

# LAW AND DOMESTIC RELATIONS

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## *Introduction*

The law on domestic relations differs materially from North America in other parts of the world. The Soviet Union and the People's Republic of China introduced radical family law reforms to terminate prior social orders. The Marriage Regulations of 1931 in the People's Republic stated a principle of "freedom of marriage between men and women" with a view to abolishing "the entire feudal system of marriage arranged by persons other than the parties themselves, forced upon the parties and contracted by purchase and sale".<sup>1</sup> The Soviet Union, other countries of eastern Europe, and the People's Republic of China have separate codes of family law, which, despite the inherent complexity of the subject matter, are drafted very generally, as indicators of social policy.<sup>2</sup> The Soviet code gives six legislative tasks: (1) to strengthen the family on the principles of communist morality; (2) to base family relations on a voluntary marital union and on mutual love and respect among members of a family; (3) rearing of children in devotion to the homeland, a communist attitude towards work, and for the construction of a communist society; (4) protection of the welfare of mother and child; (5) the eradication of harmful customs of the past; (6) the inculcation of a sense of responsibility to the family.<sup>3</sup>

Some family groups have been more widely organized than the nuclear family, for example, the classical Roman or Chinese families. A present example, and an institution under stress, is the

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<sup>1</sup> The most recent general legislation on the family is the Marriage Law of 1950. The latest reform in the U.S.S.R. is the Fundamental Principles on Marriage and the Family, published as a draft in the Soviet press in 1968 and enacted in 1969. Müller-Freienfels, *Soviet Family Law and Comparative Chinese Developments* (1968), a paper presented at a conference sponsored by the Asian Law Program, University of Washington Law School; Meijer, *Marriage Law and Policy in the Chinese People's Republic* (1971), p. 300.

<sup>2</sup> See, for example, Marriage Law, 1950, arts 7-8 (People's Republic of China).

<sup>3</sup> Fundamental Principles on Marriage and the Family, art. 1.

Hindu joint family. Traditionally an undivided Hindu family consists of all the male descendants from a common ancestor, their wives and unmarried daughters, such family being joint in estate, food, and worship.<sup>4</sup> The modern joint family has lost the characteristics of common residence, meals, and worship to a large extent, but coparcenary ownership of joint family property is still important.

About three-quarters of the world's population are peasants, living mainly in villages with a great variety of marital and family customs. Kinship ties have a dominant role in some peasant societies, affecting ownership and use of property, but in the west, kinship seems of less significance than economic factors.<sup>5</sup> All societies have used kinship ties more or less to carry legal rights and duties in domestic relations, and in North America they are fundamental determinants of legal relations between adults and children.

A belief in the favoured position of human beings has permeated western culture and religion.<sup>6</sup> Empirical science has undermined anthropocentric dogma. "Many theologians felt that the Copernican astronomy was so clearly incompatible with the Bible that if it prevailed the Bible would lose authority and Christianity itself would suffer. What would happen to the fundamental Christian belief that God had chosen this earth as His human home—this earth now shorn of its primacy and dignity, to be set loose among planets so many times larger than itself, and among innumerable stars?"<sup>7</sup> The impression of the universe given by science is of a conglomerate of systems, living and otherwise, apparently containing certain particles as standard building elements. "Thus, from the war of nature, from famine and death, the most exalted object which we are capable of conceiving, namely, the production of the higher animals, directly follows. There is grandeur in this view of life . . . whilst this planet has gone cycling on according to the fixed law of gravity, from so simple a beginning endless forms most beautiful and most wonderful have been, and are being

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<sup>4</sup> Mulla, *Hindu Law* (13th ed., 1966), p. 1; Kheterpal, *Codification of Hindu Law, Family Law and Customary Law in Asia* (1968), p. 214; Kapadia, *Marriage and Family in India* (3rd ed., 1966), ch. 10. Derrett considers the joint family "the most characteristic and fundamental part of the life of Hindus as known to the law". *A Critique of Modern Hindu Law* (1970), p. 52.

<sup>5</sup> Lewis, *Village Life in Northern India* (1958), pp. 312-320, compares an Indian village and a Mexican village, and quotes Kroeber, *The Societies of Primitive Man, in The Nature of Culture* (1952), p. 219 that "among primitive peoples society is structured primarily on the basis of Kinship and in more civilized nations largely in terms of economic and political factors". See also, Fallers, *Law Without Precedent* (1969), pp. 336-346.

<sup>6</sup> With exceptions: "The Buddha looks with a kind heart equally on all living beings, and they therefore call him 'Father'". Sermon at Benares.

<sup>7</sup> Durant, *The Story of Civilization* (1961), Vol. 7, p. 606.

evolved."<sup>8</sup> Is our species a highly-developed picture in the fire of universal change that may disappear like others, to be replaced?<sup>9</sup> Long-term re-assessment of man's place in Creation is bound to have an important effect on our attitudes to the crusts of morality, religion, social convention, and dogma that have helped to make family law in the past.

