;". Adults not incapacitated by age or handicap or special circumstances are expected in Ontario to support themselves. Dependency that may have existed during co-habitation is not expected to last much beyond the cessation of it. If the parties are spouses the dependant is expected to take steps to become financially independent, the respondent to help provided the means for doing this, such as paying for retraining or the acquiring of skills which would be likely to make this possible. Where the dependant is a child, the emphasis is on the acquiring of an education with self-sufficiency as the objective. While the latter provision continues the old pattern, the former shows a marked change. Dependency for life is no longer accepted as the condition for women who have been married. While acceptance of this may be no real problem to many Canadians, a number of the immigrants with different cultural backgrounds may find this very hard to accept, and to have this provision work as is intended in their case may require quite a lot of help and support from counselling and other services.

The second circumstances is "(j) a contribution by the dependant to the realization of the career potential of the respondent;". It has become fairly common for young people to marry before they enter upon courses of study leading to a qualification or while doing so. In many of these cases one partner, more often the wife, becomes the chief or only wage earner, subsidising the studies of the other Such marriages show a high percentage of breakup after the qualification has been obtained and its financial rewards begin to be earned. Clearly such qualification is now to be regarded as an asset to be shared. The question is at what point this sharing should take place - at the point of breakup when the increased earnings may only be just beginning, or later when the partner is established and earning substantially more, or should the "qualification's" earning potential be assessed and shared. An interesting ruling in the New Jersey Superior Court on this topic sets out what could be a fair and acceptable approach to this problem. Briefly stated the facts were as follows: two medical students married, the husband continued his studies, the wife went to work and supported him until he obtained his licence to practice. They separated shortly after and later divorced. The judge ruled that in addition to support payments from her husband she was entitled to a 20 percent share of the work of her husband's medical licence. It was the only considerable asset acquired during their marriage, and she was awarded sixty thousand dollars as her share. It is likely that under this head, the courts in Ontario will be faced with some very difficult decisions, but its inclusion is to be welcomed as it is manifestly fair and may even have the salutary effect of making people think about the obligations they incur when pursuing career objectives in this way. It does however appear that the kind of solution offered by the New Jersey judge will because of its limited jurisdiction not be available in the Provincial Court (Family Division), though it may be in the Unified Family Court, a county or district or the Supreme Court.

Provisions in the Family Law Reform Act concerning property sharing and the matrimonial home on the cessation of cohabitation should enable the court to get more expeditiously through this part of the hearings particularly if adequate conciliation services are available for use either before or during hearings. Experience elsewhere suggests that conciliation can be of considerable use in reaching agreement where property matters are in dispute. At the present time the experiment with conciliation units has been taking place largely in Provincial Courts (Family Division) where matters concerning property and the matrimonial home (apart from temporary occupation) are not dealt with for constitutional reasons. Since, without being explicitly stated, these affect the question of the amount of support obligation, it seems a pity that considerations of these matters have to be, except in the case of the Unified Family Court, divided. It would seem that the limited nature of the conciliation service attached to the Provincial Family Courts is not a particularly useful test of the contribution

that it can make to the settling of family disputes in this very contentious area.

Applications for maintenance orders, their variation and enforcement form a large part of the work of the family courts. It is pointed out above that so far as support for spouses is concerned, it is expected that these will mostly be limited in time. Support orders for children are likely to last much longer and the enforcement of these will continue to be a major and growing problem for the courts. That there is defaulting on a large scale has already been mentioned, and it can be expected that the procedure of automatic enforcement by the family court, set out in the Family Law Reform Act available to both persons and agencies, will be much used by them.

The practice of agencies providing support assistance when there is need has undergone a change. Where it was possible to make an application to the court for an order for maintenance, assistance would normally depend upon this step being taken, even though there was often great reluctance on the part of spouses to pursue this course. Not only is such an order now assignable to the agency but an application for a spouse or a dependant child may be made by the agency itself. There seems to be no available evidence to indicate whether those thus ordered to pay support do so more or less regularly when an agency is involved. Since a benefit under the Family Benefits Act or assistance under the General Welfare Assistance Act will be given whether or not the support money is paid, it would seem that defaulters could find a ready-made excuse for not paying.

Enforcement costs time and money in tracing defaulters and bringing proceedings against them in court. Automatic enforcement shifts some of the burden, though court services are not usually geared to the tracing of persons who do not wish to be found. While this change in the way the services operate can be an improvement in the delivery of services to those in need, it is not obvious that it is an effective way of securing payment from those obliged and ordered to support their dependants. It would need to be demonstrated that defaulters will be found amd made to pay and perhaps an intensive short-term programme set up to do this might have good long-term effects.

Custody matters in the family courts are also likely to show an increase in the future. These fall under two main heads - custody claims arising from the separation of parents, whether married or not - and those arising out of child welfare matters. While perhaps the majority of parents who divorce will continue to have the custody of their children settled under the provisions of this in the Divorce Act, there will be a number of married parents who separate or who fail to get the divorce asked for or whose children are not children of the marriage who will have their custody matters settled under the provisions of the Family Law Reform Act as will parents who have not married. As was suggested earlier even those wishing to divorce where there was no foreseeable difficulty in obtaining a decree, could use these to their benefit, before the divorce hearing.

The legislative approach to custody differs in these Acts. In the Family Law Reform Act the power of the court is stated in sec. 34(1) in these terms: "Upon application, the court may order that either parent or any person have custody of or access to a child in accordance with the best interests of the child..." The Act also provides that parents who have cohabited but have separated may enter into an agreement on, among other things, "the right to custody of and access to their children;" but that in the determination of such a matter the court may disregard the terms of the domestic agreement where "in the opinion of the court, to do so is in the best interests of the child". The Act gives no indication of what the best interests of the child will be deemed to be or how those interests will be ascertained. The Rules of the Provincial Courts (Family Division) provide that the court may order an investigation by a person or agency in order to help them reach a decision. Clearly the financial status of the parties involved in the custody issue is of importance for the rules require that a financial statement must be filed

and notice to the child of ten or over of a court hearing in any matter concerning him as well as provision for separate legal representation for the child show a considerable change of empahsis in the handling of care and protection matters. Indeed the inclusion of circumstances in which the child must have legal representation unless the court is satisfied that his interests are adequately protected without it, underlines the change. The Official Guardian protects the interests of the mother if she is under eighteen years.

Access is an important consideration when the child is removed from the custody of his parents and becomes either a ward of the Children's Aid Society or a ward of the Crown. Society wardship is limited in time - no order may normally be made to last beyond twelve months and in no case beyond twenty-four. If the long term objective is to return a child to his parents the link must be kept and fostered. The effect of Crown wardship is normally to keep a child as ward of the Province of Ontario until his eighteenth birthday. The Children's Aid Society which is responsible for his care under such an order is mandated to try and find adoptive parents for him if this is adjudged to be in the best interests. It effectively ends the parents' rights to custody of their child.

To help the court reach its decision as to what should be done after the finding that a child is in need of protection, it may order a range of assessments to be done, both of the child and of the parent or guardian. These may be medical, emotional, developmental, pschological, educational or social. While such assessments of children in trouble or in some kind of obvious need are more or less taken for granted now, the assessment of parents or guardians is likely to be unfavourably looked upon by them. Any sense of injury tnis causes is likely to be aggravated by the provision that the court may make what inference it thinks appropriate in the circumstances if they refuse to subject themselves to the assessments ordered. This provision does serve to underline the difference in the court approach to custody matters between those arising from child welfare matters and those involving separation and disagreement between parents.

Family violence has become a matter of public concern. Perceptions of the nature of the relationship between parents and children have been changing fairly rapidly through the last half century. Increasing concern over child abuse is likely to lead to more widespread intervention and more cases in court. There is a good deal of debate but no concensus yet as to the kind of intervention that would effectively deal with the problem, helping parents and protecting children, and the stage at which intervention should take place. Between doctors, social workers and courts the issue of the confidentiality of information has often prevented aid being given in time to help parents and children. The arguments for confidentiality are usually based on the need to preserve the confidence of the client even though in the long run it may be the client who suffers most through insistence upon it.

It is only relatively recently that domestic violence and harassment - except as ground for divorce - has been perceived as in essence no different from the injury that persons not married or not related as parent and child could inflict on one another, and that therefore, the protection of the law should be as fully extended to people who were its victims. There is no longer any immunity of suit between husband and wife or between parent and child, and matters so arising can be expected to increase the workload of the courts. Section 34 of the Family Law Reform Act provides that a spouse may apply to the court for an order "restraining the spouse of the applicant from molesting, annoying or harassing the applicant or children in the lawful custody of the applicant ..." To enforce this the court may require the person so ordered to enter into "such recognizance as the court thinks appropriate". This may include requiring that person to move from the matrimonial home. The power to make orders of this kind is a very useful way of buying time so that disputes between parties can be conciliated and dealt with after calmer consideration.

The change in the attitude of the law and of the courts to domestic disputes of this kind ought also to be reflected in a change in the attitude of the police who notoriously dislike interfering in domestic matters. An ability to claim protection from the courts which can be pursued independently of them may have the effect of making them more helpful when called upon.

The present situation

In review it can be seen how much the work of the Ontario Law Reform Commission has provided the basis of a legislative programme that has transformed and simplified the law relating to families. Families based on monogamous, polygamous or no marriage are brought within one framework. Rights and obligations between family members have been clarified and the bases of these changed to recognise both the individuality and the interdependence of family matters. The legislative programme for improving the handling of family law cases, insofar as it lies within the constitutional competence of the province, would seem to be about complete. Further improvement would lie with the federal government and in co-operation between the federal and provincial governments. One improvement that could be achieved without too much difficulty would seem to be statutory clarification of the doctrine of paramountcy as it applies in the area of family law. As mentioned earlier recent cases have interpreted it to mean that federal legislation on a topic does not exclude provisional legislation on the same topic, but that federal legislation will override the provincial where they contradict each other. Dicta of this kind always leaves room for argument and the making of distinctions. Certainty in this area would, from the point of view of clients, be highly desirable.

The social approach to divorce that is expressed in the Divorce Act is now very different from the one on which the law reform package of Ontario is based. Since many of the matters that are heard in the family courts arise in contemplation of or as a result of divorce or nullity, the attitudes and choices of the parties in those cases must be largely determined by the grounds for divorce and the still operative bars to it. It is true that the Divorce Act 1969 recognised that counselling for couples embarking on divorce could be useful either in effecting a reconcilation or in helping the court to reach the conclusion that the marriage was beyond repair. The Act placed a duty on lawyers and courts to inform the spouses that counselling services were available for their use, and a Divorce Counselling Unit was set up by the Department of National Health and Welfare to provide this service. There has been general agreement that this has not worked well. Not only did it appear to be too little, too late, but there appeared to be more conflict than co-operation between the professionals involved - the lawyers and the social workers - an understandable reaction when no one seemed to be very sure how they fitted into the new scheme.

Federal and provincial legislation differ basically in the manner of the handling of family disputes. Provincial handling of matters is designed to reach agreement if this is possible between the parties on matters in contention between them. The federal approach is adversial. It is the feeling of the Law Reform Commission of Canada expressed in their 1976 Report that this should change. A shift of legal policy should be made, they said, towards focussing on the social and economic implications of family breakdown with the emphasis on fair and constructive solutions to the problems that arise from this. The emphasis they place on the importance of the time sequence in the handling of these matters is equally valid for other family law cases. The aim should be, they argue, to provide the opportunity for reconciliation where this is possible, for conciliation where it is not, but not occasion unnecessary delay where matters should be handled speedily. Flexibility is important, and so is the provision for the making of interim orders which could help to defuse a situation. They advocate a single ground for divorce - marriage breakdown - and a suggestion that a year should be enough to apply for a divorce but that the proceedings, taking into account the need to provide enough opportunity for counselling and conciliation, should

last about a year. As elsewhere, there will no doubt be a good deal of argument about what is the appropriate length of time from which marriage breakdown could be deduced, but whatever the decision reached, it will not be a satisfactory test unless the contribution that the services for counselling and conciliation can make in matters such as custody, maintenance, the sharing of family property and the like is properly made use by both the parties and the courts. Obviously the range of skills that would have to be provided would be wide and would include proper advice on tax and financial matters as well as help with personal relationships and such knotty problems as custody and access.

This range of expertise should ideally be available where people first meet the system - usually in the Provincial Courts (Family Division) - for much of this help would be most effective if given before the decision to take action is made, not after. Clearly the Unified Family Court would seem to provide the best answer to this problem. But the provincial family courts are now, and it is likely that they will continue to be in the foreseeable future, the main forum for the handling of family law cases, so that public access to the services would be easiest there. There would seem to be need for the rather specialist service of the family court clinics, with its emphasis on assessment, to continue as a separate agency, as it would not be easy to build the kind of wide-ranging service visualised on it. The experiments at conciliation referred to earlier limited themselves in financial matters mainly to securing agreements about maintenance and a good deal more financial and legal expertise than was available to them would seem to be necessary to help people make sensible decisions on their economic affairs. This would seem to be especially necessary when a second marriage was in contemplation. It is clear that such services will be needed at a variety of stages in the hearing of a matter, not only at the beginning, and there would be considerable benefit to clients and to courts if it were the same service, or branches of the same service, throughout.

Much thought has been given to the improvement of the services available to family courts, but at the present access to them depends largely upon reference by courts and sometimes lawyers. When matters have reached that stage the possibility of reaching satisfactory agreement is already reduced.

The way family courts have developed in Ontario has meant that it was the judges who determined not only the style of the courts but the way in which social services were used and experiments in helping families and people tried. Now that legally trained judges are routinely being appointed to the Provincial Courts (Family Division) some of the insistence on the dominance of the judge's role in all aspects of the court's work may diminish and it may be possible to establish overall a generally acceptable pattern of social service input, so that the spirit as well as the letter of the new legislation may inform the work of the courts.

Notes on the Chapter on Ontario - Canada

Much of the sociological research on the family done in Ontario, and in Canada generally seems to concentrate on ethnic groups, and sometimes on classes within these groups. As remarked in the chapter, it is difficult to get an overall picture of family functioning. Particular use was made of :

The Making of the Modern Family - E. Shorter

Canadian Society: Sociological Perspectives edited by Burshin et al.

Divorce and its effects, including the effect on children, has been the subject of a number of studies.

The Government of Ontario, following on the Reports of the Law Reform Commission, initiated public discussion about family law reform and then moved on to the discussion of the family in relation to social policy. The following proved useful:

The Family as a Focus for Social Policy: A Discussion Paper

Compendium which accompanied this made up of brief description of Government of Ontario programmes that assist families

A number of Journals devoted to various aspects of family law and practice have come into existence, particularly in the latter half of the Seventies, and these provided a view of what matters caused most concern.

The following Reports were extensively used:

The Family Law Reports of the Ontario Law Reform Commision 6 vols.

The Report on Family Law of the Law Reform Commission of Canada 1976

Report of the Task Force on Family Court Clinics

Legislation

Federal

B.N.A. Act as of 1981

Canada Pension Plan (Amendment) Act 1977

Divorce Act R.S.C. 1970 CD - 8

Ontario

Children's Law Reform Act
Child Welfare ACT S.O. c.85 of 1978
Family Benefits Act Cap.157 R.S.O. 1970 as amended to 1974
Family Law Reform Act 1978 S.O. c.2 amended 1979 c.96
General Welfare Assistance Act R.S.O. 192 as amended to 1980
Legal Aid Act R.S.O. c. 239 as amended by 1973 c.50
Marriage Act
Married Women's Property Act R.S.O. c. 262
Matrimonial Causes Act R.S.O. c. 265
Succession Law Reform Act
Unified Family Court Act (1976) S.O. c.85 as amended by 1977 c.4

SIERRA LEONE

The former colonies and protectorates of Britain in East and West Africa all have the problem of reconciling the legal systems of widely different cultures in their efforts to create stable independent countries. Because of the way in which it was settled, and the manner of its evolution into an independent republic, Sierra Leone is a particularly good place in which to look at the various elements of the problem. The "settlers" of the colony were not Europeans but freed slaves brought back to Africa from the United States, Canada, the Caribbean and England by Britain. These were later joined by other Africans rescued from the slave ships. As a group they had very little in common besides the fact that their origins lay in Africa. Many different tribal and linguistic groups were represented among them. The first group had one important thing in common - they had all been exposed to western culture and Christianity, and not surprisingly these formed the bases of their social and cultural life in their new home. Among the rescued slaves who joined them there were a large number of Muslims, but the dominant group in the colony remained western-oriented, Christianized settlers.

The colony had been established in the coastal area of a region that had a number of well-established tribes and a busy trading life. Relationship between the tribes and the settlers were never easy from the beginning because of doubts about the validity of the agreements under which the colony was established, and the marked differences between their legal, social and cultural institutions. In time trading interests linked the colony to the hinterland, and these considerations were influential in the establishment of the protectorate. No attempt was made to assimilate the social and cultural institutions of the tribes and the legal framework for their functioning to those of the colony.

Today Sierra Leone is an independent country, a Republic within the Commonwealth, with the problem of balancing the interests of three main groups - the tribes, Mende and Temne prominent among them, based mainly in the Provinces, the Creoles, former colonists, based mainly in the Western Area and the growing number of Muslims who are to be found in both areas. Its population has doubled since 1950 and now Creoles number only about 2% of the population. Like other countries with improved health and hospital services and a high birth rate (48.5 per thousand) the age structure of the population is changing. The most recent estimate available (1978) show that those between birth and fourteen years make up 44.5% of the population and the numbers of those 65 and over are growing slowly. It can be expected that this increase in dependants will put some strain on the normal ways of providing for their maintenance and care, and will affect the way families, the main caretakers, function. Education used to be confined mainly to the Creoles. They laid great stress on its importance and valued it for the mobility it afforded them. Since independence great efforts have been made to improve the availability of both primary and secondary education throughout the country. Most progress has been made in the number of girls who now go to school. The rate of adult literacy, low at 7% in 1960, rose to 15% in 1970.

