

FAMILY AND MARRIAGE: **THE ENTANGLEMENT OF LAW AND RELIGION**

In this discussion, we will consider the concepts of ‘the family’ and ‘marriage’ in our society in particular and societies in other countries and examine how these are related to the changing concepts of family and marriage in postmodern times and the legal recognition which is given to the various family forms. The role of family law in defining the new meanings of these traditional concepts is very important. Care must be taken not to put ‘new wine in old wine skin’, and at the same time careful consideration must be accorded the new and growing developments in the global village. Readers are invited and urged to think critically about the content of this brief article and make a determination as to the definitions which most resonate with her/him. Any position taken can be supported with logical, coherent argumentation supported by authorities.

One thing that is evident in this study is that the meaning of family and marriage has changed over time and will continue to change. As a matter of fact, the meaning of family and marriage vary according to the cultural context. “Family forms vary according to the traditions and culture of the particular societies ... Each is a product of a particular culture at a particular time in history” (Wilson, 1985, p. 5).

Defining family in the context of Family Law is critical but it is a difficult challenge. However, it is not an insurmountable challenge. Through critical reading and evaluation of the available sociological and legal materials a reasonable, though not clenching, definition is possible. The role of Family Law in this situation is to identify, regulate and protect the family. However, this can also be seen as a form of state unwarranted intervention in the private and personal lives of its citizens.

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

The Caribbean situation presents a multiplicity of family forms arranging from relations by blood and marriage, to some intimate relationship of commitment and caring. The parties may or may not reside within the same household. The various types of family unions are nuclear, extended, union other than marriage, and visiting unions. This list is not exhaustive. Despite what may appear to be a clear definition of a family, it may still be possible to find an exception to that definition.

Sociologists, such as Smith (1965) have described mating relationship “in the Caribbean as: (a) extra-residential union, (b) consensual cohabitation, and (c) marriage. These conjugal relationships do correspond to a great extent to those prevailing in Barbados. Extra-residential union is a relationship in which a man visits or meets a woman at intervals for sexual intercourse” (Owusu, 1992, p. 57).

Misinterpretations of Caribbean family life are legend. The functionalist anthropologists and sociologists, who dominated kinship studies from the mid 1950’s to the early 1970’s, described as ‘incomplete’, ‘denuded’, and ‘dysfunctional’, (Greenfield 1966, Clarke 1970, Simey 1946) these families which differed from prescribed Parsonian ideal of the stable nuclear family. Conjugal relationships other than marriage were stereotyped as ‘weak’, loose’ (Simey 1946), without the stamp of authenticity’ (Smith 1956) and marred by frequent ‘marital shifting’ (Rodman 1971) (Barrow in Bailey, 1998).

Finding a clenching definition of family is still a sociological challenge:

The word ‘family’ is one which it is difficult, if not impossible to define. In one sense it means all persons related by blood or marriage; in another it means all the members of a household, including parents and children with perhaps other relations, lodgers and even servants (Bromley & Low, 1992, p. 1).

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

Social arrangements which may contain the ingredients of a family may be seen as situations which constitute the relationship of two or more persons who may live together as spouses, a parent living with one or more children, brothers and sister living together or in separate household, a grandmother and children living together. However, this is very broad view and may run against the grain of traditional social constructs. The court in *Gammons v. Ekins* discussing unmarried couples said: "... to say of two people masquerading as these two were as husband and wife, that they were members of the same family, seems to be an abuse of the English Language" (1950, p. 331). This opinion would be frowned upon today.

While the family has remained fundamental to social organization, the present generation has witnessed considerable relaxation of the grip which the marriage institution has held over the family life and its related functions such as sexual activity and childbearing. This is the result of changes in public opinion which have come to place a high value on respect for individual fulfillment and free choice, and tolerance of diversity of styles in personal relationships and concern for the well-being of all parties in society, especially the weak, vulnerable, and the disadvantaged.