There are fears that we are over-producing people and destroying important environment. Why are these problems stated in crisis language? A reason given is that "population, food production, industrialization, pollution, and consumption of nonrenewable natural resources—are increasing. The amount of their increase each year follows a pattern that mathematicians call exponential growth. Nearly all of mankind's current activities, from use of fertilizer to expansion of cities, can be represented by exponential growth curves."<sup>10</sup> Exponential growth is when a quantity increases by a constant percentage of the whole in a constant time period.<sup>11</sup>

The present world population seems to have a doubling rate of thirty-three years,<sup>12</sup> but the real crisis lies in the total system-dynamics involving population, agriculture, natural resources, industrial production, pollution. So viewed, the population in North America, where there is a high level of economic activity and use of resources, may be at the crisis level.

The economics of families has an important effect on growth factors. Simplistically North American business is a pump for the circulation of goods, services, and money. Certain factors have increased the pumping, particularly: a huge rise in consumer credit promoted by finance companies and banks; increasing rates of depreciation and obsolescence in manufactured goods heightening the demand for new consumer goods; a considerable increase in the number of married women in employment. The present system does not guarantee the basic essentials of reasonable life to all members of a society who are willing (whether or not they are able) to contribute to that society and its economy. "Poverty is the great social issue of our time. Unless we act now, nationally, in a new and purposeful way, five million Canadians will continue

<sup>8</sup> Darwin, *The Origin of Species*, last paragraph.

<sup>9</sup> *The Limits to Growth*, Report of the Club of Rome (1972), states at p. 17 that: "The arms race, environmental deterioration, the population explosion, and economic stagnation—are often cited as the central, long-term problems of modern man. Many people believe that the future course of human society, perhaps even the survival of human society, depends on the speed and effectiveness with which the world responds to these issues."

<sup>10</sup> *The Limits to Growth*, *ibid.*, p. 25.

<sup>11</sup> Compare compound interest and simple interest.

<sup>12</sup> "And if we continue to succeed in lowering mortality, with no better success in lowering fertility than we accomplished in the past, in 60 years there will be four people in the world for every one person living today." *The Limits to Growth*, *op. cit.*, footnote 9, p. 38.

to find life a bleak, bitter, and never-ending struggle for survival."<sup>13</sup> In the past, extreme poverty was more general, but now it is a minority affliction in North America and involves exclusion from participation in the generally affluent life rather than the risk of starving to death, or dying merely from lack of medical or other services.<sup>14</sup>

The maverick in political, social, or business organization is the human being. According to Professor Skinner: "A behavioural technology comparable in power and precision to physical and biological technology is lacking, and those who do not find the very possibility ridiculous are more likely to be frightened by it than reassured. That is how far we are from 'understanding human issues' in the sense in which physics and biology understand their fields, and how far we are from preventing the catastrophe toward which the world seems to be inexorably moving."<sup>15</sup> Is "individuality" a label to describe the behaviour of one system as distinguished from others, and "freedom" a negative reinforcer, inducing us to avoid what we dislike or fear?<sup>16</sup> Can alterations in the environment cause desirable changes in the individual? There has been a long history of attempts to control the environment of domestic relations, at least indirectly, by religion, morals, law, and custom. In English law, from the early Middle Ages to the nineteenth century, the courts of the Roman Catholic Church and then the Church of England exercised jurisdiction over most of family law. What will be the future objectives of legal controls on domestic relations—will they be more "scientific" and less dogmatic than in the past?<sup>17</sup>

There may be control of living systems by direct operation, as distinguished from the long-term, general effects of environ-

<sup>13</sup> Poverty in Canada. A Report of the Special Senate Committee (1971), p. vii. According to Galbraith: "Family life itself is in some measure a manifestation of affluence. And so, without doubt, is the shared sense of helplessness and rejection and the resulting demoralization is the product of the common misfortune." The Affluent Society (1969), p. 290.

<sup>14</sup> "The Privation of which Marshall spoke was, a half century ago, the common lot at least of all who worked without special skill. As a general affliction, it was ended by increased output which, however, imperfectly it may have been distributed, nevertheless accrued in substantial amount to those who worked for a living. The result was to reduce poverty from the problem of a majority to that of a minority. It ceased to be a general case and became a special case. It is this which has put the problem of poverty into its peculiar modern form." Galbraith, *op. cit.*, *ibid.*, p. 286.

<sup>15</sup> Beyond Freedom and Dignity (1971), p. 5.

<sup>16</sup> Skinner, *op. cit.*, *ibid.*, p. 30, where it is said that: "What we call the 'literature of freedom' has been designed to induce people to escape from or attack those who act to control them aversively."

<sup>17</sup> "O you who are so good yourselves, so pious and so holy, You've naught to do but mark and tell Your neighbour's faults and folly," Burns, "Address to the Unco Guid, or the Rigidly Righteous". See also "Holy Willie's Prayer".

ment, and, for example, there are experiments to reduce aggression or heighten pleasure by electrical impulses into the brain, and for the transfer of content from one brain to another brain. There is the possibility of changing personality by genetic engineering. These could have the same broad objectives as the ecclesiastical law in mediaeval England, to modify man to a given pattern, but they have a different predictability. Where the religious teacher and the moralist stood in the past, there may stand the biologist and the behavioural scientist. If so, this will create new problems for those in power, who have not always resisted the desire to save sinners.<sup>18</sup> Future salvation may be more scientific than the obscene arrogance of some past methods, but future makers of law on domestic relations may be tempted by more effective techniques. There is talk of an apocalypse as roughly predictable unless there are basic changes. If, in future decades, the quality of life begins to deteriorate generally, as some studies have suggested, there may be a demand for drastic controls on social and economic growth. An important target may be domestic relations, and "family law" may move into new and rough waters.