Other social indicators, taken from the UN Statistical Yearbook, 1978, underline the nature of the change that is taking place in Sierra Leone. Transport and communication are the fastest growing sector of the economy. Roads are opening up the hinterland, and there is a slow but steady growth in the numbers of the urban population. The majority of people, about three out of every four, still live in villages, but the improvement in transport and communication has meant more movement around the country. Perhaps as important as transport in the opening up of the country is the growth in the numbers of the urban population. The majority of people, about three out of every four, still live in villages, but the improvement in transport and communication has meant more movement around the country.

In spite of the constitutional and other changes outlined above, Sierra Leone has kept, presumably as a matter of policy, the distinction between the two elements that make up the country - the colonists, mostly Creoles, and the natives. This is set out in the Interpretation Act (No. 8 of 1971) in which the native is defined as "...any person who is a member of a race, tribe or community settled in Sierra Leone (or the territories adjacent thereto), other than a race, tribe or community (a) which is of European or Asiatic or American origin; (b) whose principal place of settlement is the Western Area." The purpose of the definition is to make clear what system of law applies according to whether the person concerned is a native or a non-native. There are exceptions to this general rule. There can be agreement between the parties, for instance in commercial matters, as to what law should apply. There are circumstances not covered by customary law, or where statute has overridden custom. And in family matters, Muslims are governed by the law of Islam, and in this succession is included. If it were as easy as the legal definition suggests to determine who was a native or a non-native, the problem of having two widely-differing legal systems working side by side might be manageable. But there has been a good deal of movement throughout the country, inter-marriage between the different groups and some assimilation of cultural habits through contact and education. Everything indicates that this trend is likely to continue and to grow. In addition a political system based on the vote is bound to blur group distinctions further.

Using the law to maintain the distinction between different groups of Sierra Leoneans may be one way of dealing with the search for a national identity which seems to bother so many ex-colonial territories who find disparate groups within their border. The old dogma of the superiority of western and Christian ways brought to Africa by the Europeans has been displaced by a growth in pride in native culture and the need to assert it. To put this in perspective in Sierra Leone it ought to be remembered that the organisation of chiefs and chiefdoms which took shape during the Protectorate and which now participate in the constitutional arrangements in Sierra Leone, were in part a creation of the British. Administrative needs require that some kind of organisation be imposed on a country. It was the policy of the British in the Protectorate to rule through chiefs, as the heads of powerful household or descent groups came increasingly to be designated. The most powerful became known as paramount chiefs

There were in all about one hundred and fifty chiefs. These had wide-ranging responsibilities, which included the welfare of kin and subject, management of their lands, the settlement of disputes and the maintenance of peace and order. Much of their wealth came from the produce of the agricultural labour of their kin and subjects, tribute that might be paid to them and fees for hearing disputes. The economic base of their power began to be seriously eroded when in 1937 chiefdom treasuries were established. Both the receipt of tribute and the forced agricultural labour of subjects were forbidden. Instead chiefs received fixed salaries paid by the government. In the same year a Native Administration plan was introduced setting up chiefdom councils with the job of electing the paramount chief. Increasing efficiency in the collection of taxes was probably the main reason for the changes.

After the Second World War, preparation for self-government in a number of colonies became a significant ingredient in the policy of the British government. In Sierra Leone this would mean bringing colony and protectorate under one government. An attempt to do this in 1947 was opposed by the Creoles and not particularly welcomed by the Natives. But by 1951 this had been achieved. Political parties had by this time begun to take shape. For a constitution fashined on democratic lines to function properly, political parties need a mass base. It could have been expected that this would have had the effect of undermining the power of the chiefs, but this has not happened. Their place in the structure of government has been preserved by the constitution. Twelve seats in the unitary House of Representatives are reserved for them and elections for those seats are actively and vigorously contested. Party lines have not, as might have been expected, closely followed tribal divisions. In part this has been due to the influence of the men's secret society, Poro, the membership of which cuts across ethinic boundaries. The women's secret society, Bundu, does also exercise some political influence, particularly in the support

of women chiefs seeking election, but its main area of influence lies elsewhere and it will be dealt with later in the section of family patterns and functioning.

The only real rift in inter-ethnic relations is between the Creoles the dominant group among the non-natives, and the natives of the Provinces. The Creoles have from the beginning regarded themselves as an outpost of Western civilization in Sierra Leone. Educated, Christian, monogamously married, they felt that theirs was a superior way of life, to be emulated by others. With the coming of self-rule and independence, that position of dominance was lost. They did not, as they expected, inherit the place of the British, and accommodation with the new political parties and governments has not been easy. They still however dominate the professions and much of the civil service, but in time this too will be lessened as education spreads beyond the Chiefs' sons to others in the Provinces. Creoles, by their ability to function in a modern state still have a great deal of influence, and it remains to be seen how great an effect this will have on the educated young emerging from the Provinces.

It can be expected that increased contact between the various groups in the country brought about the economic, political and social changes will result in the modification of their social and cultural patterns of life and thought. It is unlikely that the modifications will all be in one direction. Studies that have been done on various groups within Sierra Leone indicate that this modification is already taking place. The area of family law and family law functioning is one that will most certainly be affected increasingly in the future.

Family Patterns and Family Functioning

Patterns in family organisation and functioning in Sierra Leone divide into three main groups - the indigenous, the Christian and the Muslim. The first group is by far the largest, but because it lacks firm legal underpinning it is the most vulnerable to change. The Christian group is the smallest, but has the advantage of a firm legal basis. Islamic law, as locally interpreted, is applicable to Muslims insofar as marriage, divorce and devolution of intestate property is concerned.

The functioning of the family in the indigenous group is governed by custom, and as such it is likely to vary between tribes, and to be modified in response to changes in circumstances. In countries where, as here, the basis of economic life is subsistence agriculture, large kin groups have evolved along with the practice of polygamy. The kin group is tightly knit, owning land in common and having mutual rights, duties and obligations. As between the individual and the group, it is the interest of the group that is paramount. The way in which marriages traditionally have been contracted reflects this. The most usual type of marriage, that of a virgin girl, is arranged as a result of agreement between families, the negotiation being normally undertaken by male family members on both sides. The bride price - often referred to as dowry - which is agreed upon is distributed between members of the bride's family. This is liable to be repaid to the family of the groom if the marriage breaks down in circumstances not attributable to the fault of the groom or his family, a powerful incentive for the bride's family to help in the settlement of marital disputes. Marriage according to custom, being an alliance between families rather than a contract between individuals, has to be treated in a basically different way from monogamous western-style marriage.

The pattern of preparation for marriage and women's roles within marriage are worth looking at in some detail, because it is here that change is already beginning to take place and further changes can be expected. This is likely to result in a change in the nature of customary marriage itself. The women's secret society - Bundu - has already been referred to above. The main object of its existence is the preparation of young girls to become wives and mothers. This involves what MacCormack calls "the characteristic surgery" of a Bundu woman, reputed to increase fertility, as well as preparing the girls to work co-operatively with the other women in their husbands' households. The choice of group in which a girl is initiated may enhance her marriage prospects as well as provide

her with fellowship throughout her life. It can be expected that over time, as women become more exposed to the educational programmes being promoted by the state, their attitudes towards early marriage and initiation surgery will change.

Already the economic roles that women assume are changing. Women in the rural areas have always been very active as agricultural workers. Over the last twenty years, the percentage of the labour force in agriculture has fallen from 77% to around 67%. The number of women in agriculture has fallen rather more than this, and this seems to bear out the view that women are rather more reluctant than they used to be to work in the fields. It is, however, still the responsibility of the head wife - not necessarily the first wife - to organise the household, usually of kin, co-wives, clients and wards, into an efficient agricultural work force. She also oversees the management of the household and the training of junior wives and wards who may be sent for this purpose. But women have been moving into other occupations beside agriculture. Some have seized the opportunity offered by the growing change to a cash economy in Sierra Leone to become traders, jobs needing a good deal of individual initiative as well as physical mobility. This development fits uneasily into a social system which calls for women to be subservient to the wishes of their husbands and places some emphasis on the need for male protection. In addition, employment opportunities in both the urban areas and in mining have attracted both men and women causing some amount of migration and putting some strains on the functioning of the traditional family group.

The emergence of man-woman relationships other than those embedded in the traditional family system has been noted. Some of these have acquired the status of marriage. One of these described by Harrell-Bond and Rijnsdorp is the stranger-permit marriage. During the years of the diamond boom, the stranger permit was used by chiefdoms in the area to check migration into them. From this evolved the practice that a man might obtain from a chief a stranger permit for a woman to live with him as his wife. The chief's permit - which has to be paid for - confers some status on the union, giving the man immunity from any suit for adultery if the woman had been previously married. This seems to indicate that among the migrant group there is a break with the dowry system and the involvement of family members. The same research report notes as "not uncommon" a type of marriage arrangement called a "pledge marriage". The groom gives no dowry, but receives his bride as part of a loan transaction with her father. He expects to be repaid but will not press his claim. Again the significance of dowry, the key element in the making of a traditional marriage, is reduced.

In the traditional view, prestige is equated with the size of household. Wives and children add to a man's consequence. It is taken for granted that children belong to the father and a separated or divorced wife accepts that this is so. Where the traditional system is beginning to break down, the women are able to provide economically for themselves, custody becomes a matter of importance. This is particularly so as women have shown themselves ready to invest in the education and training of their children as a hedge against destitution in their old age.

The system of land tenure in the Provinces is a powerful factor in the continuing strength of the traditional family pattern of life there. Land in the Provinces is vested by law in the chiefs and the chiefdom councils for and on behalf of the families in their area. Family land is held in common, and it cannot be willed away or alienated, though portions of it may be leased to others in the course of management of the family's resources. But the individualism that tends to creep in with the growth of the cash economy, migration and the growing demands of education and training for family members all put strains on the discipline which is needed for a communal property holding system to function. In addition, the government policy of developing agriculture into a revenue-earning resources means that some changes are inevitable, and these are likely to result in some adjustments in the way the traditional family operates.

The Muslim family has features in common with the indigenous. It is polygamous with arranged marriages involving the families of the spouses.

But they differ in certain essential respects, though the differences tend to be blurred because many tribes have embraced the religion of Islam without giving up their tribal customs. The matter of the permitted number of wives is a case in point. Islam permits a man to marry up to four wives, but lays some stress on there being the ability to provide for them and obtaining the agreement of the first wife. Under customary law there are none of these restrictions. Dowry in both is a crucial element in the making of a marriage, but the function it serves in each is different. In the customary marriage, the parties are not regarded as married until the whole of the dowry (really bride-price) is paid. When it is paid in instalments, it is the last instalment that is important. Though the parties may be living together, the marriage is not deemed to be complete until that is paid. In Islamic marriage, the payment of dowry is an obligation imposed by law. The amount and time of payment is left to the parties to decide. It is intended to be for the benefit of the wife, in a sense as a kind of insurance in case of need. That, at least, is the theory, the practice may be somewhat different.

Those professing the Muslim religion form about forty per cent of the population. It is not clear, however, how many of these can claim the law of Islam as their personal law. This is a topic which will be considered later when looking at the different family law regimes and the persons to whom they are applicable. It need only be noted here that the Mohammedan Marriage Ordinance (cap. 96, Laws of S.L. 1960) provides the Muslim family with the protection of a statutory base.

Only about seven per cent of the population are Christians. These are mainly Creoles and other non-natives, living for the most part in Freetown and the Western Area. Harrell-Bond in her study of marriage among the professional classes in Sierra Leone has remarked that "Being Christian, educated and married under statutory law is strongly associated with prestige in Creole society." Marriage under the provisions of the Christian Marriage Act is mongamous. An area of doubt was removed in 1965 when a customary marriage was recognised as a marriage under this Act for those married or seeking to be married according to its provisions. The way families function in this group is very like the way they functioned a couple of generations ago in Britain. The consent of parents to a marriage is only needed if the parties wishing to marry are under the age of twenty-one. It is the responsibility of the husband to provide a home for and maintain his wife and children. Some obligation to assist relatives is acknowledged but it is more or less taken for granted that parents, especially mothers, have a claim to assistance. Great importance is attached to education. Husbands and wives are prepared to accept long separations from each other in the interest of one or other of them getting a professional qualification or training. Schooling for children is an important concern, and aid to relatives often takes the form of assisting them to get an education.

There is a good deal of evidence to suggest that monogamy, insofar as most men in this group are concerned, does not mean fidelity to one's marriage partner. While women jealously guard their status as statutorily married wives, men keep other partners, sometimes families, outside the union. Perhaps the overwhelming presence of polygamy in the country has its effect. Virility seems to be equated with the number of partners and children that a man has. Though the law makes adultery a ground for divorce, resort to this remedy is in fact very infrequent. Great efforts are made by family members to mediate marital disputes, and lawyers as well as courts try to reconcile couples.

In a situation where marriage confers status on a woman, and where the matrimonial property regime heavily favours the husband, women will not lightly seek divorce. But they do attempt to safeguard themselves financially and economically. Among the professional class where both husband and wife work, Harrell-Bond reports that it is fairly common practice for them to keep their financial affairs separate. General acceptance of the dominant role of the father in the household is also reflected in the attitude towards the custody of children after marital break-up. It tends to be accepted that the father has the superior claim, though if the matter comes before the British-style courts of the

Western Area for decision, the welfare of the child is deemed to be the overriding consideration in determining who shall have custody. Though divorce is not often resorted to, the predilection of men for keeping outside partners during marriage means that the most frequent marital problem dealt with by the caseworkers of the Ministry of Social Welfare is the failure of husbands to maintain their wives and children.

Before concluding this section on the functioning of the various family patterns in Sierra Leone, there should be some mention of those families who do not fit squarely into any one of these groups. A good deal of intermarriage takes place, not only between members of the various tribes, but between native and Creole or other non-native. Many may choose to marry under the regime of one of the partners, but for those who do not wish to marry under any of the regimes described above, there is the alternative of a civil marriage under the provisions of the Civil Marriage Ordinance. For some, this may have some drawbacks too. While providing for a statutory marriage, it does not, like the Christian Marriage Ordinance, insist that it be monogamous. The history of the Act as described by Morris makes it clear that this is deliberate. A previous customary marriage does not prevent a civil marriage, nor does such a marriage prevent a subsequent customary one. It is a kind of halfway house that may mean more to a woman than a man. It at least has the benefit of certainty and rather more status. For a non-Christian couple wishing to marry monogamously, or for a couple customarily married but wishing to convert their marriage into a monogamous one, it also provides a way. It is an instrument flexible enough to suit varying needs.

Indications of a trend towards monogamy has been noted by some researchers. This has variously been seen as a threat to the survival of customary patterns of life, as showing the superiority of the model of the western family and the like. However, the comment of Zabel in her article on the Gold Coast and Lagos Marriage Ordinance is worth bearing in mind. She writes, ".... the decision to contract a monogamous marriage may be influenced by various economic and social pressures unrelated to the celebrants' attitude towards customary traditions."

Family Law

This outline of the three main systems of family functioning would seem to indicate that each ought to be governed by its own system of law, and that there would be clear rules about how conflicts of law arising from marriage across group lines should be handled. This is in fact not so. The theory is that the system of family law applicable is determined by the "personal law" of the individuals concerned. When people marry it works like this. Under customary law, a woman becomes subject to the personal law regime of her husband, losing her own if she belonged to a different group or tribe. If a marriage takes place under the Mohammedan Marriage Act both parties are governed by Islamic law. Marriage under the Civil or the Christian Marriage Acts leaves the personal law of the parties unchanged. The important factor in determining their "personal law" is whether they are natives or non-natives.

The continuing legal differentiation between native and non-native appears to be a matter of government policy. A native is defined in law as "... any person who is a member of a race, tribe or community settled in Sierra Leone (or the territories adjacent thereto), other than a race, tribe or community (a) which is of European or Asiatic or American origin; (b) whose principal place of settlement is the Western Area." It is, then, membership of a group, other than those excluded by the definition, as well as a group's principal place of settlement which defines a person's status as a native. Is membership dependent on ethnic origin? It is not clear. In a country in which there is a good deal of internal movement and migration, some intermarriage and no universal system of registration of births, ethnic origin may not be always easy to prove. Even when births are registered, the absence of any information on ethnic origin in the certificate may make it less than conclusive. Is membership to be deduced from the way one conducts one's life? Earlier in this century, the law recognised that a person could change his status from native to non-native, where he lived and his way of life being the critical factors.

It may be presumed that the reverse could also take place unless the customary laws of any tribe or group forbade it. Though there is no longer any explicit recognition of the possibility of change between the categories of native and non-native, certainty as to the application of these categories would be greatly aided by some rules about what is meant by membership, in much the same way as rules have been developed by which a person's domicile is determined.

Even when it is clear what category a person falls into, religion may be a complicating factor in determining the personal law of an individual. For example, many natives have embraced the Muslim faith. The personal law of Muslims for family law purposes is prescribed by the Mohammedan Marriage Act. For a native Muslim living in the Western Area, it is likely that Islamic law will be taken to apply to matters such as inheritance. But if he lived in the Provinces, the matter would be much more open to doubt. A marriage registered under the provisions for registration in the Mohammedan Marriage Act would seem to make that Act applicable to family matters. If it were not so registered, and if any conclusion can be drawn fron decided cases, it appears that facts rather than legal presumptions guide decisions.