The leading case which gives a new definition of family-in-law is *Fitzpatrick v. Sterling Housing Association Ltd* [2000]. This was a decision of the House of Lords wherein their Lordship was called upon to interpret the meaning of 'family' in the Rent Act, 1977.

The case concerned a Mr. Thompson and a Mr. Fitzpatrick, who had lived together in a flat for 18 years until Mr. Thompson died. Under the Rent Act 1977 Mr. Fitzpatrick could succeed to the tenancy of the flat, which had been in Mr. Thompson's name alone, if he was a member of Mr. Thompson's family. So, the core issue was whether a gay or

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

lesbian couple could be a family. By a three to two majority the House of Lords held that Mr. Thompson and Mr. Fitzpatrick were a family (Herring ,2004, p. 5).

A similar decision was reached in *Mendoza v. Ghaidan* [2002]. The court interpreting paragraph 2(2) of Schedule 1 of the Rent Act, 1977, decided that a same-sex couple were living as the tenant's husband or wife and there they were a family within the meaning of the Act (these decisions are the precursor or the foretelling of the storm that is about to break the dam).

Marriage has traditionally provided a legal and institutional framework for family life. In the past, the marital character of the family was closely guarded by stringent moral norms and legal rules which marked certain activities as being exclusively the function of marriage, and so to be discouraged outside of marriage. Hence, we find the former doctrine of illegitimacy denying family rights to those children who are born outside of marriage, and the idea of sexual immorality extending its various ramifications far into the law of contract and property.

The Christian Church considers the social phenomenon of marriage and family to be her sole prerogative ordained by God and administered by the Church (this is a wooden lie). This claim has since been countered by social anthropologists, who contend that marriage is part of the natural order of things. The biology of sex holds that men and women store within them the urge to mate. At a certain stage in the evolutionary process, men and women became conscious and self-conscious of the need to regulate their sexual urges. Why? Perhaps because unrestricted sexual license could not be tolerated in society. So mating urges had to be restricted and controlled; after all we are not animals according to good church doctrine. It was also necessary to settle the matter of inheritance and the perpetuation of society, as well as for social stability. Marriage then emerged to serve

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

these objectives and therefore was not instituted by the Judeo-Christian religion; and as such the church's position is intellectually and unsound and theologically dishonest.

Genesis chapter 15 records the inheritance motive for family in a conversation between Abram and God: "O Lord God, what will you give me for I continue childless, and the heir of my house is Eliezer of Damascus." And Abram said, "You have given me no offspring, and so a slave born in my house is to be my heir." Another interesting conversation is recorded in Chapter 16 as well, this time between Abram and his Wife, Sarai:

You see the Lord has prevented me from bearing children; go into my slave girl; it may be that I shall obtain children by her." And Abram listened to the voice of Sarai. Sarai ... took Hagar the Egyptian her slave girl and gave her to her husband Abram as a wife. He went into Hagar, and she conceived.

It therefore seems, based on scripture and sociology, that the social phenomenon of marriage is to provide children for inheritance, and perhaps a helpmate because "it is not good that man or woman should be alone".

The Christian Church grew up in a world which for the most part accepted monogamous marriage, but this was not always the case because the Hebrews practiced polygamy, allowed by the Mosaic Law. In the post-exilic period polygamy was rare. The polygamous marriages of Jacob, David, and Solomon are not attractive examples. With the ever-changing cultural patterns, the Jewish ideal of marriage became increasingly and clearly monogamous (Hastings, 1973, p.6).

It follows inexorably that Jesus did not institute monogamous marriage; he found it operating in his culture and accepted it as the ideal relationship between man and woman

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

(and soon to become by progressive social development between man and man and woman and woman). This is presupposed in his teachings which were based upon Genesis Chapter two and verse twenty-four: “Therefore shall a man leaves his mother and father and cleaves to his wife, and they become one flesh.” It is upon this teaching that the Church bases her understanding of sacramental marriage (Hastings, 1973, p. 7).