This part of our century is proclaimed in the news media and elsewhere as the great era of change. We are told that "we must focus on the twin forces of acceleration and transience. We must learn how they alter the texture of existence, hammering our lives and psyches into new and unfamiliar shapes. We must understand how—and why—they confront us, for the first time, with the explosive potential of future shock".<sup>19</sup> Such susceptibility to change may surprise those of us who have already met at least one world war; their first home electric lighting; "crystal set"; "talky"; air travel, atom bomb, computerized account statement; and so on. The second half of the nineteenth century was associated with, for example: Darwin; Clerk Maxwell; Thomson; Rutherford; Pasteur; Lister; the Curies; Graham Bell; Marconi; Planck; Lorentz; Einstein; Marx; Engels; Freud; major social changes such as the education and enfranchisement of women. Do our times produce comparable work? This seems to be rather the age when earlier thinking, by mass application, affects the life of the "reasonable old lady on the T.T.C.". Apart from the life sciences, directness and intensity of technological application seems to be the feature of our times, leading, if it remains open-ended, to over-intensity of development affecting family life in various ways. But the life

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<sup>18</sup> "Barefooted and wearing paper crowns describing their sin, adulterous baillies and their women walked to their public whipping at the Market Cross. The scourge and the brank, the stocks and the stool of penitence, sack-cloth and the ducking-pond, banishment and burning, were all revolutionary weapons of the dictatorship of the presbytery." Prebble, *The Lion in the North* (1971), p. 212.

<sup>19</sup> Toffler, *Future Shock* (1970), p. 18.

sciences could change this picture, and alter the reasonable old lady herself and not just her environment. Will human beings have the chance to sit at the controls of evolution, co-pilot to the Creator, within the lives of children of these being born? How will "family law" or its successors in office face these issues at domestic level?

Morality is not likely to fold its tents and depart, but in the future it may be found in different places, with war, cruelty, violence, over-aggression, identified as Deadly Sins. Affecting domestic relations, the moral pressure has been on sexual sin. Anyone knows that a man must not sleep with his sister, and that prostitutes are sinners, while adultery was the original and main ground for dissolving a marriage. Wars, many forms of cruelty, violence, greed, poisoning the environment, killing animals unnecessarily, and so on, have not possessed the clear immorality of sexual sin. But modern trends in divorce legislation in North America and in Europe favour marriage breakdown as the reason for dissolving a marriage,<sup>20</sup> and divorce after a year or so of *de facto* separation has become available in many western countries.

### I. *Children.*

The law has institutionalized the biological connection, subject to exceptions such as adoption; illegitimacy; removal of a child from the parents. The principle that a new-born child "lies where it falls", is one of convenience and tradition, and gives an enormous range of possible environments at the beginning of life: good, loving, rich with opportunity, educated, affluent; bad, violent, miserable, diseased, illiterate, poor.

Most societies have used legal dependence, an elaborate example being the Roman *patria potestas*, under which the *pater familias* had power over an extended family group.<sup>21</sup> At common law, a legitimate child was dependent on the father and subject to his decisions to a great degree, and it was held that the court could only interfere with the father's discretion where his conduct proved him entirely unfit in any respect to exercise his parental authority and duties as regards his children.<sup>22</sup> The Child Welfare Act<sup>23</sup> and other legislation enlarged the interventive power of the courts. But subject to widening of boundaries, and statutes such as The In-

<sup>20</sup> Divorce Reform Act, 1969, ss 1-2.

<sup>21</sup> See Watson, *Law of Persons in the Later Roman Republic* (1967), p. 98; Jolowicz, *Historical Introduction to Roman Law* (1954), p. 118; Crook, *Law and Life of Rome* (1967), p. 107. "The early Roman period did not regard man as an individual, but as a member of the group to which he belonged." Kaser, *Roman Private Law* (1965), p. 60.

<sup>22</sup> *Re Agar-Ellis* (1883), 24 Ch. D., at p. 317; *R. v. Gyngall*, [1893] 2 Q.B. 232.

<sup>23</sup> R.S.O., 1970, c. 64.

fants Act in Ontario which makes the mother a co-guardian,<sup>24</sup> the basic principle appears to be that the courts may interfere with the decisions of parents or guardians where there are special circumstances and an authorizing law. The married woman has become a "feme sole" in property and contracts,<sup>25</sup> but a child really has no positive legal personality. Decisions which affect a child, such as when to consult a lawyer, issues about money or property, compensation for injury, adoption, may be determined by one or both parents, except when a statute or the common law limits parental discretion. There is more sensitivity to "conflict of interest" in trust, corporation, or administrative law (where "daddy knows best" is not the rule), than in the law on children. An important problem is to ascertain situations where legal advice and representation is needed and to deliver these services. At least when they are small, children are vulnerable to abuse and violence (of which the "battered child" is the most publicized example) and to adult decisions in which they may play little or no part but which can affect the course of their lives. A small child does not know when a lawyer is required or how to instruct one. What is needed is a screening operation to detect the proceedings in which separate legal advice or representation is desirable for a child, and to deliver the required services. The Family Law Study recommended to the Ontario Law Reform Commission experimental machinery for this purpose.<sup>26</sup> Protection of the interests of young children and their legal representation is a complex and important topic which, it is hoped, will receive more attention in the future.