The effect of marriage under the Civil and the Christian Marriage Acts is rather different. Parties married under these laws may have rights and obligations arising under them, such as those concerning the maintenance of wives and children, but in matters of inheritance the personal law that applies depends upon whether a person is a native or non-native. If the person is a native, the rules of customary law that are applicable govern the matter; if a non-native the rules of general law apply. General law comprises all enactments in force in Sierra Leone in addition to the provisions of English law and equity as of January 1880 which have not been altered by local statute.

In order to see how the three systems of family law fit together, it is necessary to look at each separately.

Customary Law

There seems to be general agreement among those who have studied the matter that while there are differences in the customary law of the various tribes in the country, there is a marked degree of cultural unity among them. As a result these differences do not present problems of conflict of laws in the Local Courts which administer customary law. Being unrecorded, customary law remains flexible, and this is probably desirable if, as expected, mobility and intermarriage will increase. Attempts to eliminate practices which have come to be seen as undesirable - such as widow inheritance, whereby a widow marries a member of her husband's household in order to keep her place in it, or the prolonged squabbles over the return of dowry when a marriage has broken up - are undertaken through government directives to Chiefs and Chiefdom Councils. The effectiveness of these directives depends upon local action, and whether or not this is taken may depend on the importance attached to these practices locally.

Since there is no code of customary law, and as there is likely to be some variation on particular points between the different tribes and communities, any description of it must necessarily confine itself to those areas in which there is general agreement in practice. Here marriage, the rights and responsibilities arising from it, the ownership and use of property and succession to it within the family will be looked at. As a general principle, it can be said that the interests of the family are more important than those of the individual, and it is in this context that the working of customary law is considered.

The most common marriage is that of a young, unmarried girl who has been initiated into the Bundu society, to a man who may or may not be already married. This is arranged between the families of both parties and involves the payment of dowry which is distributed to the relations of the girl, or some other consideration in lieu of dowry that might be agreed between the parties. The marriage is not valid until the dowry has been paid in full. Betrothals of infants, once common, are now rare.

Indeed, in 1965 there was legislation raising the age of marriage for natives to eighteen years. Since traditionally the onset of puberty signals a readiness for marriage, the fact that the age of puberty seems to be falling, as it is in other countries, to around thirteeen years of age, can present something of a problem which no custom has yet evolved to meet.

There is no prohibition against the marriage of divorced women, but divorce does raise questions of the repayment of the dowry received for the earlier marriage. Since the payment of dowry has such a crucial place in the making of a marriage, it seems obvious that its repayment should be seen to mark the end of it. Though negotiations about dowry may be less important in the making of second marriages, the families are still involved, their consent being sought and at least a token payment made to the bride's family.

The type of marriage known as "widow inheritance" has already been referred to. Traditionally, if a woman's husband died, she would be expected to marry a member of his family. She and her children would rank below his other wives and their children, but at least there would be no problem about her continued entitlement to maintenance by the family. The children's claims as family members would not be in dispute. If she refused such remarriage she would be regarded as having cut herself off from the family much as though she had got a divorce, and repayment of the dowry given at her marriage would be sought. Neither "widow inheritance" nor the repayment of dowry in such circumstances is looked upon officially with favour, and attempts have been made to discourage both practices.

Other types of marriages such as the pledge marriage and the stranger-permit marriage have been referred to in the previous section. The pledge marriage, based upon an acknowledgment of indebtedness by the girl's father to the groom or his family, can be said to retain some element of the dowry agreement. It appears to be an accepted custom of long standing. The stranger-permit marriage represents a complete break away from the family rights of marriage-making, and in those parts of the country in which it is recognised, it may have the effect of influencing future developments in marriage practices.

In considering the rights and responsibilities arising out of marriage, it has to be borne in mind that marriage means very different things to men and to women. A man may marry as many women as his means and his inclinations permit, a woman marries one man who has exclusive rights over her. It is the responsibility of the husband to maintain his wife and children so long as they are living with him or in the accommodation he provides for them. It is the duty of the wife to be sexually faithful to her husband and fulfil the household responsibilities expected of her, fitting herself into a family group of his kin and her co-wives and their children. Failure to perform the duties expected of her may lead a husband to return his wife to her family. This may result in a divorce, the consequence of which will be considered under that head. However a wife who has returned tc her family, except on such occasions as the birth of her children or for some other recognised event, is no longer entitled to be maintained by her husband. The father is entitled to custody of any children they may have, and as part of his household they are entitled to be maintained by him.

Families are usually involved in the settling of marital disputes when these arise. It is clearly in the interests of the woman's family to preserve the marriage if this is at all possible. If it ends as a result, for example, of her being returned to her family for failure to carry out her duties, or if she runs away or takes a lover, her family become liable to repay the dowry they received for her. In addition, they are once again responsible for her maintenance. Traditionally, the matter is settled between the families, but if there is failure to agree, assistance may be sought from a local headman or chief. With the establishment of Local Courts, a differentiation has arisen between the functions of conciliation and adjudication which used both to belong to the recognised local authority. The adjudication procedure demands kinds and

and standards of proof which may be alien to the spirit in which family negotiations are carried on, and growing recourse to the courts can be expected to result in changes over time in the way families deal with these problems.

As the economy of the Provinces of Sierra Leone changes from a subsistence to a cash economy, so property rights within the family show signs of modification. In the traditional family, property is held in common and used for the maintenance of its members, wards and clients. Any surplus could be disposed of by the head of the household for his own purposes, though usually with the benefit and prestige of the family in mind. In these circumstances a wife's separate property is limited to her clothes, her ornaments and her cooking pots. When demands beyond the level of subsistance, as for example, for the education of children, indicate that new sources of income need to be found, the opportunity is created for wives to engage in trading or other enterprises.

When the earning of money can be seen to be the result of individual rather than co-operative effort, it is much easier to lay claim to it and the items it purchases, and to have that claim upheld. In their research report, Harrell-Bond and Rijnsdorp noted this trend in a number of decided cases (p.38). This would mark a distinct break with the traditional family property regime, and could initiate a whole new approach to the ownership of property acquired during marriage as between husband and wife. Such a matrimonial property regime could make divorce an altogether more contentious matter than it is at present.

The grounds on which a divorce can be obtained reflects the difference in status between men and women in marriage. There are a whole range of reasons for which a man can divorce his wife including, to quote from Harrell-Bond and Rijnsdorp (p.24) "...failure to perform domestic duties, disobedience, disertion, refusal to cohabit, repeated adultery, witchcraft and inability to get along with co-wives." To divorce her husband, a wife must show that he has either treated her with extreme cruelty, failed to support her or committed incest. Other grounds may be permitted in the different native groups within the country, but those cited give a general indication of the grounds for divorce that are socially accepted.

Traditionally, divorce, like marriage, is a family matter. Acceptance by the family of the wife that the marriage, for whatever reason, is over, raises questions of the return of the dowry received for her. If it is the wife who seeks the divorce, the husband has strong grounds for demanding the return of the dowry. If it is he who wants the divorce, he will have to convince her family that she was so at fault that the dowry ought to be repaid. It is not the divorce so much as the claim relating to the return of the dowry that is the really contentious matter. Increasing resort to judicial process to settle these matters has been noted. Registration of divorces, and as a consequence, registration of marriages begin to assume some importance. These court battles can be prolonged and there is much argument as to what expenditure related to the marriage, other than the agreed dowry, the wife's family should repay. By Directive in 1963 the Government sought to lay down rules by which the amount of dowry repayable on divorce could be calculated. But Directives, as pointed out earlier, do not have the force of law unless locally adopted, and response to this one has been small and patchy.

Where families are unable, or unwilling, to make repayment, the woman concerned may take on herself the burden of discharging the debt. If she has not the financial resources to do so, or is unable to find a new husband who will pay it, she may try to raise the money by involving herself in an irregular union. This is highly unlikely to last, and may in time give rise to other problems. These may include getting maintenance for children born of these unions. Circumstances like these tend not to be easily handled by customary law. Help may be sought from Social Welfare agencies, or application may be made for remedies available under statutory law. Women married under customary law may find themselves forced to take the same route to obtain maintenance at least for their children if their husbands fail or neglect to maintain them and do not respond to family pressure. Claims from both groups of women would be made under the

Bastardy Act, since under the provisions of the Married Woman's Maintenance Act, a customary marriage is not recognised. It is interesting to observe that one of the subjects within the original jurisdiction of the Supreme Court is "...to establish the existence or dissolution of any marriage governed by customary law and relating to any claim founded upon such marriage." Presumably a claim for maintenance by a wife on behalf of her children and herself would have to be heard in the Supreme Court, the easier and cheaper remedies of the lower courts not being available to her.

The rules of customary law regarding succession apply to every one who is a native according to the legal definition quoted above. This is intended to apply regardless of religious affiliation - except possibly those whose marriage has been registered under the Mohammedan Marriage Act - and regardless of whether the native may have contracted a marriage under the Civil or Christian Marriage Act. The jurisdiction of the Local Courts in dealing with such matters only covers property within their boundaries. Where a deceased's person's estate includes property outside of this, in the Western Area for example, the administration of such estates would fall within the original jurisdiction of the Supreme Court.

The rules of customary law are based upon differentiating between personal property and family property. The distinctions in English law between real and personal property do not fit these categories precisely, and to try and equate them would confuse the issue. As in other countries where joint family property exists side by side with the personal property owned by individual family members, both kinds of property may include what is known to English law as real property, lands, houses and the like. How it may be disposed of depends not on the nature of the property but who owns it. Family property cannot be disposed of by will, personal property can.

As Sierra Leone changes to a cash economy, it becomes increasingly possible for family members to earn money by individual initiative over and above family requirements. Insofar as there are customary roles about the way such personal property should be disposed of on the death of the owner these indicate that such property should be held in trust for or be for the use of his or her children. It is possible to direct the disposal of such property by will, but making wills is not a common practice. Indeed, Local Courts appear to show some distrust of wills, putting more reliance on the status of the witnesses to the will than on any other factor.

It is in the nature of law based upon custom developed over time to react slowly to new situations. The growth in personal property is likely to become more rapid, and as in other countries with a similar relationship between family and personal property, considerable conflict can develop in the absence of clear and accepted rules about what falls into each category and what rules of succession should apply to each.

Islamic Law

The Mohammedan Marriage Act was passed in the colony of Sierra Leone in 1905. This gave statutory recognition to the religious rules governing the marriage, divorce and intestate succession of Muslims living in that area. These would fall into the non-native category. In the independent country of Sierra Leone all statutes apply throughout the whole country unless any specific area is excepted.

The Act provides that marriages made according to Islamic law may be registered. Such registration would provide prima facie evidence that the rules of Islamic law would apply to the consequences of marriage and divorce. Where a marriage is not registered, proof that if falls within the terms of the Act can be given in any court before which there is a matter in which application of Islamic law is claimed.

A problem of conflict of laws may arise when natives, resident outside the Western Area and adherents of the Muslim religion, die intestate. The Administration of Estates Act makes the distinction between descent

by customary law applicable to the estates of natives, and descent by general law applicable to the estates of non-natives. No mention is made specifically of descent according to Islamic law permitted by the Mohammedan Marriage Act. If the deceased had been married, and the marriage was registered according to the provisions of the Mohammendan Marriage Act, there would be no doubt that the rules of Islamic law relating to the distribution of property upon intestacy would apply. Similarly, where a marriage was not registered, but evidence can be adduced to show that it falls within the terms of the Act, these rules should apply.

The Administration of Estates Act does, in the Amendment of 1975, provide for the possibility that two descent regimes may apply to the property of a native who died intestate. If a balance remains after distribution according to customary law has been made, and there are persons who would have a claim had the deceased been a non-native, the balance would go to them. Presumably the right of claimants so to benefit could be determined either by Islamic or general law.

General Law

What is known as general law in Sierra Leone comprises English law and the rules of equity for which the reception date is January 1, 1880, and all statutes passed and still in force in that country. This law is applicable to non-natives, except, as already noted, to Muslims in the area of family law to whom the Mohammedan Marriage Act applies. It is applicable also to natives in those matters not covered by customary law.

The family law provisions of general law, therefore, apply to all non-natives other than Muslims. Sections of it may also apply to natives. A native may marry under the Christian Marriage Act or under the Civil Marriage Act, but the consequences of such marriages differ under general law. Marriage under the former Act means that the marriage is monogamous and the laws relating to bigamy, the legitimacy of children, the duty to maintain and the provisions of the Matrimonial Causes Act apply. But customary law would govern the distribution of property if the native were to die intestate. Under the Civil Marriage Act, the consequences of marriage would be somewhat different. A previous or subsequent marriage by customary law would not be bigamous, though a subsequent statutory civil marriage would be. As between the parties married under the Act, the provisions of the Married Woman's Maintenance Act and the Matrimonial Causes Act would apply, but as in the previous case the rules of intestate succession would be customary. As noted earlier, natives may turn to general law for assistance where there is no satisfactory remedy in customary law, as for instance where there is neglect or failure to maintain.

Reference has been made earlier to the importance attached to a marriage by the women of Sierra Leone. Harrell-Bond in her study, "Modern Marriage in Sierra Leone", notes that among western-educated Creoles Christian monogamous marriage is a symbol of high status. Civil marriages, though regarded as having more prestige than customary marriages because they are contracted under statute, are much less popular. It may be that the ambiguity that lies at the heart of such marriages makes them less desirable. Only about five per cent of those married according to the provisions of statutory law, contract civil marriages.

The age at which one may marry under the Civil and Christian Marriage Acts without parental consent is twenty-one years. Socially, however, the consent or at least the agreement of parents to the marriage is still considered of sufficient importance to be sought. The differences that obtaining such agreement may make may be seen if the husband is a native and dies before his wife. Consent to the marriage will strengthen her claim to be maintained by her husband's family especially if customary law rules govern the distribution of his estate. Under these rules wives do not inherit from their husbands. Usually, marriage under either of these two statutes can be taken to indicate the acceptance of a western lifestyle as between the partners and their children.

The subject of the ownership of matrimonial property and how it should be divided where there is conflict or where the marriage comes to an end has not attracted the attention given to it in most western countries. Perhaps this is due to the observed reluctance to end marriages even when the parties have ceased to cohabit. Property acquired during marriage is regarded as belonging to the husband. A wife may only with confidence claim anything she has purchased or acquired from her own resources. The legal situation regarding matrimonial property probably has much to do with the development of the practice reported by Harrell-Bond of husband and wives keeping separate financial accounts, the husband, however, being responsible for maintaining his home and family.

A married woman whose husband neglects or refuses to maintain her and their children may bring suit against him under the Married Woman's Maintenance Act. The awards that can be made under the financial limits imposed by the Act are so small that it is hardly worth the trouble to make an application under it unless other aid is dependent upon one being made. It is ironic that maintenance awards for children under the Bastardy Act are much better. This may reflect the fact that this Act offers a remedy to a much larger number of persons than the relatively small number married under the statutes. Included in the larger number are women married under customary law who are trying to get maintenance for their children from their husbands. An attempt in 1966 to improve their situation and remove the stigma of bastardy from legitimate children by providing for the maintenance of all dependents regardless of status in one Act proved unsuccessful. It is not surprising that women married under the statutes should feel threatened in a society where the male practice of liaisons outside marriage is widespread and where the legal provisions for their maintenance is so meagre.

The grounds for matrimonial relief are those which received the earliest recognition in English law - adultery, cruelty and desertion. Though judicial separation is available very little use is made of it, a marriage in name being thought to be better than no marriage at all. Consequently there is no pressure to make divorce easier. The preferred method of dealing with irreconcilable marital problems seems to be separation, though not on a formal basis. When there are marital difficulties, reconciliation is usually sought by family members. Indeed, the attempt to reconcile married couples goes beyond them, and may be attempted by lawyers or judges before whom maintenance matters, for example, come.

Socially, as well as economically, divorce results in more hardship for women than for men as a general rule. Not only do the rules governing the ownership of matrimonial property leave her only with what she can show to be hers, but she may well also lose her social status. A dispute over the custody of children of the marriage may well go against her. It is true that the courts administering general law make the welfare of the child the paramount consideration in any award of custody, but the assumption that children belong to the father is so widespread that she may not feel it worthwhile to press her claims. If, as is possible, her financial resources are much smaller than the father's, her claim will be the more difficult to sustain.

Marriage under either the Christian or the Civil Marriage Acts does not necessarily mean that the general law provisions relating to succession will apply to the property of the spouses. Whether they do or not depends upon the status of the deceased as a native or non-native. In matters of succession, the personal law of the deceased applies. The personal law of a wife is not changed by marriage under the Acts as it would if she were married according to customary law.

The general law relating to succession applies to all non-natives except Muslims. Property both real and personal in the English law sense may be bequeathed by will. The Administration of Estates Act lays down the rules for distribution upon an intestacy, which include, as customary law does not, the entitlement of a widow to a share of the estate of her deceased husband. As has been noted above, the general law may also apply to a portion of the property of a deceased native. The location of

of the property may be a reason. The jurisdiction of Local Courts in these matters is geographically limited and the disposition of the property of a native in the Western Area would lie within the jurisdiction of the Supreme Court, which has the power to recognise claims other than those arising under customary law.