Religiously, sacramental marriage is the union of a man and a woman in matrimony in a religious ceremony (marriage can also be performed in a legal ceremony). However, the majority of West Indian families do not observe these elaborate ceremonies and formalities, hence they are categorized as “living in sin” or unmarried. The union other than marriage or faithful concubinage is the closest approximate to the model we have of Christian marriage of total commitment on a permanent basis. But there are other short-lived unions. The West Indies present a complex pattern of family forms which makes it difficult to classify.

As long as the laws reflect moral hostility to extra-marital relationships, the courts could not consider the rights and obligations which such relationships might invoke. But as moral values change, the merits of disputes arising from such relationships no longer floundered at the bar of moral censoriousness and such rules and principles as were calculated to check deviation from matrimony seem to be giving way to unimpeded application of general principles of the common law – a result of liberty and the sexual revolution of the 1960s, I suppose.

It has been demonstrated by many West Indian Sociologists that most people in the Caribbean do not formally get married. Most couples cohabit; they may or may not have children (Clarke, 1957). Barbados is no exception to this phenomenon. It is the kind of family arrangement which is obtained in the common law of Barbados. An arrangement

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

which has been traditionally frowned upon by the churches, especially those of the fundamentalist type – for good or ill.

Disputes between cohabitantes would ordinarily involve the contractual aspects but in former days the doctrine of sexually immoral contracts prevented any contractual solutions of such disputes. So that in a situation where a man rented a house for his mistress, the Landlord could not sue for his rent because as far as the court was concerned a woman living as a man's mistress was the same thing as prostitution which was legally and morally proscribed. This is a myopic conflation of two different social phenomenon.

Until about 20 years ago extra-marital cohabitation gave the parties no rights over and above those possessed by, say, a brother and a sister living together. ... In *Upfill v. Wright* [1911], the plaintiff let a flat to the defendant who was to his knowledge the mistress of man who intended to visit her there. Holding the plaintiff could not recover the rent, Darling J said: ‘

The flat was let to the defendant for the purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man ...” (p. 510).

A similar decision was reached in 1959 in the case of *Diwell v. Farnes*, a woman who has been living with a man could not make any claim for an interest in the house which was bought by the man with whom she was living because such a contract would have been based on an immoral consideration.

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

However, modern family law has moved a long way from this position and from the moral values it reflected. An excellent example of such a development is the Barbados Family Law Act (1981). This progressive piece of legislation, following the spirit of substantive adjudication, extends beyond sexually based relationships to include other aspects of family life. The Act recognizes relationships in “unions other than marriage”, makes provisions for property rights in the home of the cohabitants and for maintenance similar, if not identical, to those considerations given to married couples. Disputes between unmarried couples or couples in a union are resolved on the basis of their merit, with no reference to illegality or immorality, not even when the parties concerned are still married to others (see the erudite discussion of the Caribbean Court of Justice in *Katrina Smith v. Albert Anthony Peter Smith*, BB Civil Appeal No. 14 of 2010).

The Barbados Family Law Act requires the cohabitants to live together for five consecutive years and that the party should have made a substantial contribution to the domestic and economic functions of the family. Section 50(1) provides that a party to a union other than marriage is liable to maintain the other to the extent of his ability to do so. Section 51 also makes provisions for the parties of a union other than marriage, to maintain all children of that union who are under the age of 18 years. So, the legal position of persons in union other than marriage may virtually be the same as those who are married. So, who needs marriage?

So, it would seem then that all the formalities, legal, and moral restrictions which were previously obtained in family relationships have been modified and/or sidelined. However, the statute has made a distinction between marriage and union other than marriage. But what purpose is served by this distinction? The distinction seems to be anomalous since any dispute in either situation the parties will have more or less the same legal rights. This seems to be a distinction without, or with little difference.