Distinctions in the law between legitimate and illegitimate children are out of fashion in many countries.<sup>27</sup> The *Family Law Study*<sup>28</sup> recommended to the Ontario Law Reform Commission that Ontario should follow this trend, but the Commission have not stated their views. The present Ontario law of intestate succession is unfavourable to the illegitimate child, and so is the rule that a bequest to "children", "issue", or the like, is interpreted to mean legitimates. If a testator wants to distinguish between children, he or she should be able to do it expressly, but the law itself should not discriminate. A substantial number of illegitimate chil-

<sup>24</sup> R.S.O., 1970, c. 222, s. 2. The *patria potestas* approach of the common law was softened by equity and statutes have carried on the process in custody, and similar situations, by emphasizing the best interests of the child as the paramount principle. See *J v. C*, [1970] A.C. 668. [1969] 1 All E.R. 788. The Supreme Court of Canada has tended to presume in favour of the natural parent as the custodian, absent evidence of unsuitability.

<sup>25</sup> See, for example, The Married Women's Property Act, R.S.O., 1970, c. 262.

<sup>26</sup> Family Law Study. Vol. 10 (1969), appendix to ch. 4.

<sup>27</sup> See generally, Krause, *Illegitimacy: Law and Social Policy* (1971).

<sup>28</sup> Family Law Study, Vol. 3 (1967), pp. 529-531, 537.

dren are in one-parent families, and about a third of the unmarried mothers bring up their children. A woman, the usual head of a one-parent family, earns on the average much less than a man.<sup>29</sup> She may need full-time employment outside the home, and require to place the child in a day nursery.<sup>30</sup> She may or may not have financial aid from the father.<sup>31</sup>

To what extent should children be left by society to take the consequences of their parent's situation? It can be argued that a state has a duty to the young children living within its boundaries to offset at least the major detrimental situations, financial, and otherwise. Concern for the quality and quantity of our population is a task for social and political institutions and for the law, including greater equality of opportunity for children.

The education of children in North America has grown enormously in the present century as regards the number of students and the length of the process, and the state now plays a major role, comparable in influence to that of the parents. Education may serve a variety of purposes: literacy and basic mental training; job or professional training; cultural development; custodial or "baby-sitting", and can occupy as much as the first third of a person's life expectancy, as a "full-time" process, if university education is included. After being "locked-in" to the educational system for a number of years, a person may enter employment and work at fixed hours until retirement, this occupying somewhat more than half of the life expectancy, but the rigidity of these patterns is being questioned. Should work processes be more continuous and people have a range of possibilities as to the distribution of their total hours of work over the day, the week, and the year? In the future, North America may have less "batching" of work and more "real-time" options for doing it. A similar process might apply to aspects of education. Should education as cultural development be available continuously throughout a person's life-time, particularly if there are more options available to him or her on the time distribution of employment? We are told that future professional and job training will continue through the working life to prevent employee obsolescence, and lawyers and other professional bodies for example, have made moves in that direction. The different purposes of education, at present so inter-meshed, may become more distinct, with some of the strands made available over the life-time. If these moves to redistribute work and education have substantial

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<sup>29</sup> Poverty in Canada, *op. cit.*, footnote 13, pp. 21, 23.

<sup>30</sup> "The Minister of Health and Welfare has pointed out that although administration costs of day-care centres can be financed under the Canada Assistance Plan, and cost split down the middle with the Federal Government, only about 9,000 children are now attending them, and about 900,000 need them." Poverty in Canada, *op. cit.*, *ibid.*, p. 155.

<sup>31</sup> See The Child Welfare Act, *supra*, footnote 23, s. 59.

results, the impact on family life and domestic relations will be considerable. It may be that young people will enter the work force at a lower age than at present (as they used to do in the past) and their job training and cultural education will continue during their employment, and the present concept of full-time "locked-in" education for a long initial period may be modified by the end of the century. This in turn may require a re-assessment of the relative functions of parents and the community in the rearing and maintenance of children.

Which decisions should be made by parents and which by specialists in education, social work, legal adjudication, and so on? In decision-making (as distinct from advice), the specialist tends to operate marginally at present—for example, where a child is "in need of protection" under The Child Welfare Act, where a child is delinquent, where there is a dispute as to custody, where a child is adopted with the consent of the natural parent or parents. But the statutes contain rather general statements (for example, Ontario definitions in Part II of The Child Welfare Act)<sup>32</sup> and give elbow-room to the judge for interpretation. This may go further than a custodial decision. The general law in Ontario on adoption is that parental consent is required.<sup>33</sup> But the Ontario statute provides that the adoption of a Crown Ward does not need parental consent. A child found to be within one of the numerous definitions of a child "in need of protection" in Part II can be made a Crown Ward, and the natural parents may be unfortunate, and not "bad" parents, or they may have a difficult child. Prior to a recent amendment of the Act, the natural parents could apply to the court for return of the child to them after placement *de facto* for adoption and before adoption *de jure*, for example, on the ground of an improvement in their circumstances after the order of Crown Wardship. In *Prospective Adoptive Parents v. Mugford*,<sup>34</sup> the Supreme Court of Canada ruled against a Children's Aid Society, and the Ontario Government, with a speed not matched by them in other areas of family law reform, introduced legislation cutting off the previous right of natural parents to apply for return of their child due to changed circumstances, subsequent to an order of Crown Wardship and after the child has been placed *de facto* for adoption.<sup>35</sup> So, in Ontario, a child can be adopted against the wishes of natural parents who are not "bad" parents, if a judge makes the child a Crown Ward. Is this a policy trend for the future, indicating a greater incursive power by the state in allocating parents to children?