The Administration of Family Law

Two systems of lower courts exist side by side in Sierra Leone. Courts based on the English system served the colony of Sierra Leone. The native courts continued to deal with civil matters according to customary law and some criminal offences during the life of the Prctectorate. With some changes of name, administrative pattern and personnel in the native courts, both systems continue to the present day. While some of the English-type courts have been established in the Provinces, a similar spread of customary courts has not taken place in the Western Area in spite of the movement of population throughout the country. Though a Decree establishing a Special Magistrate's Court designed to administer customary law in the Western Area was passed in 1967, it seems never to have functioned. This lack poses a problem for those living in the Western Area whose affairs are governed by customary law.

In brief, the dual system of courts operates in the following way. The Magistrates' Courts administer general law, the Local Courts administer customary law and may in addition apply the rules of general law in matters coming before them to which there is no customary law applicable. These latter courts exist at three levels - Local Courts, Group Local Appeal Courts, which are joint courts for two or more chiefdoms, and District Local Appeals Courts over which instead of chiefs or their representatives, the Police Magistrate of the District presides assisted by two assessors to give advice on the rules of customary law. A matter initiated in a Local Court can go through all three stages, or appeal may be made direct to the District Appeal Court by-passing the Group Appeal Court. Included in the original jurisdiction of the Supreme Court are general law matrimonial causes as well as matters arising out of customary law marriages, seduction and breach of promise of marriage. There is a Local Appeals Division of the Supreme Court as well as an appellate division for the general law courts.

As remarked earlier, the present system of courts which has taken the place of the native courts lacks the conciliation aspect which was a feature of the work of the older courts. Though there is no requirement to do so, conciliation seems frequently to be attempted in family cases coming before the general law courts.

Some General Problems

There has been much comment about the problems caused by the perceived difference in status between customary marriages and those contracted under one of the statutes. In a country where different patterns of marriage and family organisation can be expected to persist into the future, the problem is not the achieving of one family law applicable to all, but how to give comparable legal recognition to the status of persons irrespective of the kind of family organisation in which they are involved. The dimensions of the problem can perhaps most clearly be seen by focussing on the married women in Sierra Leone.

The woman polygamously married clearly stands in a different relationship to her husband than the woman married monogamously. But her marriage is no less valid. It has long been recognised that the proof of the validity of a marriage is greatly aided by its registration. Marriages under the Civil and Christian Marriage Acts are routinely registered. There is provision under the Mohammedan Marriage Act for registration of marriages. Efforts to get registration procedures for customary marriages established in the various chiefdoms of the country have met with only limited success. But without such registration it would be difficult to extend to them the remedies existing under statute for women, the proof of whose marriage under other statutes being recognised as the basis for their claim to relief. Present trends indicate that remedies under general law will be increasingly sought as circumstances

arise in which customary law does not provide relief. Economic, educational and social changes will inevitably create a demand for new remedies outside the customary rules and to which they may have difficulty responding.

The need to clarify the ways in which persons can claim the status of native, or non-native, has already been referred to. Equally, there is need to define the application of the Mohammedan Marriage Act to native Muslims. Here again the compulsory registration of marriage may prove useful.

A particular problem of natives living in the Western Area is lack of access to established lower courts in which matters arising under customary law can be heard. The unofficial ones which exist no doubt serve a useful purpose in providing a forum for conciliation, but cannot satisfactorily replace courts whose decisions are enforceable. There is on the statute books provision for such a court.

Sierra Leone shares the interest in family law reform that has developed such momentum in common law countries during the last decade. But the problems which engage the attention in Sierra Leone, as in some other similarly situated African and Eastern countries, are not the same as those with a single system of law. Zabel summarizes their problem in the following words: "...basic to the encounter between two widely disparate cultures is the need to chart a balanced path of progress to produce a stable society with new values and fresh law." For this each country has to devise its own solution based upon the need of its own people.

Notes to the chapter on Sierra Leone

The demographic material and information on social indicators has been taken from: The UN Statistical Yearbook 1978
World Tables published by the World Bank (1980 ed.)

Information about family functioning came mainly from anthropological studies of which the following were most helpful:

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Sande Women and Political Power in Sierra Leone C.P. MacCormack 1975) West African Jour. of Sociology & Political Science Vol. No.1

Particular use has been made of the following:

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Modern Marriage in Sierra Leone B. Harrell-Bond Mouton The Hague
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The Development of Statutory Marriage Law in 20th Century British Colonial Africa H.F. Morris Jour. of African Law Vol. 23 No. 1 (1979)
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Legislation

Administration of Estates Act Laws of Sierra Leone (1960) c.45 order 1975
Bastardy Law (Increase of Payments) Act No. 12 of 1961
Christian Marriage Act c.95 order No. 48 of 1965
Civil Marriage Ordinace c.97 order No. 49 of 1965
Interpretation Act No. 8 of 1971
Married Woman's Maintenance Ordinance c.100
Matrimonial Causes Act c.102 order No. 16 of 1961
Mohamadan Marriage Ordinance c.96
Courts Act 1965
Local Courts Act 1963

NEW ZEALAND

INTRODUCTION

The manner of the settlement of New Zealand up to the middle of the nineteenth century, and the pattern of migration which it has since pursued, has resulted in the creation of a nation in which the dominant pakeha group is homogenous and strongly British. The Maoris, decimated by the diseases which the settlers brought with them, and defeated in the struggles to hold on to their land, have only since the middle of this century begun to grow again in numbers. With the increase in immigration of South Pacific islanders, the non-pakeha group is again a significant presence in New Zealand. Aided by changed attitudes and heightened awareness of human rights, they are becoming integrated into the society. This integration has come too late to have any effect on the political, legal or judicial institutions of this country, all of which derived from the British model.

The people who colonized New Zealand came, with very few exceptions, from the British Isles and from British overseas colonies, mainly in Australia. They tended to come from a very narrow stratum of British society - the upper levels of the working class - and they brought with them the attitudes, behaviour patterns, interests and concerns of that group. M.G. Vosburgh in her study, '"The New Zealand Family and Social Change' noted that 'From the beginning it was clear that what the colonists were seeking were better living standards and greater economic security". She goes on to point out that "... equality and security became, and have continued to be, dominant New Zealand values". Much of the social history and the social legislation of the country reflects these values and these concerns.

The creation of social legislation of a distinctive New Zealand character was aided by its early and rapid achievement of responsible government. The strong provincial governing bodies of the early years of settlement lost their political power soon after the establishment of a central government. They were abolished in 1876. Since that time, a strong central government has become a marked feature of the political life of the country. Though New Zealand became a Dominion in 1907, it was not until the early 1950's that it became a separate state under the provisions of the Statute of Westminster. It had in all other respects been a separate state for decades before that. While ties with Britain remained strong, and immigrants from there, continued to come in a small but steady stream, a distinctive New Zealand way of life, economic, political and social had during that time taken shape.

That no extremes of wealth or poverty emerged among the colonists was very largely due to deliberate government policy. Dairy, wool and meat production early became important elements of the country's economy, but assistance to poor farmers and taxation policies prevented the growth of very large farms. In the recession that followed the boom period of the 1870's, the plight of the urban poor attracted the attention of the government. Schemes of insurance against sickness, poverty and old age were formulated. Positive steps to improve labour conditions in the cities resulted in legislation specifying conditions of work and employment, and setting up Industrial Concilation and Arbitration tribunals on which both workers and employers were represented. The Old Age Pension Act of 1898 was the first piece of social legislation of its kind in any British colony, including Britain itself. As years passed, similar provision was made for other disadvantaged groups and the range of benefits widened. It was the foundation stone of the imposing edifice of welfare legislation that New Zealand has created.

With a population of just over three million, with plenty of land space and growing industrially, New Zealand is well placed to act as a laboratory for social experiment. The forms that such experimentation take spring from the very strong values inherent in the society. These could be summed up as the importance of securing for all better living standards and greater economic security within the context of promoting the welfare of families. Legislation introducing no-fault accident insurance which compensates victims and a whole new approach to the handling of family breakdown are the most recent expressions of these continuing concerns.

Population Characteristics

The population of New Zealand has grown very slowly during the last twenty years. The birth rate is low, currently at about 16.3 per thousand. This coupled with a migration rate that has been negative during the latter years of the 1970's, has resulted in a growth rate of less than one per cent over the last decade. This small, stable population makes the achievement of social goals much easier than it would be for countries with much larger or rapidly growing populations.

In spite of the fact that the economy depends largely upon the proceeds of agriculture, the numbers of persons engaged in farming constantly decrease. New Zealanders are overwhelmingly an urban people. The population in the cities is growing at a steady two per cent per year, and the 1981 census records that over eighty three per cent are now urban dwellers. As in all industrialised countries with low birth rates and long life expectancy, the young are in the minority. It is interesting to observe that the Maoris and the Islanders, after a fairly rapid increase in numbers after the Second World War, are drawing closer to the pakeha group in both birth rates and life expectancy. Free medical care, which for the poor began by the turn of the century and has since been extended to all, may have been largely responsible for this state of affairs.

The provision of education was one of the early concerns of the settlers. In 1877 an Education Act was passed providing free and compulsory primary education for all children. The expansion of education provision at all levels up to university has been continuing government policy. In keeping with the legal equality women began to enjoy in the 1890's they early gained access to university and other training. It is not surprising that the literacy rate has for some time now been recorded as ninety-nine per cent.

The pakeha population with its emphasis on equality and with its high social mobility has for long enjoyed a considerable degree of homogeneity. The social indicators would seem to suggest that Maoris and South Pacific Islanders are moving towards the same standards of living and of education and, by these routes, the possibility of real integration.

In the 1960's there was considerable expansion of the urban industrial base of the economy. It was a time of full employment, and the number of women, married and single, at work outside the home, grew appreciably. Social security benefits proliferated, firmly establishing the welfare nature of the state. The strongly centralised government makes possible the creation of this kind of welfare infra-structure, and is, in turn, strengthened by it. Major policy decisions are all taken in Wellington and administered from there. Even though grumbles may be heard that New Zealand is "over-governed", the demands made on the government will ensure that power remains strongly centralised. Vosburgh (p.) remarks: "Ease in obtaining work and the feeling of security engendered by full employment conditions and supported by comprehensive social security measures, were formative influences on attitudes and behaviour patterns especially those of the younger members of society who had not experienced the pre-war depression". Though New Zealand, like

everywhere else, has been hit by recession, no diminution can be detected in the expectation of increased government-provided social security. New lifestyles are emerging, and it is taken for granted that they will be accommodated within a benefit system designed to support traditional ways.

From the later decades of the nineteenth century, except for a short period during the recession of the 1930's, the welfare of the family has been an important determinant of social policy. That this is still so can be deduced from the attention paid to family matters by the Social Development Council between 1977 and the present. During this time they issued a number of discussion papers on a variety of family issues - finance, solo parenthood, coping with large families and family members with disabilities, violence as well as the roles of family members. These were designed to test public opinion on ways of improving family functioning and the delivery of services to families before any fresh legislative or other initiatives were undertaken. The Report of the Family Policy Group of the Social Development Commission - "Families First" - issued in 1981, asserted that the importance of the family as "the cornerstone of New Zealand society" underlined the necessity to give careful and continuing consideration to the impact that any government policy would have upon it.

Families and Households

There has been considerable discussion in recent years about how the word "family" should be defined. Growing numbers of persons are living together and having children without marriage. Single-sex households of persons related neither by blood nor affinity claim that they perform the functions of families, and should be classed as such. Should the family be defined by its composition or by its functions?

Until half-way through this century the single-income earner, two parent family with children was the norm in New Zealand. After the end of the Second World War the protection of individual human rights became a matter of great concern to Western nations. The human rights movement set off a chain reaction. In particular, women and children have been the beneficiaries. Focus on their needs has resulted in legislative protection of their rights and public and private modification of social attitudes. In New Zealand the process can still be seen at work.

Statistics can provide a useful guide to family formation and functioning. The age at which first marriage takes place seems to go up and down with the state of the economy - the marriage age is low when the economy is booming, high when it is in recession. Currently the age is around twenty-three years for women, twenty-five years for men, somewhat highter than it was in the mid 1970's. Marriage is nearly universal. Only about five men and three women out of a hundred of each sex can expect not to be married during the course of their lives. As in most countries with a high standard of living, the birth rate is low, averaging around two children per couple. But these figures do not give any real indication of the growing diversity in family formation in the country.

There are, for example, a growing number of solo-parents. At the last count, one in seven families with dependent children was a solo-parent family. The numbers in this group had shown a 33% jump between the censuses in 1976 and 1981. Of course, solo parenthood, whether as a result of widowhood, dissolution of marriage or having children outside marriage, is not necessarily a permanent status, and many families pass in and out of this state. But at any one time they represent a sizeable group of those families which have dependent children, though they tend to have fewer children than do two-parent families. The survey of households showed that by far the majority of one-parent households were headed by women, though some divorced or unwed men had begun to take on this role.

A number of the two-parent families will have been formed as a result of the re-marriage of one, or both, partners. Re-marriage rates tend to keep pace with divorce rates, though always at a somewhat lower level. Men tend to re-marry more quickly, and in many more cases than do women. Families formed of such unions are liable to strains not normally experienced by the single marriage, two parent family.

The census has shown a significant increase in the number of couples who are childless - an increase of the order of eleven per cent between 1976 and 1981. This would seem to be the result of a large number of people voluntarily choosing childlessness. Some of these will be people who have decided to postpone undertaking parenthood for some years after marriage. A number of studies on women and on the family have shown that women who are working when they get married tend to continue working for some years before starting a family and leaving the labour market altogether or substantially reducing their invovlement in it for a period.

Since the Second World War the number of women in the labour force has grown steadily. Even during the recession years this growth has been maintained, though not at the same rate. It is clear that marriage no longer necessarily means permanent withdrawal from employment outside the home. Census figures show that while in 1951 married women formed twenty-four per cent of all women in the labour force, by 1976 their share had grown to fifty-six per cent and is now in the region of sixty per cent. Investigations indicate, however,that the pattern of women's employment is significantly different from that of men. Women tend to work in the service and caring sector as teachers, nurses, secretaries, clerks and in social service and child care, though there are also a significant number in light manufacturing. About a third of them work part-time, fitting their jobs around their domestic duties, especially where there are small children or other relatives needing their care. Work for them seems mainly to be for the purpose of adding to the family income to maintain or improve the standard of living. Even those women who work full-time are reported as receiving, on the average, wages considerably lower than those of men, mostly due to the types of occupations in which they are employed. Their contribution to the family income can also be seen as subsidiary.

The fact that so many married women work does have significant social effects. The two-income family has replaced the single income one as the pattern of the majority of all families. The result of this has been to trigger concern at the different standards of living enjoyed by one and two earner households. In equality-conscious New Zealand there is clearly some feeling that benefit intervention may be necessary to correct what some see as a growing imbalance.

Perhaps the most important change, brought about by women's altered economic status within the family is in the area of roles and relationships both during marriage and after its dissolution. Partners tend in these days to be close together in age, of similar education and social status. Companionship is now a basic value, reflected in the new law governing dissolution of marriage. There is more equality in decision-making. But change in the roles traditionally assumed by men and women in the day-to-day business of family living does not necessarily follow as a consequence, and this has been considered by the Social Development Council as a problem worth looking at.

A significant new group is emerging in the census data - people living alone. Until recently these were mostly the widowed and divorced. Young persons tended to stay in the family home until they married and set up their own homes. But it appears that they are beginning to leave home and live on their own while still single. The trend is most noticeable in men and women in their late teens and early twenties, and again in the late twenties and thirties.

Overall, the change in the composition of households shown in the 1981 census documents the results of a growing freedom of individual choice in styles of living. In spite of this the typical New Zealand family can be said still to consist of a husband and wife with one or more children. But family policy can no longer be confined to serving its needs, but must take account of the diversity that seems now to be firmly established.

Family Functioning - Some Problem Areas

It is usual in discussing problems of family functioning to confine these to certain clearly-defined areas - relationships between partners, or between parent and child, the use and division of family income and property and the enforcement of claims to maintenance. But in recent years one aspect of family functioning has taken on special significance for many countries - i.e. the numbers of children which people have. In most developing countries the conern is to get people to limit the size of their families. In some industrial countries where the birth rate continues to decline, the problem is seen as the reverse of this. During the latter part of this century, the birth rate in New Zealand has steadily declined. It is clear that if the trend continues for another generation, as it shows every sign of doing, numbers would fall below the minimum needed to ensure long-term replacement of the population. This is being seen as a national problem that should be tackled. It is not clear what kind of policy initiatives other than persuasion any government could take to reverse the trend. During the last twenty years the right to choose the size of one's family has become generally accepted as an important human right. The record of social legislation in New Zealand shows the importance attached to securing to women equal rights in a number of different areas as well as acceptance of the duty to ensure the protection of the human rights of individuals. Any attempt to reverse this to achieve a higher birth rate would be unacceptable, and would almost certainly not work to the desired end. It is likely, however, to be a continuing point of discussion in the future.

Two problems have attracted a great deal of attention in recent years - domestic violence and child abuse. These problems are not new: they are as old as recorded history. But what has changed are public and private attitudes towards violence in the family in any of its forms, born of the acceptance of the view that each individual has human rights which should be protected.

The Domestic Protection Act which came into force on March 1 1983 addressed the problem of violence in the home. The provisions in this Act will be looked at in more detail, but it is worth noting here that it goes farther than the usual legislative response to the problem. The Act applies not only to husband and wife or persons living together without marriage and their children, but to other relatives living in the same household. For example, sisters may be protected by its provisions from the violence of their brothers, and parents from the assaults of their children.