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

SAME-SEX FAMILY IN FAMILY LAW

Traditionally, same-sex couples have been specifically excluded from family law protection. They have no family law rights and are, for example, unable to marry. A fact which seemingly does not breach ECHR, Article 12. However, they can now claim to be a member of their partner's family for the purposes of succeeding to a statutory tenancy as decided in *Fitzpatrick v. Sterling Housing Authority* (1999) Here, the House of Lords reached the conclusion that while same sex partners were members of the 'family' they could not be considered be 'living as husband and wife'. However, Ward LJ in a dissenting judgment in the Court of Appeal takes a progressive view on how the law should define the family in its contemporary context, and in contrast to the majority of the Court of Appeal reached the conclusion that Mr. Fitzpatrick was both a member of his deceased partner's family and had been living with him in same-sex union 'as husband and wife.' The dam has since burst its bank in almost all jurisdictions much to the moral chagrin of the church (a discussion for another article).

MARRIED AND UNMARRIED FAMILIES IN FAMILY LAW

In Barbados the nuclear family is the ideal founded upon monogamous marriage, a voluntary union – potentially for life – between a man and a woman. Yet whilst the law no longer just ignores unmarried family relationships, no universal, all-embracing definition of the family is to be found. In *Sefton Holding Ltd v. Cairn* (1988) the difficulty was resolved in this way:

[I]n no case has the court found it possible to identify the necessary ingredient or quality that distinguishes a familial nexus from a nexus less than familial. The approach of the courts has been to look at the circumstances and then seek to answer the question: What would an ordinary person characterize the family as?

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

Whereas much of the legal discrimination against children of unmarried parents has been removed by the Status of Children Reform Act, 1980 (Barbados), with parenting itself conferring family law status, adult unmarried relationships are not treated coherently. In some circumstances, Family Law still concentrates on the family as defined by relationships of blood and marriage.

Increasingly, it has had also to focus on relationships - both intimate and economic – within a household, where the protection afforded the married is extended in whole or in part to the unmarried. However, it tends to measure other family structures by the ideal of the married family. The first statutory description of unmarried heterosexual cohabitation is stated s. 39(b) (Family Law Act of Barbados) as a ‘union other than marriage’ or ‘union’ means a relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously for a period of 5 years or more ...’ Thereby unjustifiably excluding same-sex cohabitation relationships (a discussion for another article).

So, based on the foregoing discussion, the last 20 or 30 years have seen a revolution in the law’s treatment of family. There is a next step for Barbados, but does it have the courage to do the unthinkable?

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

REFERENCES

Bailey, W. (ed.) (1998). *Gender and the Family in the Caribbean*. Institute of Social and Economic Research. University of the West Indies, Mona, Jamaica.

Bromley, P. M. & Lowe, N. V. (1992). *Bromley's Family Law*. Butterworths & Co. (Publishing) Co.

Clarke, E. (1957, 1999). *My Mother Who Fathered Me: A Study of Families in Three Selected Communities of Jamaica*. The Press University of the West Indies.

Hastings, A. (ed) (1979). *Christian Marriage in Africa*. The Secretary General of Anglican Consultative Council.

National Council of Churches in Christ. (1989). *New Revised Standard Version Bible*. Oxford University Press

Owusu, S. (1992). *Union Other than Marriage Under the Barbados Family Law Act, 1981*. Anglo-American Law Review.

Smith, M. G. (1965). *Plural Society in the West Indies*. Berkley University of California Press.

Statute

Barbados Family Law Act, 1981, Cap. 214

Cases

Diwell v. Farnes [1959] 2 All ER 379, at 384 (per Ormerod LJ).

Fitzpatrick v. Sterling Housing Association [2000] 1 FCR 21 HL.

Gammon v. Ekins [1950] 2 KB 328, at 331 CA.

Mendoza v. Ghaidan [2002] 3 FCR 591 CA.

Upfill v. Wright [1911] 1 KB 506, at 510.

Katrina Smith v. Albert Anthony Peter Smith, BB Civil Appeal No. 14 of 2010.

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.

ONESIMUS LEGAL SERVICES

Onesimus Legal Services

This information does not, and is not intended to constitute legal advice. Instead, all information, content and materials are for general informational purposes only.