<sup>32</sup> *Ibid.*, s. 20.

<sup>33</sup> *Ibid.*, s. 73. Cf. Report on a Draft Law of Adoption, Office for Revision of the Civil Code of Quebec (1968), ss 12-18 and 11.

<sup>34</sup> [1970] S.C.R. 261.

<sup>35</sup> Child Welfare Act, *supra*, footnote 23, s. 32.

When a custody order is made, the child will normally be *de facto* in the custody of one or other parent, and this situation can have existed for some time. It is difficult to be sure what society expects of a judge, a lawyer, or a social worker concerned with custody. The judicial process does not check on the working out of its custody decisions, unless they are brought back to court. "Marriage-breakdown" and separation will have occurred before the custody issues come to court, and the normal function of the judge, where the case is uncontested, will be whether to change the *de facto* situation. Perhaps the function of the judicial process and social services is to prevent the more obvious mistakes, such as where a child is likely to be neglected or ill-used, to be in unhealthy conditions, or among wicked people. Basically the function of the court in custody may not be so different from the spirit of some sections of Part II of The Child Welfare Act of Ontario, that is, removing a child from an undesirable atmosphere. Future emphasis should be on realistic conceptions of what parents, lawyers, social workers, and educators are capable of doing in making decisions for and about children, on an honest understanding of their abilities and limitations, and on co-operation.

## II. *Marriage.*

Matrimony has many facets: social, religious, economic, as well as legal, but there is a tendency to regard it as a package. Calls for reform are nothing new.<sup>36</sup> There is some criticism of the legal characteristics, on the lines that "love does not need a legal document". The number of marriages celebrated is presently high in North America. Whether a cult of achieving matrimony, as something expected of a female, is psychologically harmful, is outside the range of this article, but it may contribute to the number of marriages, as may also the extent to which our social patterns continue to make life difficult for the single woman, including those divorced, separated, and widowed. It is typical of social customs that they outlast the problems they were invented to solve (the "grin" of the Cheshire cat remaining after the cat has gone).

In the older systems of law, a marriage ceremony could be part of the formalization of property settlements between the parties or their families, and of the transfer of the woman from dependence on her own family to dependence on her husband. Frequently the difference between a wife (first class) and a concubine lay in the property agreements associated with the former. Some marriage

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<sup>36</sup> ". . . marriage has become difficult, and if it is not to be a barrier to happiness it must be conceived in a somewhat new way. One solution often suggested, and actually tried on a large scale in America, is easy divorce". Russell, *Marriage and Morals* (1929), p. 96.

services today still use phrases borrowed from the past.<sup>37</sup>

What are the main legal results of a valid marriage today? It prevents a second marriage in a monogamous jurisdiction, and makes the children legitimate. In Ontario, proceedings for alimony in the High Court and under The Deserted Wives' and Children's Maintenance Act<sup>38</sup> are available to a married woman against her husband, and there are proceedings available to a wife in other provinces. The alimony and maintenance provisions of the Divorce Act apply reciprocally to husbands and wives.<sup>39</sup> Divorce is restricted to those lawfully married. Under separation of property, spouses are treated like strangers in regard to what they own, but the position is different in Quebec and recent amendments to the Civil Code have introduced partnership of acquests as the legal regime for married couples.<sup>40</sup> Intestate succession makes provision for a surviving legal spouse, and some provincial statutes make possible a claim against an estate by a dependant in poor circumstances.<sup>41</sup> If the distinction between legitimate and illegitimate children were removed, the main legal consequences of marriage would be the creation of support obligations *ex lege*, and intestate succession. If a couple without young children are both employed full-time, neither spouse may want the legal results of marriage. Some think that female involvement in motherhood may be reduced by the end of the century and that a movement towards a zero-growth population will mean that more women will seek employment because they will not be rearing children.<sup>42</sup> A legal ceremony and registration is a convenience for the preservation of evidence and the avoidance of disputes, perhaps years later in a succession case. The preservation of evidence is the most obvious legal use of a marriage ceremony followed by registration.

### III. Divorce.<sup>43</sup>

Divorce *a vinculo* applies only to legal marriages. Non-legal cohabitation can also have problems, concerned with children, money, property, but there are no special rules for the winding-up of a

<sup>37</sup> For example, "with this ring I thee wed"; the "wed" was a pledge in Anglo-Saxon law for carrying out an obligation, such as the payment of money or delivery of property. Holdsworth, *History of English Law* (3rd ed., 1923): Vol. 2, pp. 87-90.

<sup>38</sup> R.S.O., 1970, c. 128.

<sup>39</sup> R.S.C., 1970, c. D-8, ss 10-12.

<sup>40</sup> S.Q. 1969, c. 77.

<sup>41</sup> For example, The Dependants' Relief Act. R.S.O., 1970, c. 126 where a legal spouse or a child of a testator can be a "dependant".