Some incidents of child abuse may be covered by the Domestic Protection Act, but legislation protecting children has long been in existence. Child abuse normally falls within the terms of the Children and Young Persons Act, but applying the law has often proved a matter of considerable difficulty. This can be especially so when there are culturally different groups in the population whose patterns of family functioning and childrearing diverge. Even without complications of this kind the diagnosis and management of child abuse is not straightforward. There are medical, social and legal implications. It involves persons trained in a number of different disciplines who may not know a great deal about the practice of each other's professions, as well as people like neighbours, relatives and child-minders. Concern to improve

the identification of children at risk as well as the handling of these cases led to the holding of a symposium in 1979 to explore the problem. A number of recommendations were made, but implementation has been slow in coming. The recommendation that might have been easiest to implement - the removal of care matters arising under the Children and Young Persons Act to the jurisdiction of the newly established Family Courts has not been accepted. It was felt that consideration of this should be postponed until the courts had been operative for long enough for an informed decision to be made on the matter.

The Status of Children Act 1969 abolished the status of illegitimacy for all purposes in the law of New Zealand. Parents who live together without marriage have the same rights and responsibilities in relation to their children as do married parents. In the years since the passage of the Act, there has been a steady increase in the numbers of persons living together, having children and bringing them up outside of marriage. Social as well as legal attitudes have changed. But while the law protects the interests of the children, there has been very little change in the legal position of the partners. A parent with custody of small children may be entitled to be maintained in the interests of the children's welfare. But a claim to a share of goods and property that has been accumulated during cohabitation can only be sustained if ownership or financial contribution to its purchase can be proved. These property disputes can be very contentious matters, and resort to the courts in these matters is bound to grow.

In most Commonwealth countries, much of the time and resources of the courts dealing with family matters is taken up with trying to secure enforcement of maintenance orders. With the growing numbers of children being born out of wedlock in New Zealand - currently over twenty per cent of all live births - it might be assumed that this would also be the case here. The introduction of the Liable Parent Contribution Scheme set up by the Social Security Amendment Act of 1980, which will be described later, appears to have significantly reduced pressure on the courts and the legal services. Enforcement is now an administrative and not a judicial matter, and the effects of the change have been noted in the report of the Legal Aid Board, after the first year of the operation of the Scheme. They reported nearly five thousand fewer requests for legal aid in suits in the domestic area of jurisdiction of the District Courts, and attributed this to the change in enforcement procedure.

One effect that might have been expected from the increase in the numbers of births out of wedlock would be an increase in the incidence of adoptions. In fact, the opposite has occurred. Relaxation of social disapproval and the availability of adequate social security benefits have made it possible for more mothers, even though not cohabiting with the fathers of their children, to choose to keep their children. The nature of adoptions has also changed. The confidentiality that was insisted upon to safeguard privacy of the parties is now considered less important and more open adoption practices have become usual. There has as yet been no change in the law to take account of the change in public attitudes.

Family Law

Reform of family law became a matter of worldwide interest during the 1960's. It began with the UN-generated focus on the rights of the child. Since the family is the single most important unit in the life of the child, legal protection of his rights had to be considered within the context of family duties and obligations. As in other countires, much discussion, consultation and research took place in New Zealand in the 1970's about the directions that reform should take. Based on the results of this, a considerable body of new legislation has been passed between 1976 and the present, and the view of

family functioning which shaped it can be clearly discerned.

Marriage is no longer the crucial factor in the legal definition of the family. The change began with the passage of the Status of Children Act in 1969. By its provisions the relationship of mother and father to their children is determined without reference to the status of the relationship between the parents. The principle of equality of the sexes underlies much of the new law concerning the rights and responsibilities of the partners during marriage and at its dissolution. The whole approach to the breakup of marriage has altered, and this is symbolised by the replacement of the term "divorce" with the less prerogative "dissolution of marriage". The concept of matrimonial fault has gone taking with it all the different grounds for divorce which used to be available. These are now replaced by the single requirement of proof of the breakdown of marriage.

The way the law is administered has changed also with the establishment of Family Courts and the provisions for making counselling and conciliation available at all stages of family conflict. Welfare assistance to ease unnecessary financial stress has also been built into the new procedures. In general, both the new family law and its administration emphasize the paramount importance of the welfare of children.

During Marriage

The majority of people marry, set up their own family homes and have children. Their rights and responsibilities during marriage have been affected by the new legislation, which effectively began with the Matrimonial Property Act of 1976. Its provisions are based on the recognition of marriage as a partnership. It is expected that decision-making will be shared, as is the guardianship and custody of children, and extends, after three years of marriage, to equal shares in matrimonial property unless there were circumstances which would make the presumption of equal shares a gross distortion of justice. The change in the legal approach to marriage can perhaps most clearly be seen in the matter of maintenance. Each partner has a duty to maintain the other if, for any one of a number of stated reasons, that partner is unable to meet his or her reasonable needs. These reasons are as follows - physical or mental disability, the inability to get an appropriate job that pays enough, or being the home-maker and responsible for the care of dependant family members. A claim to maintenance may also be allowed so that a spouse may pursue a course of further education or training. Therefore, unless the facts indicate otherwise, both spouses will be treated as responsible adults with a duty to meet their own reasonable needs.

Normally, questions about what share each spouse should be deemed as having in matrimonial property, or actual division of such property only arise upon separation or dissolution of marriage. Now the interest of each party in such property can be protected while the parties are still living together. For example, if the ownership of the matrimonial home is in the name of one spouse, the other may protect his or her interest by notice on the title. The division of matrimonial property can also be applied for at any time to protect a spouse's share where there is a brankruptcy or wilful waste.

It is not only property rights that are now protected. Mounting concern has been expressed about the victims of domestic violence who were often denied the assistance they could have claimed if their assailants were not family members. The police, understandably, have always been reluctant to intervene in family disputes, particularly when complaints were highly likely to be withdrawn, and their own powers were not well-defined. The Domestic Protection Act 1982 has brought together and added to, the variety of orders which a victim of domestic violence seeking protection may now apply for.

Protection may be sought by means of a non-violence order which permits arrests without warrant. A non-molestation order can be obtained that will protect from violence by forbidding entry to the victim or potential victim's place of residence, or from molestation in the street or any public place or even by telephone. A non-molestation order can be applied for at the same time as an occupation order or a tenancy order, and may be applied for, if needed, where there is a separation order or a separation agreement in force. The making of such orders is dependent upon the court being satisfied that it is necessary for the protection of the applicant or in the interests of the children.

The rights of the person against whom such an order is made are taken account of in the legislation. A person arrested without warrant where a non-violence order is in force can only be detained by the police for up to twenty-four hours. The intention is to provide a time for tempers to cool down and some help obtained, if this is necessary. In order to protect persons, but leave time for a more considered decision on the merits of the case, interim orders can be obtained quickly. Both sides will normally be heard before a final order is made.

Separation

Separation has for many years been the preferred ground for applications for divorce. This, no doubt, influenced the decision on the way the law should be reformed. The only ground for the dissolution of marriage now is that "the marriage has broken down irreconcilably". The proof of marriage breakdown is two years' separation with no hope of reconciliation after counselling and mediation have been tried.

Parties may separate for any of a number of reasons, not necessarily as a step to dissolution of marriage. Rights and obligations in matters such as maintenance, the custody of guardianship of children, the matrimonial home and other property will continue, and it may help to have these sorted out in a separation agreement. This can be useful if both parties want the separation. If it is opposed by one partner, the orderly way to handle it is by applying to the Family Court for a separation order, accompanied by any other order such as a non-molestation order, tenancy, occupation or furniture order that may be necessary.

Normally, where a separation order is applied for, counselling is arranged for the parties to see if their disagreements can be straightened out with help of this kind. This may not be required if there has been violence, or if counselling has already been tried. For a separation order to be granted, the Court has to be satisfied that "there is a state of disharmony between the parties to the marriage of such a nature that it would be unreasonable for them to continue, or resume cohabitation."

Dissolution of Marriage

Proof of separation of at least two years' duration is an essential element in supporting a claim that a marriage has broken down. If there have been during this period, times when the parties have resumed cohabitation in an effort to be reconciled, these will not be taken into account if, in total, they come to less than three years.

Provisions for counselling and conciliation form part of the Family Proceedings Act 1980 which deals with separation and the dissolution of marriage. Either spouse can ask for counselling services to be arranged through the Family Court before the decision to take legal proceedings, or after such proceedings have begun. Since the court has to be satisfied that the marriage has broken down beyond hope of reconciliation before granting a dissolution, it has the duty of helping the

to explore the possibilities of reconciliation through counselling or other appropriate help. The Court's duty also extends to helping couples who want their marriage dissolved to reach agreement on as many matters as possible before a hearing in court. Before an order dissolving a marriage is made, the Court has to be satisfied that proper arrangements have been made for dependent children, or that there is good reason why these have not been made.

Legal aid provision in family law cases throws an interesting side-light on the view the law takes of marriage breakdown. Legal aid may be available in all family matters except the actual application for dissolution of marriage. This serves to underline the responsibility of the spouses for the decision they take to end the marriage. It may also cause spouses to think twice before contesting the application, and steer them toward less adversarial means of dealing with the matter.

Though misconduct is no longer considered in an application for dissolution of marriage, it has not entirely disappeared from the field of family law. A parent's misconduct will not be taken into account in determining the award of custody of a dependent child unless, in the judgment of the court, it will affect the welfare of that child. So far as the division of matrimonial property is concerned, the misconduct of a partner will not normally overturn the equal shares rule in marriages of more than three years' duration. To do so, it would have to be gross misconduct, which had significantly affected the matrimonial property. But the court has a discretion in deciding how the division should be implemented, and misconduct of one spouse might affect that decision.

Matrimonial Property and the Matrimonial Home

The major part of the matrimonial property in most marriages is likely to be the matrimonial home. Other matrimonial property consists of the contents of the home, property acquired before the marriage for that purpose and property acquired during marriage except for that received by one of the spouses as an inheritance or a gift. It had come to be expected that where there were dependent children of school age, the spouse who had custody of them would have exclusive use of the matrimonial home until the children left school. Each spouse would then be entitled to receive his or her share in the property. With the principle of equal shares being enshrined in the Matrimonial Property Act 1976 there has obviously been some reconsideration on this point, and division of shares in the matrimonial home may be ordered even when young children are involved.

The presumption of equal shares in matrimonial property can be displaced if it can be shown that one spouse has made a substnatially greater contribution to the marriage than the other. Contribution can take many forms - not just the provision of money or property. The care of dependents and the management of the home will be taken into account. Assistance or support given to the other spouse for the purpose of training or employment will be assessed as contribution.

Matrimonial property now includes superannuation earned from contributions made after the celebration of the marriage. Since the payments of superannuation benefits are likely to take place some years after the dissolution of the marriage, the amount to which a spouse is entitled would have to be assessed. Spouses are encouraged to enter into agreements guaranting fair shares in the benefits, and the court may make an order on this basis. The managers of superannuation funds are bound by the court order.

Business or farms are not treated as part of matrimonial property, and there are no rules as to how the assets shall be divided. If the parties do not agree on this, the court will make a decision on the matter taking into consideration the best interests of the parties. It has been noted that the kind of disruption that it had been feared would ensure from the division of farm and business assets has not occurred.

Maintenance

The new approach to the maintenance obligation of spouses during marriage, which has already been described, applies also during separation and upon dissolution of marriage. It is not past services but future reasonable needs which determine the duration and the amount of maintenance awarded. Each party is expected to be able to provide for his or her own needs. Maintenance may however, be awarded, where a spouse's earning capacity has been impaired by household responsibilities, for a period of time sufficient to enable them once again to provide for herself or himself. The amoutn awarded may take into account the expenses of any training or further education that may be necessary if an appropriate job is to be obtained. Normally, long-term payment of maintenance is not envisaged. It has been described as "rehabilitative" in nature. The only exception is where age and the duration of the marriage makes continued payment of maintenance reasonable and just.

Re-marriage is steadily becoming more common, though men tend to re-marry more often and ealier than women. The number of solo-parent families with dependent children headed by women suggests one reason why re-marriage may be more difficult for women. Since a parent's obligation to support his children remains, no matter what his marital status, a man can find himself with maintenance obligations to two families without the means to meet them. There are limitations which a court must recognise in making an order for the payment of maintenance. A person cannot be ordered to pay an amount which would deprive himself or herself of a reasonable standard of living. This covers provision for the needs of a dependent living with him or her. It becomes obvious then, that where a person remarries, it is the second family which has the prior claim to be maintained. The state then has the responsibility to maintain the first family if the ex-spouse at the head of it cannot do so, though a claim may be made against the other by the State for whatever he may be deemed to be able to afford to contribute.

The new laws regarding maintenance take into account the responsibility of the state to provide long-term maintenance for those unable to maintain themselves, and recognises that the breakdown of marriage may create circumstances in which claims for welfare benefits may be made. Such a situation is described above. Also long-term maintenance will not be required for an ex-spouse on the grounds that the other cannot maintain himself or herself because of physical or mental incapacity, or failure to obtain employment. But parents are still liable to maintain their children up to the age of sixteen, and this can be extended to twenty depending on their educational status.

There will still, therefore, be maintenance orders which may from time to time not be paid. Enforcement through court process has never worked well, with consequent hardship to the recipients. Enforcement of such orders has now become the responsibility of the Department of Social Welfare. The Maintenance Officers have a variety of powers,particularly in relation to wages and property, to assist them, and recent figures issued by the Department of Justice on maintenance recovery suggests that the administrative approach to the problem is working rather better than the judicial.

The Liable Parent Contribution Scheme is another administrative development designed to streamline benefit payment and recovery in the case of the solo parent with dependent children who is entitled to a domestic purposes benefit. There is no longer any requirement that a person seeking a benefit should try to obtain, either by court order or agreement, maintenance from the liable partner. Instead, upon application for benefit, the finances of the liable parent are assessed administratively, and the amount that he would be required to reimburse the state worked out after taking all the circumstances into account. There is opportunity for objection to the assessment, but when it is fixed, it becomes enforceable in the same way as any other maintenance order or agreement. Because this scheme applies to parents, it is assessed on the basis of child support, but this is fixed so as to enable the mother to provide the needed care. In this sense it does not differ significantly from the principles applied in the determination of maintenance in other circumstances. The general feeling that parents should not lightly be allowed to escape from their responsibilities to maintain their children is expressed in the amendment to the scheme which now requires a minimum payment of ten dollars a week from every liable parent unless the serious hardship provision applies.

Children: Guardianship, Custody and Access

Under the Status of Children Act 1969, the relationship of parent and child is determined without regard to the marital status of the parents. Where parents are married, the presumptions about the identity of both parents apply. Where they are not, it is normally the identity of the father which needs to be established. This can be done by a declaration of paternity, a paternity order, by registration on the certificate of birth, admission in proceedings or by being appointed as guardian. The Guardianship Act 1968 provides that both parents are the natural guardians of the child provided that they were married or were living together as man and wife at the time of birth. If they were not living together, the mother is deemed to be the sole guardian, but the father has a right to apply to the court to be appointed or to be declared a guardian.

As joint guardians, parents share the custody of the child and the right to dtermine how he shall be brought up. This situation continues even when the parents separate, though circumstances may require that a decision be taken about custody, which involves possession and day to day care of the child. Where the parents separate, they are encouraged to come to an agreement about such matters as custody and access for the non-custodial parent. Such agreements if they seem reasonable to court, will normally be approved and made the basis of an order. Where there is no agreement, the court will have to decide. The Guardianship Act now states quite clearly that regardless of the age of the child, there will be no presumption in favour of either parent. The welfare of the cild is the paramount consideration in coming to a decision about custody and access. This is obviously an area in which the new counselling and conciliation services available through the Family Courts can be most useful.

Unmarried Partners

The growth in the number of people living together without marriage has been referred to earlier. Though as parents they have the same rights and responsibilities in relation to their child as do married partners, in their rights and duties towards each other, the situation is rather different.

This can perhaps most clearly be seen when a decision needs to to be made about the ownership of property acquired while living together. Generally a claim has to be supported by proof either of ownership or financial contribution to its purchase or upkeep. Unless an agreement to the contrary can be proved, an unmarried partner who stays at home to care for the children and do the housework, will not be entitled to share in either the home or its furnishings when there is a separation. The only real protection is an agreement, preferably a written agreement, between the parties. Sensibly, rights and obligations should be agreed before cohabitation begins, but it is very unlikely that such step will be taken by people who are embarking on what most believe to be an open relationship, without strings.

As has been noted above, the law has moved in the matter of the claim to maintenance of an unmarried parent as distinct from an unmarried partner. If such a parent has, or has had, custody of the children of the partnership, a claim can be made against the other parent for personal maintenance. The way the court exercises its discretion to award maintenance in this case is the same as in other cases. It decides whether, taking all the circumstances of both partners into account, it is reasonable, or desirable that maintenance should be ordered.

If the relationship between the unmarried partners can be shown to be "in the nature of marriage", they will be entitled to social welfare benefits in the same way that married persons are. If the relationship does not fall into that category, then the entitlement will be different. For example, a domestic purposes benefit is available for solo parents with dependent children, but may not be awarded if there is cohabitation.

Non-violence and non molestation orders were made available in 1982 to unmarried partners. No-violence orders can also be applied for by persons who are the victims of violence by relatives other than their partners or parents. In this and other ways, it seems that the law is giving greater weight to the realities of the relationships between family members and less to their status.

Social recognition of non-marital relationships has outstripped legal recognition, but there are signs that the courts acknowledge that it is unreal to treat partners as though they were strangers. There has been no change in the law yet, so a more realistic approach depends on judicial initiative.