<sup>42</sup> Binstock, *Motherhood: An Occupation Facing Decline* (1972), 6, *The Futurist* 99, states that: "Twenty years from now, mothers will be a mere specialty group in the United States. This state of affairs will not result from the women's liberation movement, but from economic factors and technological change."

<sup>43</sup> "El amor es eterno en tanto que dure." Spanish proverb.

non-legal relationship. The view of marriage as a sacrament caused divorce to be regarded as an impiety even for a "guiltless" spouse.<sup>44</sup> The first Canadian modification of unbreakable marriage was a remedy for a wrong, but this position has been partly abandoned in the Divorce Act.<sup>45</sup> The new concept is "marriage breakdown", and legislation in England extends the use of this concept.<sup>46</sup> Under the Canadian statute an immediate divorce is obtainable on certain stated grounds; also divorce is available after three years' separation; and divorce is available to a deserting plaintiff after five years. The waiting times may be intended to promote "patience"; as deterrents; that before another marriage a seemingly period should elapse to make sure that the parties are serious about divorce; to demonstrate that law and society is in control and does not allow people to change relations legally *ex voluntate*. Before the divorce, the parties will be living apart and any children will be in the *de facto* custody of one or other. A spouse may be cohabiting extra-maritally and may have other children, and the divorce judgment does not alter the past.<sup>47</sup>

"Marriage breakdown" was first a lay expression, but it appears in the legislation as a group of concepts, and the judge's task is still the usual one of determining whether the facts fit a defining phrase. The court does not decide whether the marriage has "broken down" in the lay sense of the term, but whether the evidence meets the language of the Act. A report by a social worker is based on investigation by interviews, and this too is different from answering the layman's question: "Has the marriage broken down?" Best qualified to answer the last question are the spouses themselves, and no judge or social worker can rival such personal knowledge. Mr. X and Mrs. X have separated and Mrs. X has *de facto* custody of their three-year old child. Both are willing to appear before a judge to state that their domestic relationship has ended, and that they want the marriage dissolved. Can persons other than the couple validly say that the marriage has not "broken down" according to the layman's meaning? Even if one spouse takes this position, can a third person say that the relationship has not broken down, in layman's terms? In the next few decades, if present trends continue, dissolution of marriage may become a personal decision, with registration to preserve evidence. The real

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<sup>44</sup> The limit was reached in former times by Hindu law in which marriage was eternal.

<sup>45</sup> *Supra*, footnote 39, ss 3-4.

<sup>46</sup> Divorce Reform Act, *supra*, footnote 20, ss 1-2.

<sup>47</sup> On whether there is a causal relationship between divorce law and the incidence of marriage disruption, see Rheinstejn, *Marriage Stability, Divorce, and the Law* (1972), Appendix A. As to different changes in German divorce law, Rheinstejn, *Recent Research on Marriage Stability* (1958), 4 *Revista Juridica de Buenos Aires* 68-70.

problems in divorce are caused by the end of a relationship and the change from one way of life to another. It has been said of the United States that: "Nearly one in three marriages ends in divorce, and some researchers contend that at least 75 per cent of our marriages are ailing."<sup>48</sup> Even if these figures are incorrect, they indicate that sensible regulation of these terminal situations is very important at present and likely to become more so.

#### IV. *Support and Property.*

A couple living together usually earn money and acquire property at different rates and this imbalance may increase, depending on their life-styles.<sup>49</sup> The woman's earning rate is, on the average, substantially below that of the man's.<sup>50</sup> Particularly if she is not in regular full-time employment, an end of cohabitation can produce a serious drop in a woman's standard of living, accentuated if she is custodian of the children, unless she is compensated by support payments (of adequate amount and actually paid), or a gift of property, or transfer into concurrent ownership, or some form of community or compensating transfer. One spouse (usually the woman) may well be in financial difficulties on marriage breakdown without help from the other, from a third party, or from a community or partnership. This may be temporary, or it may continue, if the party concerned cannot obtain suitable employment or become financially independent, for example, in the case of a woman who has been at home or working occasionally part-time.

The present Ontario law on support for children, spouses and ex-spouses is a confusion of causes of action (federal and provincial) and jurisdictions. The Ontario legislation reflects the tradition that a husband must support his wife and children and that a wife does not have a similar obligation, but the Divorce Act has reciprocal provisions on maintenance. But having a cause of action, and obtaining enough money to live on from a judgment against a father or husband, are different. Female heads of families represent twenty-six per cent of those persons (excluding dependants)

<sup>48</sup> O'Neill, *Open Marriage* (1972), p. 16.

<sup>49</sup> From U.S. Labour Department figures, in 1955 the average woman worker in the U.S. earned 64% of male earnings, but by 1970 the ratio had dropped to 59%. Poloma and Garland, *Jobs or Careers? The Case of the Professionally Employed Married Woman, Family Issues of Employed Women in Europe and America* (1971), at p. 126, state that the percentage of women in the professions in the U.S. has declined between 1960 and 1970 and consider that "there is no indication of any immediate widespread career involvement for the married wife and mother. The married woman, even the highly trained professionally employed woman, has little interest in a career".

<sup>50</sup> See, for example, Royal Commission on the Status of Women in Canada (1970), p. 22; Poverty in Canada, *op. cit.*, footnote 13, p. 25, Table 9.

receiving social assistance as of July 1970.<sup>51</sup> "More than one-third of the families consisting of a mother with dependent children in her care have incomes below the 1967 poverty levels. There are about 150,000 mothers who are raising 330,000 young children. . . . Almost one-quarter of the 3.5 million families with children under 18 are below the 1967 poverty levels."<sup>52</sup> The Royal Commission on the Status of Women in Canada reported that according to "1967 data, the average income for all women heads of families was \$2,536, compared with the average income of male heads of families of \$5,821", and the Royal Commission recommended that "a guaranteed annual income be paid by the federal government to the heads of all one-parent families with dependent children"<sup>53</sup>

The Family Law Study recommended to the Ontario Law Reform Commission that the Province should guarantee a reasonable level of financial maintenance for Ontario children (where this is not being provided by a parent or guardian), and the Province should recoup from a parent or guardian liable for the support of the child, so far as he or she has the means to repay.<sup>54</sup> The Study also recommended on the maintenance of a spouse (using a different financial level). The repeal of the existing causes of action was proposed on the introduction of the recommended assessment and payment machinery. It seems logical and fair that a community should guarantee to each of its children enough funds for the child's support and upbringing at a reasonable level, irrespective of the financial capacity (or willingness) of a parent; in other words, reasonable maintenance should be guaranteed by government, with collection back from the parent by government.

Any desire of a just society to provide a decent minimum level of maintenance for each child in it, may have to live in the future alongside arguments for the control of population growth. "The notion that tax and educational policies should be framed to dis-

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<sup>51</sup> Poverty in Canada, *ibid.*, p. 31. The aged, and permanently disabled or ill, accounted for 50%.

<sup>52</sup> Poverty in Canada, *ibid.*, p. 23. Royal Commission on the Status of Women in Canada, *op. cit.*, footnote 50, ch. 6, and particularly p. 312.

<sup>53</sup> *Ibid.*, pp. 320 and 325.

<sup>54</sup> Family Law Study, Vol. 12 (1970), ch. 9. The guaranteed level of maintenance to "provide the child with a good standard of financial support, such as can be of real assistance in minimizing handicaps in his or her circumstances, such as illegitimate birth or separated parents".

In regard to an illegitimate child, the financial principle expressed in The Child Welfare Act is: "The judge shall fix such payments or amount as will enable the child to maintain a reasonable standard of life, having regard to what the child would have enjoyed had the child been born in lawful wedlock, but the judge shall take into consideration the ability of the father to provide such payments or amount and the ability of the mother to assist in the maintenance of the child." *Supra*, footnote 23, s. 59(3).

courage more than two children is attractive to many people but will be of doubtful benefit either to society or family if parental improvidence is taken out on unoffending children. Yet the consequences of improvidence are ultimately inescapable, whatever mitigations the government may propose. No imaginable disposition of the planet's resources can give the 1000 million Americans who could arrive via the three-child family, within a hundred years, conditions as spacious and promising as the standards enjoyed by three-quarters of America's two hundred million inhabitants today."<sup>55</sup>

Matrimonial property is an active field of law reform throughout the world, seeking for regimes that are consistent with the economics of cohabitation and with the end of the legal dependence of married women. Quebec made fundamental changes in its law on this subject in 1969, introducing a legal regime of partnership of acquests in place of community of movables and acquests. This new regime is an interesting construction bearing some resemblance to German and Swedish regimes, but having unique qualities. No doubt it will be some years before its popularity, strengths and weaknesses are fully discovered. The reforms are part of the work of general revision of the Civil Code of Quebec. The Law Commission in England has published a working paper on matrimonial property. This paper concludes with a model of how a matrimonial regime of partnership or sharing could be adapted for English law.<sup>56</sup> The model described is essentially the matrimonial property system recommended earlier by the Family Law Study to the Ontario Law Reform Commission.<sup>57</sup>

The Common Law provinces have separation of property, which arose by default when the Married Women's Property legislation ended the prior system. Although contractual variations and settlements can modify separation, these are not much used in present practice. What is needed, and what the Family Law Study recommended in Ontario, is a system with more meaningful options, so that couples may choose what suits their circumstances. Separation treats the spouses like strangers and ignores the sharing of a common standard of living and the mingling of patrimonies during cohabitation. The Common Law world in general has been neglectful and dilatory in working out "rules of the game" in

<sup>55</sup> Ward and Dubos, *Only One Earth* (1972), p. 120 (Unofficial report prepared for the Secretary-General of the U.N.). At p. 119: "The Natural Fertility Study in 1965 suggested that if unwanted births were eliminated, the nation would be moving significantly towards a stable population. Its large sample survey of parents showed that perhaps 20 percent of all pregnancies were unintended."

<sup>56</sup> The Law Commission, *Published Working Paper No. 42* (1971), p. 24.

<sup>57</sup> Family Law Study, Vol. 3, *op. cit.*, footnote 28 (revised recommendations).

respect of marital property. The main feature of English legal thinking in recent years in this area has been an obsession with the "matrimonial home", a feature without counterpart in other legal systems (save those following English decisions). Legislation containing realistic and fair optional regimes is overdue in the Canadian Common Law provinces and the present medley of case principles, mainly copied from England, have had their day.