Family Courts

The Family Courts Act 1980 established a system of family courts in New Zealand. These began to operate on the 1st October 1981. They are an important part of the reform of family law that has been brought about by the various Acts that have been reviewed above. It has long been recognised that amicable settlement of family disagreements will not be achieved by adversarial proceedings in court, and that a better way of dealing with disputes was needed. This the Family Courts aim to provide.

The Family Court differs from the local District Court, of which it is a division, in a number of ways. The formality of a court hearing is reduced to a minimum. Sittings are held in private, and the proceedings are confidential. Every effort is made to achieve some measure of agreement between the parties in the settling of their difficulties, but where this is not possible, the issues and the reasons for decisions should at least be understood by them. Some of the provisions relating to counselling and conciliation have already been described. It is the availability of help of this kind which distinguishes the Family Court.

Larger Family Courts have resident Judges and counselling co-ordinators; smaller ones are serviced part-time by selected District Court Judges, and there are arrangements to meet the counselling requirements. Couples having difficulties need not wait until their problems are great enough to require a court hearing for their settlement. Either spouse can at any time go to the Registrar of the Family Court, if it is a large one, or a court officer if it is a small one, and ask for counselling to be arranged. The main counselling agency is the Marriage Guidance Council, but help can be obtained from other services such as those offering financial advice, help where there is drug or alcohol abuse, or any other help that may be needed, for example from community or church social services. The hope is that early help may prevent serious problems developing.

As described above, both counselling and conciliation have a part to play when family matters come before the Court. The Family Court Judge can, for example, ask the Registrar to arrange a Mediation conference with the husband and wife to see if a settlement can be reached on such matters as maintenance, custody and access, where the parties cannot reach agreement. He may ask a social worker from the Department of Social Welfare to investigate and prepare a report on the arrangements for dependent children where a dissolution of marriage is being sought. Other reports, medical, social or psychiatric, can be asked for, in circumstances where the welfare of children may be affected. And since the welfare of children is the paramount consideration in the disposal of any matters in which they are concerned, the Judge may appoint a lawyer to represent their interests.

The Court's jurisdiction embraces nearly the whole range of family matters - adoption, guardianship, custody and access, consents for minors to marry, the maintenance of children, of marriage partners and of the unmarried parent of a child, separation, dissolution of marriage, matrimonial property, occupation of the home and non-molestation, and proceedings relating to the establishment of the paternity of a child born out of wedlock. But it does not have jurisdiction over matters arising under the Children and Young Persons Act. Care proceedings, child abuse and the like, though eminently family matters, fall outside of its scope, though the handling of such matters might well benefit from the counselling services of the Family Court. It has been announced that the inclusion of these matters in the jurisdiction of the Family Court will be considered at a future time.

The reaction to the introduction of Family Courts, by lawyers and judges as well as by the public, has been positive. It has been welcomed as a necessary and integral part of the large-scale reform of family law that has been taking place over the last eight years.

Some Observations

It is noteworthy that while the streamlining of the law and procedures relating to the dissolution of marriage has resulted in some increase in the number of dissolutions, this has been less than those opposing "easier" divorce might have expected. It is clear that the less stressful joint application procedure is welcomed. Nearly a third of the dissolutions ordered since the change in the law have been the result of joint applications. It would seem likely that after this first surge, the numbers of applications will, as in the past after each change in legislation, fall back to lower levels, somewhere around six to seven thousand a year.

Notes on the chapter on New Zealand

Acknowledgement is made of the very considerable assistance of the Department of Justice, New Zealand. Most of the material on which this chapter is based was supplied by them.

Statistics were taken from:
1981 Census of Population and Dwellings, Households and Families, Information Release, July 1983.

World Tables from the World Bank Second Edition 1980.

Use was also made of papers presented to the New Zealand Demographic Society and appearing in Population Review in 1981, 1982 and 1983.

Of the sociological material consulted, particular use was made of the following :

The New Zealand Family and Social Change: A Trend Analysis M.G. Vosburgh, Occ. Papers in Sociology and Social Welfare No 1 Vi. University of Wellington 1978.

Urban Women Revised 1981.

The Economic Life-Cycle of the Modern New Zealand Family B. Easton, Australia and New Zealand Journal of Sociology Vol. 13 No. 1.

The following provided useful material:

The Social Development Council Papers

The Welfare State? Social Policy in the 1980's N.Z. Planning Council

Pamphlets on Family Law and Related Issues in the Family Law Series issued by the Department of Justice, Wellington.

Living Together New Zealand Law Society Mary 1982.

The paper on New Zealand Family Law - Department of Justice

Legislation referred to in the text;

Adoption Act 1955
Guardianship Act 1968 amended 1980
Status of Children Act 1969
Equal Pay Act 1972
Children and Young Persons Act 1974
Matrimonial Property Act 1976
Human Rights Commission Act 1977
Family Proceedings Act 1980
Family Court Act 1980
Domestic Protection Act 1982

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ENGLAND

Introduction

The ecclesiastical origin of English family law is still discernible, most noticeably in the pace and nature of its reform. The law which the settlers, colonists and administrators took with them around the world was based upon the Anglican Church's conception of acceptable family formation and functioning. In the previous chapters, examples of the way some Commonwealth countries have modified and altered this law to suit their own needs has been described. Such change has usually followed the achievement of independence and a growing awareness of their own distinctness. The pace of change has gathered momentum during the last two decades. Bearing these circumstances in mind, it is not surprising that reform has taken place more slowly in England than elsewhere.

Much has been written about the family in England during the last fifty years. Generally, the literature falls into two categories - one arising from the concern felt about the inequities in the treatment of individual family members under the law, particularly if there was conflict between them, and the second reporting the results of the investigations of various aspects of family life and functioning by social scientists in a variety of disciplines. Of the two, the latter has had the greater effect. Research findings were instrumental in creating the social theory on which the Beveridge Report was based, and helped to lay the foundation of the welfare state.

The families that tend to come into public notice are those with problems. The operation of the welfare state has the effect of both heightening the perception of problems and of apparently increasing the numbers of families with problems. Perhaps the public perception of the growth of problem families may be in part due to an attitude expressed by the Working Party on Marriage Guidance (Marriage Matters p.23): "There seems to be at the heart of the highly developed welfare state an unreal assumption that solutions exist to all the problems of life..." This problem-oriented view of the family in England is a distorting one. A better perspective of the way families function can be gained from the statistics published in Social Trends. (HMSO 1981).

The Family in England

Demographic changes in the population have noticeably affected marriage patterns. At the ages below those affected by the Second World War, there is a surplus of men over women - a change in the ratio which has all but eliminated the spinsters who were such a feature in the lives of families. The result is that by the age of fifty over 90% of both men and women will be, or will have been married. At present counting, those who are divorced and not remarried are under 5% of the population. The great majority of children will grow to adulthood with their natural parents. Longer expectation of life has helped to change attitudes towards divorce and remarriage and the growing number of women employed outside the home has necessarily affected attitudes to family functioning.

The family was defined in the Finer Report on One-Parent Families p.62) as "an institution which regulates sexual relations, provides for the rearing and socialisation of the young and secures the transmission of property." All these functions have characterised the family over time, but the definition does not give any indication of the differing emphases that have been given to those functions at different times, no of the changing demands that both family members and society have made upon the institution. The Western model of marriage has changed greatly during the last century. The emphasis has moved from the procreation and rearing of children and the transmission of property to the importance of the conjugal relationship. This is in turn beginning to give way the view that "personal development and satisfaction are core values underlying the contemporary expectation of marriage" (Marriage Matters p.21) It would seem to follow from this that, as the Finer Report remarks: "Today, indissoluble marriage is not compatible with prevalent notions of married love and the right to personal happiness."

This does not, however, mean, that the pursuit of such personal happiness and fulfilment will reduce, for the majority of couples, the importance of having children. A report of a study of Childlessness and

Marital Instability by Colin Gibson (Journal of Biosocial Sciences vol.12 no. 2 pp.121-32) confirms the findings of other researchers that having a family remains a feature of ordinary married life. Failure to have children is often regarded as inhibiting to both personal development and fulfilment.

Patterns of fertility and the size of the average family have changed over the last hundred years. Typically now, a couple will have two children rather than the five or more of a century earlier. Child bearing and the care of small children will be compressed into relatively few years and this has resulted in changes both in the employment patterns of married woman, and the timing of child bearing. The better education of women during this period has increased their chances for employment outside the home and changed their attitudes to working. But the greater equality of access to employment and promotion with that enjoyed by men which might have been expected from these developments has failed to materialise fully. The near universality of marriage noted above has caused many to withdraw from employment for varying periods of time, as has the need to give care to the elderly. Rising economic and educational standards throughout the population have meant that domestic help has largely disappeared and all the domestic and caring function, once shared with unmarried relatives and paid help, became the responsibility of the married woman. Some such movement as the one for women's liberation was bound in time to emerge. That men should share the caring and rearing functions in the family is only now beginning to be accepted.

The post 1945 emergence of the welfare state and the popularisation of the social sciences has had a good deal of influence in defining for the community what are acceptable standards of caring and rearing within the family. The casework agencies proved the perfect vehicle for securing public acceptance of the often speculative and frequently contradictory findings of the social scientists. The statutorily defined family is the basis for the work of the benefit-giving agencies and much confusion has been caused by the lack of fit between this and the way many families function.

At present three matters seem to dominate discussion about the way families do or should function. These are the effect of a mother working outside the home, the growing resort to divorce and the increasing need for the care of the elderly.

In his paper for the Study Commission on the Family on "Family Incomes Since the War", Piachaud looked at the contribution of married women. He concluded that (p.13) "The most important single change in the economic circumstances of families since the war has not been any change in benefits for children, but rather the growth of the two-earner family." He points out that the number of economically active married women has grown from 26% in 1951 to 62% in 1979. The growth has been more rapid amongst women with dependent children but most of these work part-time, fitting work in with their domestic responsibilities. The making of practical arrangements for the care of the young, and increasingly, of the old, is often a limiting consideration on the ability of women to take available work. Various view points have fuelled a contentious public debate on the matter. One of the related issues that tends not to be publicly discussed is the effect of the realisation by most women that being economically dependent makes them exceedingly vulnerable should their marriages break down. Since it appears to be conventional wisdom that growth in the number of marriages breaking down is inevitable, the incentive to find some employment outside the home is increased, though this may not be acknowledged. What is obvious is that employement makes choices possible for many women who without it could only react to the choices made by other family members.

The research done for and summarised in the Finer Report provides the best and most comprehensive view of the way families function in these times. It points out that not only have expectations about what is personally achievable within marriage changed, but that some degree of breakdown has always been anticipated and provided for. In the view of the committee, the stability of the institution requires that a second

chance at success within it be provided for people who failed at their first try. There follows a statement which could usefully be borne in mind when assessing the evidence of marital breakdown. After referring to the near-universality of marriage for men and women in these times it goes on "...given what is known about such factors as the distribution of homosexuality and chronic ill-health, psychological as well as physical, among the population at large, it is obvious that the present popularity of marriage must be drawing into the institution large numbers who lack any evident vocation from it. From this point of view, a very high marriage rate will lead to a disproportionately high rate of breakdown." (p.25)

Pertinent to the consideration of the incidence of marital breakdown are two inter-related matters. The first is one of the major trends in marriage noted in Families in Focus (p.15) - the decline in age of marriage during the last century. The other is noted in the statement in Marriage Matters (p.28) that "Many young people view marriage as a goal in itself, a manner of gaining status or an escape from family, without recognising the quality of the relationship." In his survey of Marriage in Britain 1945-80, Domitian points out that since the Second World War there has been an average annual increase of somewhere between five to ten thousand divorces. In 1982 there were 145,000. In looking at the distribution in the marriage cycle, he noted that it was a "phenomenon of the early years of marriage", though it did continue throughout the cycle. The two peaks of divorce are in the first four years of marriage and after twenty years.

Divorce is of course not the only evidence of marital breakdown. The matrimonial jurisdiction exercised by the magistrates provides as important an indicator. The Finer Report (pp.42-3) documented the very considerable increase in the matrimonial orders issued in maintenance and guardianship proceedings in the magistrates' courts from the beginning of the century. It was estimated that about half of the wives who were given these orders went on to become either petitioners or respondents in the divorce courts. The other half could reasonably be taken to include a number of marriages that had broken down. It is interesting in the light of this to observe that evidence given by the Magistrates' Association to the consultative committee which reported in Marriage Matters included the information that in 1976 their courts had dealt with over twelve thousand applications for matrimonial orders, and that this represented a reduction in the number of cases heard since the figures available to the Finer Committee which stood at around thirty three thousand per year. It suggests that some of the rise in the divorce figures may well result from people by-passing the magistrates' courts which can only offer interim remedies, and going straight for divorce. This speculation will be looked at again when considering the different policies toward marital breakdown expressed in the legislation administered by the magistrates' courts and the superior courts. The point has often been made that the cases that come to court do not represent the total of all the marriages that have broken down. The true extent of marriage breakdown has never been known, so a reliable comparison with the past cannot be made. What is certain is that the changed public attitude to divorce has made it more acceptable as a way to end a marriage. The increase in dovorce after twenty years of marriage may be in part due to the expectation of a healthy active life lasting into the seventies. The decision to end a marriage that has become unsatisfactory after twenty years may be spurred by the thought that one could try again with the possibility of another twenty or more years with a different partner.

Longer expectation of life has a more obvious effect on family functioning where the care of elderly parents and other relatives is involved. Crisis or Challenge (p.10) documents the increase in the numbers of the elderly, - especially great in those over seventy-five - in Britain and the implications for the provision of care that arise from this. In 1901 one person in every twenty was aged over sixty-five. By 1981 this had risen to one person in seven. Those aged over seventy-five are now one in eighteen persons in the population, and the demographic trends indicate that this figure will rise during the remaining years of this century. (p.14) The study noted that despite the vast increase in the numbers, the proportion of elderly people in institutions remains

about the same at it was eighty years ago, at around five per cent. The figures on household composition in Social Trends show that many elderly people, rising to forty per cent of those over seventy, live alone. Most of the rest live with family members, usually daughters and their families. Many of those living alone depend for help in household tasks and personal care on members of their families.

The care of the elderly is not evenly divided among family members. A recent study of carers done for the Equal Opportunities Commission suggested that about three-quarters of those caring for elderly, dependent persons were women. An indication of the extent of the burden of care on women has been revealed by a study done on the Home Help Service in England and Wales in 1967. It was estimated that between the ages of thirty-five and sixty-four, roughly half the number of housewives could expect to be giving help to an elderly or infirm person. A more recent small study, quoted in Crisis or Challenge (p.75) showed that at any given time in these days there were more people involved in caring for handicapped and elderly dependents than there were mothers with children under sixteen. The difference between the care required by children and by the old should also be borne in mind. The physical care needed by children grows less as they grow older. The reverse is true of the care of the elderly, and this can go on for much longer. Intensive care giving is always a source of stress in family life, and it may be particularly so when the woman accustomed to earning has to give this up in order to give care. It is conceivable that the need to provide care for elderly relatives may well become a factor of some importance in the later years or marriage.

The three developments noted above have all to be accommodated in the way families function. One important influence in the way these adjustments are made is the view of the social services about what constitutes good, or at least acceptable, family functioning. For example, in its role as defender of the rights of children, its officers make judgments about the adequacy or otherwise of parents, often at what may be a time of particular difficulty in the family. These judgments are usually very difficult to overturn subsequently. The confidence of parents in the disciplining of their children has sometimes been undermined through dissapproval of their methods, though little effort seems to be made to help find other ways of teaching children to behave responsibly within the family and outside it. The possibility of being entitled to welfare benefits at sixteen may well, with hindsight prove to have done more harm than good. It certainly has become a factor to be taken into account because of the influence it can exercise in determining the lifestyles of some teenagers. The supplementary benefit rules which disentitle both married and cohabiting women from claiming, regardless of their circumstances, have caused much dissatisfaction. While it is accepted that there must be rules for the claiming of benefits, to the extent that some families in need do not fit the prototype statutory family, there is pressure on them to change and conform.

There has been increasing public acceptance of cohabitation before marriage as well as without marriage. There is no evidence available about the degree of stability that such unions are likely to have. There seems to be little doubt, however, that they, along with the rise in divorces, have contributed to the noticeable growth of one-parent families. The economic welfare of families formed in this way has attracted much public concern, and perhaps the best piece of social investigation of the seventies - the Finer Report. Basically the problem was then, and remains now in spite of various welfare initiatives, the provision of adequate economic support. The amount of maintenance that can usually be ordered from the liable relative, is low and often remains unpaid. In addition, the mother of children born outside marriage can make no legal claim to be maintained by her ex-partner. The failure of cohabitation may leave more serious consequences than the failure of marriage.

During the seventies, the issue of domestic violence and what should be the appropriate public response to it attracted much attention. That there is a public responsibility to protect children from cruelty has long been accepted, and a succession of Acts of Parliament have made it possible for them to be removed into the care of statutory authorities. Gradually, the approach to this problem has changed to the point that the

assumption that it is possible to prevent abuse in family life is being widely accepted. Intervention for this purpose is regarded as being desirable in the case of children. the protection of wives from the violence of their husbands or vice versa has tended to be treated as an altogether different matter, even though the two are very often linked. The refuges for battered wives that have come into existence during the last ten years have revealed something of the extent of the problem and of the need to provide protection. The Magistrates' Courts now have the power to make a range of orders to protect spouses and children of the family. If a spouse has been injured and further injury seems likely, a power of arrest can be attached to the order which enables the police to act if the order is broken or there is suspicion that it will be. However, there appears to be some reluctance by both police and courts to make use of this power.