### V. *Judicial Process.*

The courts dealing with domestic and juvenile matters present a patchwork of jurisdictions in most provinces, and reflect different sources generated by different levels of society. One source was the interests of families with property, in the development of which the real estate and trust lawyers had an important role. The other main source was close to the Poor Law, or social welfare in modern times. Family litigation represents a great volume of business, and with the exception of criminal law, no other area has such a large interface with the public. Courts dealing with family and juvenile business make difficult and lasting decisions regarding peoples' lives, for example: divorce; alimony or maintenance; custody of a child; Crown Wardship; delinquency; adoption; matrimonial property. So they require well-trained, carefully selected personnel (and not personnel appointed by politicians because of friendship or aid to a party). Also, family and juvenile business has a penetration into lives and relationships not equalled in other non-criminal litigation and requiring special organization and access to ancillary services. These factors have created interest in the idea of a new, high-quality court system, with a jurisdiction over all family and domestic litigation, usually called a "comprehensive family court" system.<sup>58</sup>

There are many predictions of high urban growth in the next two or three decades. Montreal and Toronto may rise to about five million people each with urban satellites around them. It has been said that "the largest concentration of population—metropolises of the size of New York, Tokyo, Moscow, Calcutta, and Buenos Aires—where seven million and more citizens have gathered together, are growing at twice the speed of lesser cities. If we were to extrapolate these trends unchanged to the year 2000 we should find over 80 per cent of the world's developed peoples in urban areas. In the largest conurbations London would cover most of southeast England, Boston reach Washington by way of New York, and Tokyo forming a single megalopolis of 30 million swal-

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<sup>58</sup> See, for example, Institute of Law Research and Reform, University of Alberta, Working Paper, Family Court (1972).

lowing Yokohama and completely surrounding Tokyo bay".<sup>59</sup> These extra people may bring with them in North America the world's greatest per capita density of traffic, pollution, waste, and other problems of high population density in an affluent society. Fears are being expressed, and surely with reason, that explosive urban growth can deteriorate the quality of life and personal relationships, and may create a strong increase in domestic and youth problems, and in delinquency, crime, and criminal organization. In the face of these possible changes, the study and development of first-class courts and services for domestic and juvenile problems should have high priority from any government that is alert to the risks of the future.

#### VI. *Lawyers and Laity.*

Communication between lawyers and laity is a topical theme which has a number of aspects, related to the courts, legal business in the lawyer's office, legislation, and law reform. It is a double-edged problem and includes the lawyer understanding the laity and delivering services, for example, in regard to modern technology and business practice, or giving meaningful service, geared to their problems, to people with little money, or poor education. The traditional intent of courts, in their ceremonies and practice, has been to impress on the laity the need to receive the justice of the state. For this the layman does not have to understand the process or the words with which lawyers protect the magic of their trade. In some types of legal work the client hires the lawyer for a purpose and does not care about the process of gaining it. But in domestic and juvenile matters this is not usually so, because involvement in these can be direct and emotional. It is arguable that, even in family law, the client need not understand but should leave it to the expert, but the communications gap contributes to the fear of the unknown which many people have in regard to the law, especially when added to the ambience of some courts and lawyers' office, many waitings, adjournments, and the like. For example, the effect of the whole system on a woman with young children, little or no money, and a marriage breakdown, passed from one office or court to another, waiting an hour or so in one place or another, for that which she does not understand, can be imagined. Also courts and lawyers tend to operate only when other people are working or at school. In recent years more thought has been given to these matters, and one hopes that in the future family

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<sup>59</sup> Ward and Dubos, *op. cit.*, footnote 55, pp. 87-88. Toffler, *op. cit.*, footnote 19, pp. 22-25. The rise in urban population in Mexico between 1970 and 1980 has been estimated at 16 million people: *El Perfil de México en 1980* (2d ed., 1971), Vol. 2, p. 248.

courts and lawyers will progress further in the direction of bringing efficient, humane, and considerate legal services to those who need them.

Should there be general courses on law and legal institutions in high schools, in colleges, and in the arts departments of universities? In North America, law is almost entirely professional training, but in Great Britain and Europe, for example, law is regarded as a general education, leading to administration, business, teaching, and other activities, as well as to legal practice. There, learning law is not only professional training, but the study of a part of the heritage and institutions of the community. General educational courses in law, if well taught, may increase awareness of legal process, legislation, and law reform, and improve communications between lawyers and laity.

### Conclusion

It would need foolhardiness or prophetic insight to sum up the future of the law on domestic relations. It is enough to state some personal preferences for desirable trends in the present decade. One preference is for more study and development in that difficult branch of law relating to the rights, protection, and maintenance of young children, and the co-relative position of parents, guardians and the public, including removal of the distinction between legitimate and illegitimate children. Another preference would be for a more realistic recognition of the unequal economic "horse power" of spouses in many marriages, and of the financial situation of divorced, separated, and unmarried women having custody of children. A third would be for the progressive reduction of unnecessary interference by the law in the personal relationships of adults—a re-examination of the proper role of the law in this regard, based on common sense and social and economic needs, and not on dogmatic attitudes and the imposition *per se* of the group view on the individual. "There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism."<sup>60</sup>

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<sup>60</sup> J. S. Mill, *On Liberty* (1859), ch. 1.