Vigorous public compaigns by small groups who espouse particular causes have become a feature of life in Britain during the last decade. One of these which has directed its force at the family with the aim of influencing attitudes by raising guilt levels is that which espouses the right to life, which involves the maintenance of life at all costs. The caring role of the family is emphasised at the expense of everything else. This takes to extremes the shift in attitude in the public policy toward the family that has been noted elsewhere. An experienced social worker writing for the Study Commission on the Family (V. MacLeod, Whose Child?) remarked (p.56): "It is as though the relationship aspects of family life now take second place to the caring/nursing aspects and the family is valued for its caring capacity, rather than being seen as a grouping of individuals linked by a network of relationships which locate and provide status for individuals in a complex society." Since, as pointed out above, the burden of care falls on women, it looks as though the battle for some space for development for women within family life may have to be fought all over again.

It would be odd to write about the family in England and make no reference to class. There is still a good deal of talk about class differences even though every indicator points to an increasing blurring of the lines between them. Social researchers seem to have to make more and more strenuous attempts to find definitions to separate and locate them. Though generally of diminishing importance in predicting family functioning, there is one area in which class appears still to be significant. Recent research on those who resort to divorce has indicated that a majority of those in the lower age group come from the working class (Class V and VI). It may be that the freedom to make a choice which had been denied their parents by economic considerations still has a certain attraction.

In general, so far as the family in Britain is concerned perhaps Noble (Modern Britain, Structure and Change p.100) sums up the experience of most people when he says: "From the individual point of view....it might be said that for most of us the first fifteen or twenty years of life are spent in an intensifying struggle to free ourselves from our family which is usually achieved by setting up another one we will spend the remaining years more or less desperately trying to maintain." The British attachment to family life is frequently noted in sociology texts. This may well help to account for the extent of re-marriage among divorced persons which has shown considerable increase in recent years. About thirty-four per cent of new marriages taking place in these days involve a re-marriage for one or both of the spouses (Families in Focus p.44)

The review of the circumstances of family life in England highlights the very considerable and rapid changes that have affected it during this century. The pace of change has, if anything, increased as the century moves towards its close. As individuals are affected by change, so there has to be adjustment in family life to accommodate alterations in their pattern of living. Overall, family life in England has shown itself to have remarkable strength and flexibility. It is in the nature of the welfare state that much attention is paid to the identification of problems and efforts to solve them, and this may have helped to foster a widespread impression that the family is under threat and foundering. "Looked at objectively, all the indicators point to remarkable continuing in England of the family unit based on marriage, with children who grow up to adulthood with their nature parents, and in which the handicapped receive care". But it would be wrong to assume that the battery of voices aiming their particular viewpoints at the family will grow any less, and that there will not be people made confused and uncertain by them. Noble sums up the state of things in this way: "Disinterested observation or an examination of what evidence is available... should convince.... that a clearly articulated

and self-consistent set of beliefs is something of a rarity" (in Britain). (Trevor Noble Modern Britain: Structure and Change p.217)

Implications for the law and the courts

The above brief review of the formation and functioning of family life in England suggests that there are certain matters in which there will be increasing resort to the courts and concerning which there will be changes in the law. There is some evidence to indicate that a plateau in the applications for divorce may shortly be reached. This is not likely to apply to divorce-related matters coming before the courts. The division of matrimonial property and the often related financial provisions for maintenance have become, in changing economic and social conditions, exceedingly contentious matters. New legislation aimed at achieving as great a measure of justice as possible for all parties affected within the limits of the assets and opportunities for employment available is being actively canvassed. It is unlikely that an easy or early solution can be reached, given the conflicting rights and obligations that must be balanced in achieving a fair result. Both an appropriate police and a better way of adjudicating disputes needs to be found. Until this happens, recourse to the courts in these matters is likely to grow.

There is considerable discontent, too, with the way in which custody matters are handled. This is not confined to those arising from divorce proceedings. Custody orders made in conjunction with other matrimonial orders and in affiliation proceedings are now more likely to be disputed. Fathers are beginning to take a far more active interest in at least sharing the custody of their children and it appears that this is a change in attitude that will become more widespread. Custody battles are not only between parents. Increasingly parents may find themselves in conflict with local authorities over the custody of their children. The numbers of children being taken in under care and protection orders is growing. Parental rights, even of those parents who voluntarily placed their children in care, have been sharply curtailed by the Children Act 1975 and the provision of the Child Care Act 1980. They may be asked to pay for the misdemeanours of their children, but have no right to be heard either administratively or in court when decisions about the future of their children in care are being taken. They may not even be informed. It is probably safe to predict that challenges by parents will grow in number, and that courts will be increasingly involved in their efforts to reassert their rights, not only here but in other fields such as education.

There will be some pressure on the police and on the courts to clarify their attitude to the victims of domestic violence. Already the courts have so interpreted the law that protection offered to married spouses and children has been extended to those who cohabit without marriage. Voices on and off the Bench have been heard to put forward the proposition tha family matters should be similarly handled before the courts regardless of whether the family was based on marriage or cohabitation. But there is no real sign that the legal distinction which remain will be easily discarded whatever the disadvantages for those who have chosen not to marry and their children.

The Present State of Family Law

The years since the Second World War have seen much change in both the substance and the administration of family law. Access to the divorce courts is now available throughout the country and the use of Divorce Registrars to handle undefended divorces, and the settlement of financial and custody matters, where these can be agreed, has considerably improved the ability of the courts to meet the increasing demand.

There have been changes in the law relating to the grounds for divorce and other matrimonial relief, the occupation of the rights in the matrimonial home and in other assets acquired during marriage, the determination of maintenance rights and, protection from domestic violence. There have been various pieces of legislation intended to give effect to the rights of children and provide for their protection. The extension of the provision of legal aid to a wide range of matrimonial and family

matters has had a very considerable effect on the practice of family law.

The changes in the grounds on which a petition for divorce or judicial separation could be made form part of the Matrimonial Causes Act 1973 (c.18) which consolidates a number of other related enactments. Instead of the list of matrimonial offences, on any one of which a petition could be grounded, the Act substituted the one ground of irretrievable breakdown. However, the ways in which such breakdown could be shown still made reference to adultery, cruelty and desertion, in effect retaining the notion of the matrimonial offence. The introduction of an alternative requirement of showing that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with" him or her, has in effect created a new matrimonial offence. Only the separation requirements, of two years with consent or five years where there is no agreement, seem to fit the idea of irretrievable breakdown. Not surprisingly, there has been a good deal of dissatisfaction with the way the law has worked. Its aim of giving dead marriages civilised burial has not really worked in general.

After the changes in the law were made there was an immediate jump in the number of divorces. Many of these involved people who having been in a matrimonial limbo for years took advantage of the five-year separation clause to re-order their lives. The number of divorces has risen each year since 1971, at an average of about ten thousand per year to the present rate of about one hundred and forty thousand. Less than one per cent of these divorces are contested and it could therefore be assumed that much of the bitterness and anger had been taken out of the process. That this not often so in practice may be explained by the grounds on which divorces are sought. The Judicial Statistics of 1980 has a breakdown of the grounds for petition. The largest number alleged unreasonable behaviour (c.65,000). Adultery was next often resorted to (c.48,000), and separation, though not usually opposed only accounted for forty thousand. The two first named grounds allege the kind of matrimonial behaviour likely to give rise to hurt and anger, often on both sides. All those in any way involved in dealing with these matrimonial disputes, whether as lawyer, judge, social worker or counsellow, agree that changes in the law are needed to eliminate unnecessary elements of conflict and give real meaning to the concept of irretrievable breakdown.

The public debate has made it clear that there are many different views on the matter. Some groups and persons, alarmed by the steadily increasing numbers of divorces would like to see restraints placed on the right to petition. Some have felt that making marriage and family counselling more readily available might help in promoting both reconciliation, or conciliation where that is not possible. The Law Society, many of whose members have a great deal of experience in the practice of family law, have put forward a well-argued proposal for making irretrievable breakdown the sole ground for divorce and basing this on evidence of one year's separation. They would place, in the case of new marriages, a limitation on the right to apply for a divorce. This should not be possible within two years of marriage unless there have been consultations with a marriage counselling organisation or there are special circumstances. There does not seem to be any clear public consensus on the matter and it seems unlikely that there will be any change in the near future.

Since the late sixties there has been a good deal of change in the law relating to matrimonial property. This has fallen into two parts, the occupation of the matrimonial home and the adjustment of property rights between the parties to a divorce, judicial separation or nullity suit, and the matter of maintenance which is frequently considered along with this. It seems odd that the two matters should not have been brought together in the Matrimonial Causes Act 1973, since occupation of the matrimonial home is often taken into account when adjusting property rights and fixing maintenance. Also, both reflect the same significant change in policy. It is now accepted that a wife has an interest in the matrimonial home which the law will protect even though she has no legal right of ownership nor has made any contribution to its acquisition other than by her work within the home in the care of the family and in its upkeep. The situation would of course be reversed if it were the husband at home, but in the vast majority of cases it is the wife whose interests are protected.

The most hotly contested matrimonial matters tend to be those associated with property adjustment between the parties and maintenance. Since the fifties, owner occupation of houses has steadily increased. Today more than half the number of house-holds fall into this category. The other large category consists of those who rent from local authorities. For many who divorce the matrimonial home is their one substantial asset. When property adjustments have to be made between the parties, the matrimonial home necessarily plays a large part in the calculations. The law which recognises the right of a non-owning spouse to occupy the matrimonial home only applies during the subsistence of the marriage. An order allowing occupation will not apply after divorce, unless the court has previously been requested and has extended the occupation beyond this date. Where the house is the only substantial property asset, occupation has to be dealt with separately from the division of family assets between the parties. Normally, where there are dependent children, occupation will be assigned to the spouse with custody, with some adjustment to the amount of maintenance to be paid.

When the court's power of adjustment was limited to transfers between the parties or settlement of the rights of one for the benefit of the other or of the children, any real division was likely to be postponed until the children were no longer dependent or there was money available to buy out the share of the non-occupying party. Since 1981, the courts have had the power to order the sale of property when making an order under the Matrimonial Causes Act. In many cases, this now means that assets can be divided without postponement, through the sale of the matrimonial home. This course is not without its difficulties for the parties if they have been legally aided. The matrimonial home is subject to a statutory charge for legal aid costs which become payable if the house is sold. With assets reduced in this way, resettlement in a new home can be made more difficult. An order for sale may, however, have the merit of achieving something like the much desired clean break between the parties.

There has been much discussion about what a wife's share of the assets should be on the breakup of a marriage, how much maintenance she should be entitled to and for how long. The Matrimonial Causes Act sets out the matters which the court should take into account in the exercise of their discretion. Conduct is to be disregarded unless it were so obvious and gross what it would be inequitable not to take it into account. To this extent the matrimonial offence is no longer important. Much more attention is paid to matters such as the age of the parties, duration of the marriage, their resources and earning capacity, their contributions to the welfare of the family however made, the financial needs, obligations and responsibilities of each as much as can be foreseen and the standard of living the family had enjoyed. The court is directed to exercise its powers so "as to place the parties.... in the financial position in which they would have been if the marriage had not broken down" so far as that, in all the circumstances, is possible. This direction has shown itself in practice to be unworkable. Such a result could only be achieved if the parties were so rich that a division of assets and awards of maintenance would not affect their standard of living, or if both were living on supplementary benefit payments. In any other case the support of two households instead of one would result in a lowering of the standard of living of at least one, if not both, households.

Starting from the position adopted by the Church when it was the arbiter of matrimonial matters, that the wife should be, if of good conduct, entitled to one-third of the income they had enjoyed, the courts now generally accept that a half share is more equitable. Where the parties are young and employed or employable or where the marriage has only subsisted for a short time, or where there are circumstances that indicate otherwise, half shares of assets may not be ordered either if both parties are clearly able to provide for themselves, or may be ordered only for a limited time to allow for one to resume income-earning. The presence of dependent children is a factor of considerable importance, for provision for them takes precedence over the needs of the parents except insofar as the one is related to the other. Decisions as to which of them should occupy the matrimonial home is a case in point. All this adds weight to the argument that in the statutory direction to the court far more emphasis should be placed on the need of the parties, and the aim of

retaining their standard of living abandoned. This approach might help the court in reaching a decision on how long maintenance should continue to be paid. For children, the rules are clear, but for a wife, it would be difficult to make any firm rule as circumstances vary so much.

The growing incidence of the remarriage of divorced persons has lent some urgency to the argument. Divorced men and ex-wives have joined forces to lobby for a time limitation to be attached to maintenance orders and favour provision for the "rehabilitation" of the ex-wife in order that she should become self-supporting. Ex-wives who have given up employment or professional careers in order to attend to the welfare of their families are only too keenly aware how difficult it is to re-enter full-time employment at anything like their old level, or even to find employment at all. That a second wife should benefit from the employment and career opportunities of her ex-husband which the first helped to sustain would make such a proposal even more unpalatable. Perhaps something of the North American approach to defining what is family assets might provide a solution. For example, the law in Ontario provides that a wife who has supported her husband while he obtained a professional qualification or skill should have his resultant earning capacity taken into account when assets are divided or maintenance awarded. In various of the states in the USA this principle has been upheld in recent years.

A clean break, however desirable, is rarely attained when there are dependent children of the marriage. Apart from arrangements for their maintenance, there is the matter of custody and of access for the non-custodial parent. There is now greater understanding of the needs of both children and parents to maintain contact irrespective of the award of custody. The management of the consequences of divorce has become more child-centred. Access is usually awarded unless there is any over-riding reason why it should be denied, and joint custody is beginning to be asked for and awarded where the parents can reach a satisfactory agreement about it. Where no agreement is reached there is sometimes a good deal of discontent expressed about the way in which decisions about which parent should have custody are reached. Though welfare reports are sometimes asked for, and are for the information of the court only, there is not much indication that any particular attention is paid to their findings. Much of the research that has been done confirms the general impression that whichever parent has effective custody at the time the decision is made, will be awarded custody. As great emphasis is placed on not disturbing the children unduly, and there is rarely time or opportunity for the spouse who has left to establish another suitable home, the merits of the award of custody apart from provisions for the physical needs of the children seem infrequently to be considered. Clearly, if agreement between the parents can be reached, it will be better for all parties.

There is less likely to be agreement when custody arises in suits under the Guardianship of Minors Act or as a result of matters arising in the magistrates' courts. In these latter, as in divorce and judicial separation, there is frequently a close connection between occupation of the matrimonial home and the award of custody. But the result of making the interests of children paramount and construing this to mean preserving their home base has led to some bizarre results. The Times reported in December 1982 that a mother, and children of whom she had custody, having left the matrimonial home could not regain possession of it as the father now lived there with another woman and her children. Because of the presence of the children the court left the father in possession even though there was evidence to show that his children were effectively without a home. The need for some legislative guidelines seems indicated.

Orders made as a result of domestic violence under the Domestic Proceedings and Magistrates Courts Act of 1978 may also affect the occupation of the matrimonial home. The offending spouse may be excluded in order to protect the other spouse and such children as there may be. The words of that Act suggested that the protection was limited to married persons,

but decisions by the courts have extended the protection to cohabiting persons who live together as man and wife. The protection afforded by the Act does not however extend to ex-spouses.

The really intractable problem in family law is the enforcement of maintenance orders. There is general agreement that those who have children or have taken on the responsibility for them or for a wife should support them and when they refuse or neglect to do so, the law should provide a remedy. Applications for these orders form a large part of the matrimonial work of the magistrates courts. A good deal of research has been done on how such orders are made, the involvement of the courts in both the collection and payment of maintenance and the steps taken to enforce payment when there is default. In general, these studies show that these orders are inadequate to provide support, that at any one time about forty per cent of the orders are in arrears, more in areas of high unemployment, that attachment of earnings is relatively unpopular with liable persons and not always welcomed by employers and that imprisonment for non-payment has almost nothing to recommend it. In many cases where the means of the liable party are small and make no real contribution to the support of those named in the order, enforcement proceedings would seem to be pointless. In these, as in other cases where maintenance is sought, social security benefits provide the real means of support. At one time wives used to be urged to take proceedings against their husbands, it being understood that this would help their claim for benefits. This has now been discontinued but wives may still assign their awards of maintenance to the Social Service Department who can take action if there is default, which a wife might be reluctant or unable to do. Unwillingness to pay maintenance is, it appears, more often directed against spouses than against children, and the longer an order lasts the more likely it is to fall into arrears. The new powers of the magistrates courts to order the payment of lump sums up to Five Hundred Pounds should go some way to meet this problem.

The reports of some conciliation agencies provide a little evidence that where maintenance is agreed between the parties it is likely to be paid. Perhaps more research effort should go into gaining some understanding as to why people do not pay rather than into ways of enforcing payment. It may be that, apart from any ill-feeling about paying, the knowledge that welfare benefit will provide for basic needs removes any element of urgency about making payment.

From a maintenance point of view, the parent of a child born out of wedlock is in the most vulnerable position of all. Even if the mother brings proceedings under the Affiliation Proceedings Act and the putative father is named, maintenance can only be awarded for a child. Those who live together outside of marriage have no obligations to maintain each other.

Until recently the policy of the law administered by the magistrates in matrimonial cases was very different from that administered in the superior courts. So much was this the case that they could be described in the Finer Reports as being different systems of family law. Apart from the financial limits placed on the magistrates' jurisdiction, one of the principal differences lay in the way in which conduct affected the relief afforded to parties. The standards of conduct that the law required from women were higher than those from men. A single act of adultery was sufficient to deny a woman her claim to maintenance, but could be ignored if committed by a man. The Matrimonial Causes Act of 1973 consolidated the changes in the law relating to divorce, nullity and judicial separation, and related matters, that had been taking effect during the sixties and emphasized the gulf between the way family matters were handled in the upper and the lower courts. Recent changes in the law which have allowed magistrates to use much the same criteria in considering matters such as claims tc maintenance and the amounts that should be awarded have

brought them closer together.* This, however, is unlikely to last for long as changes in divorce law and proposals such as the co-ownership of matrimonial property are now being actively canvassed.

The two jurisdictions differ in that, by and large, they deal with problems at different stages in the process of family breakdown. Problems very often arise first in ways that can be dealt with on an interim basis by magistrates. Applications for permanent relief and other matters which may also involve considerations of legal status are dealt with in the High Court and courts and registrars having jurisdiction in matrimonial matters. The only matter of status dealt with by magistrates is that of putative father and that only for the purpose of the payment of maintenance for a limited period of time. But custody matters fall within the jurisdiction of both.

Magistrates usually deal with applications which ask for what is essentially interim relief. These are often present as matters of urgency and ease of access and speed in dealing with them are important considerations. Family problems which surface in this way, unless they are among the few that are settled by reconciliation, tend to be the subject of other court appearances, either before magistrates or in other courts. The way they are handled on first appearance may have a crucial effect on the way family relationships subsequently develop. It would seem that the kind of skilled counselling and conciliation for which so eloquent a case has been made in divorce and other matrimonial causes is even more necessary in the magistrates' courts, when there may be a better chance of agreement between the parties being reached. It seems clear that not only is consistency needed in the law administered by the various levels of courts but in the way matters are dealt with by them. The choice of forum would then be dictated by the kind of remedy sought not by the way matters like one's conduct would be likely to be dealt with, at present a relevant consideration.

Legal Aid

There is general agreement that the provision of legal aid in matrimonial matters - first in the High Court and then in the magistrates' courts - has resulted in much more equitable access to the reliefs offered by the courts. Divorce, for example is no longer available only for those who can afford it. Wives who are second or non-earners have been the biggest group to benefit, but there are a growing number of divorce cases in which both parties are legally aided.

In general, legal aid is available where need can be shown for the services it provides, either free, or on the basis of an assessed contribution towards the cost in the following family matters: a defended divorce case, or an undefended one or judicial separation which has for some reason to be heard in open court; matters relating to property, maintenance or any financial matters, contested custody or arrangements for children, hearings concerning the occupation of the matrimonial home, domestic violence and any orders arising from it and the like. Legal aid is now available to children in care as well as in offence matters. But in the provision of legal aid in care cases parents tend to fare less well than children when they attempt to contest care proceedings initiated by a Local Authority.

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*The Domestic Proceedings and Magistrates' Courts Act of 1978 provided that either party to a marriage could apply to magistrate's court for financial provision on the following grounds (1) failure of respondent to provide reasonable maintenance for spouse, or (2) failure either to provide or make reasonable contribution toward maintenance for any child of the family or (3) has behaved in such a way that applicant cannot reasonably be expected to live with respondent: or (4) desertion. Adultery of wife is no longer a defence to a claim to maintenance. Also when considering an order for financial provision the magistrate must now have regard to the following: The income, earning capacity, financial obligations and responsibilities, standard of living of the family, age, health, the contributions which each party has made including looking after the house and family and any other circumstances including conduct, which appear to be relevant.

It has been pointed out earlier in this paper that getting legal aid is not without its difficulties where parties are of moderate means. Where the matter in contention concerns property, and the legally aided person has as a result acquired ownership or part ownership, a statutory charge attaches. Upon sale of the property, the portion of the legal aid costs for which he or she has been assessed becomes payable. This has worked particular hardship in those divorce cases where the family home has been the only asset of importance. Courts, in endeavouring to achieve fairness to both parties, have often directed that the home be sold and a division made so that both parties are enabled to acquire homes of their own. That this laudable effort is sometimes frustrated by the statutory legal aid charge that attaches to the proceeds of sale has been cause for growing comment in the courts (See Simmons v Simmons C.A. TLR March 24 1983). Clearly a change in the law which would exempt the proceeds of the sale of a matrimonial home under a fixed limit would seem to be indicated. There would seem to be a strong case for ceasing to apply the legal aid rules for civil matters to matrimonial cases and developing other rules to cover these.

The provision of legal aid has no doubt resulted in a considerable increase in the number of matrimonial cases coming before the courts. Those disturbed by the numbers might reflect that this way of handling family disagreements could have considerable benefits for society at large. This depends very largely on the way decisions are reached. The importance of securing agreement between the parties wherever possible seems to be becoming more widely understood. Nothing is gained and much lost if court decisions are rejected and enforcement is in practice either impossible or will worsen the family situation. Since it is hardly ever possible to sever contact between family members permanently, the benefit of skilled conciliation when there are problems is beginning to be recognised.

Conciliation

The case for the provision of adequate conciliation services attached to or working with all courts that deal with family matters seems incontestable. It is not by chance that various experiments in conciliation are now being undertaken in various parts of the country. They differ in various ways. Each tends to reflect the kinds of problem it was set up to deal with and the kind of worker who delivers the service. Some offer help to parents faced with problems over custody or access and who are reluctant to engage in a court battle over their children. Others may concentrate on isolating problems which can be settled by agreement and a few address the financial problems consequent on breakdown. The services they offer may include marriage counselling, though for many who seek their services this is inappropriate. What is clear is that any useful conciliation service has to be prepared to offer a range of responses and of expertise to meet needs as and when they arise.

Though conciliation services where they exist are acknowledged to be helpful, there seems to be a general feeling that the cost of providing such a service generally would be prohibitively high. Yet the experience of the Bristol Courts Family Conciliation Service suggests that it might provide the best possible way yet devised of meeting that hitherto intractable problem of ensuring the payment of maintenance orders where the means to do so exist. The saving in court time and prison space would go a considerable way to meeting the costs of conciliation. Some magistrates' courts have found conciliation useful as do an increasing number of lawyers experienced in family practice.

Perhaps the most impressive support for the idea that conciliation services should become a routine part of the judicial handling of family matters has come from the various associations of lawyers who have studied the matter. It is they who are most keenly aware how the present adversarial handling of matters that go to court can exacerbate family problems, and recognise that the law does not offer a solution to family problems only decisions about status and rights and responsibilities in the circumstances of the cases that are brought to court. Judgments do also put a judicial seal of approval on changes in public attitudes but

usually long after these changes have been generally accepted.

The failure to act on the calls for the provision of conciliation services is due in part to reluctance by successive governments to give any real consideration to the establishment of a family court system.

A Family Court System

The Finer Report included a vigorous statement of the case for the establishment of a system of family courts and also considered some aspects of what this would mean in practice. Since the publication of that report, many groups have given support to the idea. The response of government that this would cost a great deal of money and could notbe considered in a time of financial stringency has masked an unwillingness to tackle the resistance that a change in the court systems would be likely to meet from those currently in it, and also to address the problem of how the conciliation and judicial services could be brought together in a working relationship that acknowledged the importance of both.

There seems to be some hope that resistance to the idea of a special court for family matters may be growing less. The split jurisdiction between the county courts and the High Court has meant that litigants in matrimonial cases could indulge in forum shopping in order to seek an advantage for themselves. The Lord Chancellor's Department has recently issued a consultation paper putting forward the idea of giving the jurisdiction in matrimonial and family matters now enjoyed by both these courts to a new family court. This would be a great improvement. But it leaves out any consideration of how the jurisdiction exercised by the magistrates' courts in family matters could be integrated with it. Since there exists much information that many of those who first seek relief in the magistrates' courts subsequently appear as parties in actions in the superior courts, it would seem that such integration would be the next logical step if real improvement in the handling of family matters is to be achieved. Any overall consideration of how a family court system should be structured, and the kind of administration and procedures that would be necessary to make it work, has been inhibited by the practice of considering each of the elements that should go to make up the whole in isolation. Nearly all the elements have been the subject of investigation by a commission, but their terms of reference have precluded any such general investigation as has been needed. There is no indication that there will be any change in this approach at the present time. It is unlikely that anything other than piecemeal approaches, with all the problems inherent in this, will result, in spite of the interest shown by both the public and the professions in the establishment of a family court system.

Welfare Benefits and Taxes

The economic management of family breakdown has received a great deal more attention than the judicial. That this is so is in part due to what seems the overriding concern of the welfare state - the matching of benefits to problems. But it is also due to the acceptance of the fact that the division of property calculations about maintenance and the like offer the courts the only really practical way of achieving some fairness in meeting the competing claims of family members when there is breakdown. It is an irony that since these are the ways in which problems can be dealt with, these are the terms in which they come to be formulated. The most contentious arguments that result from family breakdown are most often about money and property.

Child benefits, family income supplement, supplementary benefit and one parent family allowances are now all part of the financial calculation of meeting the cost of separation or divorce. Applications for benefit and the necessary disclosures of personal circumstances to substantiate them can add to the stress caused by family breakdown. Any plans to improve the way family breakdown is dealt with will have to take this into account. Pensions are an important part of the economic strategy of the welfare state. The entitlement of dependent wives is a matter which the courts now recognise should be taken into account in the financial settlements in divorce.

Any structure of a system of personal taxation has to have at its base a model of the family, composed as it usually is, of wage earners and dependants. Since the accepted model of once married, wage-earning husband, wife not employed with two or three dependent children fits only a minority of families in these days, the tax system tends to work in a way which results in hardship for some, tax loopholes for others. Tax considerations can loom very large in the timing of such matters as marriage and divorce, in calculating the amount of maintenance payments and in decisions about matters such as paying maintenance directly to a dependent child. It is worth noting that where maintenance payments are voluntary - i.e. not the subject of any order and therefore unenforceable - they are ignored for tax purposes. This probably works against their usefulness as a means of reaching an amicable settlement in a difficult matter unless one is rich enough that tax reliefs do not matter. The reason for this is perhaps bureaucratic convenience, but in the light of the known difficulties about enforcing maintenance payments, perhaps this could be reviewed.

Taxation rules discriminate between those who are married and those who are not. While this may work to the benefit of the parents, it may be otherwise with the children. Children born out of wedlock do not come within the rule that maintenance from a separated parent paid directly to them does not attract tax.

Clearly the settlement of money and property problems forms a large part of the matters which an effective conciliation service has to be prepared to tackle. The range of such problems is likely to increase with the prevalence of second marriages and the expected growth in family responsibilities for the aged.

At the present time, as is usually the case in times of rapid change, the family has become the focus of much interest, analysis and speculation. Because there are so many angles from which it may be viewed, it is judged according to different, frequently conflicting, criteria, and this confusion is reflected in legislation and in the courts. "Whose Child" published on behalf of the Study Commission on the Family provides a good example of the way in which social theories influence legislation concerning children, and rights and duties of parents and of public authorities in relation to their care and upbringing. The changing roles of women have caused similar confusion. The morality which public institutions may be required to uphold may in the future have less to do with promoting one generally acceptable form of family formation and functioning and more to do with protecting the right to choose family patterns which promote individual development and happiness. If there is such a shift - and there is some evidence from studies on the family that it is already on the way, - there will be need for flexibility in both policy and administration which most public institutions as they are at present structured would find it difficult to achieve. That this is true of both law - making and the courts in the area of family law has already been recognised.

Notes on the chapter on England

The literature on the family in England, in general and relating to various aspects of its functioning, is extensive, and there seemed little point in listing all the sources consulted. Attached to the study by R. and R. Rapaport: "Fathers, Mothers and Others" there is an excellent bibliography.

Particular use was made of the following sources:
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Noble, T. Modern Britain : Structure and Change
Publications of the Study Commission on the Family: in particular
Occasional Papers.
Marriage in Britain 1945-80 Dominian
Equity and Family Incomes Bradshaw
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Crisis or Challenge? Family Care, Elderly People and Social Policy, Rossiter and Wicks
Family Incomes since the War Piachaud
Employment Trends and the Family Rimmer and Popay
Whose Child? MacLeod
Reports
Happy Families? A discussion paper
Values and the Changing Family
Gibson C. Childlessness and Marital Instability (Journal of Biosocial Sciences Vol. 12 No. 2 pp 121-32)
Report of the Committee on One-Parent Families Finer HMSO
The Reports on the various aspects of Family Law Law Commission HMSO
Report on Matrimonial Proceedings in Magistrates' Courts Law Commission 77
Marriage Matters: A Consultative Document Working Party on Marriage Guidance HMSO
Battered Women Coote and Gill National Council for Civil Liberties
Non-accidental Injury to Children HMSO
"A Better Way Out" and "A Better Way Out" Reviewed Memos by the Law Society's Standing Committee on Family Law
Times Law Reports 1981-83 on family law cases

Visits to courts
Cuttings from newspapers 1980-83

Legislation

Child Care Act c.5 of 1980
Children and Young Person Act 1969 as amended by Children Act 1975
Domestic Proceedings and Magistrates Courts Act c.22 of 1978
Guardianship of Minors Act c.3 of 1971
Inheritance (Provisions for Family & Departments) Act 1975
Legal Aid Act c.20 of 1979
Magistrates Courts Act c.43 of 1980
Matrimonial Causes Act c.18 of 1973
Matrimonial Homes Act 1967
Matrimonial Proceedings and Property Act 1970, 1976
Protection of Children Act c.37 of 1978
Legislation on Welfare Benefits is two volumes to cite in detail.

CONCLUSION

From even this small sample of Commonwealth countries there is plenty of evidence that no one system of family law could be devised that would be appropriate to all its members. Though there are problems that they all share, and some, like the enforcement of maintenance payments, in which there has been much useful collaboration, each country has, in the field of family law, its own priorities and its own social goals. There is a shared concern about law reform in this area, but the problems addressed differ, as do the underlying reasons for seeking reform. England, for example, shares with places like Canada and Australia one overriding preoccupation. Graveson, writing in "A Century of Family Law"* articulated it in this way:" The inherent problem of our (English) lawyers is to reconcile the independence of the individual with the stability of the family as a social unit..." There are a number of other countries in which this would not be regarded as of the first importance.

The U.K. of course differs from almost every other Commonwealth country in that it does not have a written constitution. It could therefore be assumed that this would make law reform easier. Written constitutions impose a rigidity on the legislative and judicial systems of the independent countries of the Commonwealth which affects both family law and practice. As the chapter on Ontario demonstrated, it can be a considerable handicap to reform. But, if anything such handicaps seem to stimulate experiment. Both Canada and Australia have been far more willing than England to follow new directions in both law and practice.

The literature on law reform has grown immensely during the last dozen years. The reports of the Law Reform Commissions of England and the older Commonwealth countries have been eagerly studied by other countries wanting to change their own laws. This has been particularly true in the area of family law. It is not always clear however that many of the reforms advocated in these report depend for their efficacy on a range of available social supports. Legal aid, financial benefits and a number of social services enable individuals to claim their legal rights, a fact that the study of legislation by itself does not make clear. However, as well as enabling, the social services can generate their own influence on family law and practice. This can be observed in England, where, as for example in the matter of taking and keeping children in care, it has begun to generate some controversy.

Whatever their system of family law, most Commonwealth countries seem to agree that adversarial conduct of family law cases does more harm than good, and that agreement amicably reached is far more likely to mean that obligations are honoured. This is particularly important where dependent children are involved. In recognition of this, the management of family breakup by the courts is becoming child-centred. But it has become obvious that this, by itself, will not guarantee that maintenance obligations, for example, will be met. There have been experiments with the use of conciliation in a number of countries with very promising results. But these experiments also indicate that if conciliation is to be an effective way of dealing with the range of financial, property and personal disputes that could arise, it has to be offered by skilled and trained persons, and the service would have to have a clear organisational link with the courts dealing with family problems. Understanding and acceptance of its role by lawyers as well as judges and court staff would seem to be essential.

With the gradual disappearance of matrimonial fault from divorce proceedings and where there is no general social acceptance that a child should belong to one parent rather than another, judicial decisions about the custody of and access to dependent children become very complex matters. The aid of probation officers, children's officers or other skilled persons has been sought in various places. This, taken with the experiments in conciliation seems to indicate a growing recognition that they can be an important element in the handling of cases where relationships will continue

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*A Century of Family Law 1857-1957 ed. Graveson and Crave Sweet & Maxwell p.414

after a decision has been given in the matter under dispute. This has indeed been accepted in places where family courts have been set up, but even where this has happened difficulties remain about the nature of the links between courts and services. In others, such difficulties foreseen, have inhibited moves towards the setting up of family courts.

In the developed countries, a world recession, unemployment and a resulting degree of economic hardship, have tested some of the assumptions on which matrimonial law reforms were based. For example, the notion of marriage as a partnership has come to mean that not only should the assets accumulated during marriage be equally divided on divorce, but that each party would, within a measurable span of time, become self-supporting. The difficulties that women face in returning to full-time employment in a less than buoyant job market after years looking after families, as well as the growing expectation that they must care for the old as well as the young, casts considerable doubt on the second part of the proposition. The answer to the question of how long a divorced wife should be able to claim maintenance is now much less clear than it seemed five years ago.

The countries in which more than one system of family law is recognised face problems that are altogether different. Not only must the legislative and judicial systems offer equal recognition to each separately, but must carry this over into situations where, by intermarriage or otherwise, they overlap. This is a problem to which each country will have, in the end, to find its own individual answer, as no country is exactly like another.

Migration of large numbers of persons within the Commonwealth has nearly always meant that some accommodation of their family law and practices has to be made by the countries to which they go. The experience of countries to which this problem is not new could be helpful. In the future development of family law, Commonwealth countries clearly have much to offer each other.

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