

by Nena Fay Hicks

**‘The Changing Family – Family Forms and Family Law’**

**edited by John Eekelaar and Thandababtu Nhlapo,**

**Hart Publishing, 1998.**

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This book has immediate appeal for anyone interested in Family Law in the South Pacific region, not because it deals with the region (it doesn't), but because it examines many of the issues pertinent to Family Law here. It contains some fine examples of socio-legal scholarship, historical analysis and comparative legal research and the quality of the contributions makes the typographical errors in the text bearable.

Emerging from the Ninth World Conference of the International Society of Family Law held in Durban, South Africa, the book examines the theme of ‘Changing Family Forms: African Themes and World Issues’ and draws on experience from diverse jurisdictions. For example, Part III, which deals with ‘The State and Legal Pluralism’, contains ten articles drawn from African, European and Asian contexts.

The relevance of this book for the USP region comes, not only from its largely developing world context, but from its general approach to law and legal research. For example, legal pluralism, human rights, customary law, constitutional law, ideological changes and law reforms are discussed, predominantly but not exclusively, from within a post-colonial context. The issues, reflected in such titles as - "Why I can't teach Customary Law" (Stewart), "Family Law in Namibia: the Challenge of Customary and Constitutional law" (Hinz) and "African Customary Family law in South Africa: A Legacy of Many Pasts" (De Koker) - will resonate with those of us grappling with laws and legal systems affecting South Pacific communities today.

A brief description of the six parts will further demonstrate the relevance of this book. In Part I – ‘The Changing Face of Family Law in the Context of Social and Ideological Change’ - Andrew Bainham provides a good summary of the changes which have occurred in the Family Law landscape in England. He demonstrates that Family Law, which cannot rely on the traditional coercive powers of other laws, seeks to influence family life at the conceptual level. His examples, such as the legitimate/illegitimate distinction, make for a thought provoking and challenging look at law reform, however we may wish to conceive of the link between societal change and law reform.

Anders Agell also examines this theme in the Swedish context. Other chapters of particular interest for those interested in the South Pacific region are by Oluwatoyin Ipaye who looks at the changing pattern of family structure in Nigeria and M.O.Hinz who looks at the family law as challenged by customary and constitutional law in Namibia.

Part II is titled, 'The Dynamics of Legal Assimilation of Changes in Social Norms'. It deals with the administration of the law in response to changes in social norms and structures.

In his chapter on the proposed abolition of de facto unions in Tanzania, Rwezaura explains how some judges have used the legislation to deal with "complex issues of legal pluralism and social change" (176). This chapter is of particular interest as it describes a jurisdiction where "marriage" takes several forms: marriage according to colonial English laws, marriage according to the traditional African model (involving the union of two families) and de facto unions. These forms, as well as Hindu and Islamic systems of family law, are also noted by Kabeberi-Macharia and Nyamu in their chapter on de facto unions in Kenya.

Both these chapters look at the law related to de facto relationships and the administration of that law. The former chapter is particularly interesting for its comments on the recognition of customary marriages by the courts. What is discussed is that relationships recognised by the State affect all kinds of rights, such as property interests and inheritance rights. In a different context, the issue of equality and inequality within Australian families, whether the parties are married or not, is discussed by Bailey-Harris.

It is instructive, and reassuring, to consider the degree to which similar problems arise in such different contexts. The comparative approach implicit in these contributions provides us with some possible solutions or approaches for our local regions, as well as providing support for different family forms in our own pluralist societies.

In her chapter titled 'Why I Can't Teach Customary Law', Stewart makes the point that, historically, law curricula in the Southern African region has incorporated African customary law as it appears within the formal legal system, i.e. within statutes or as discussed in cases. Her preferred approach is to view customary law as a "dynamic living system" which "should be approached as a system of cohesive laws with underlying guiding principles that need to be identified, recognised as a source of jurisprudence and their content sensitively explored" (217). Stewart goes on to discuss the critical skills that are required by such an approach.

Another perspective on this issue can be found in the article by Koker in Part III titled 'African Customary Family Law in South Africa: A Legacy of Many Pasts'. Koker concludes that there is an invented system of African customary law which discriminates against women. Certainly Ranger ('The Invention of Tradition on Colonial Africa' in E. Hobsbawn and T. Ranger (eds), 1983, *The Invention of Tradition*, Cambridge University Press, 211-262) supports the notion of 'invented' law although whether the result can be seen as an invention or a mutation is debatable. Whatever the process, it seems that the status of women in law remains inferior to that of men.

Other topics discussed in Part II include; reducing discretion in family law in Australia and the United Kingdom (Dewar); and changing perceptions of family forms in Germany and Tanzania (Jones-Pauly). The issue of judicial discretion remains an important theme throughout the book.

The theme of pluralism and the state is specifically developed in Part III which begins with an important chapter by Freeman titled 'Cultural Pluralism and the Rights of the Child'. This persuasive defense of the concept of pluralism foreshadows chapters on family law in New Zealand (Atkin & Austin), South Africa (De Koker, Zaal, Sloth-Nielsen & Van Heerden, Goolam, Steyn), USA (Wardle, Katz) and Scandinavia (Lund-Andersen).

Using a number of child abuse cases as illustration, Freeman argues that pluralism is the *only* framework to be used. The other choices are either cultural relativism or monism, both of which are undesirable in a multicultural society.

This is not to suggest that solutions are easily found by employing this approach, as discussed by Atkin and Austin in access and custody cases. Where there are different cultural or religious backgrounds, or where parents and grandparents disagree on the best interests of the child, the criteria which must be balanced will never produce an instant solution incapable of being criticised. The incoherence within family law, the authors suggest, is due to its nature and its structures and rules which frustrate efforts to pursue policy. Wide discretion in individual cases and supposedly neutral principles are preferred. This framework, they argue, frustrates attempts at an analysis of the aims and purposes of family law and deals awkwardly with external policies or agendas. They illustrate their argument by referring to policies of domestic law vis-à-vis international human right conventions and indigenous people's claims.

The brief discussion of the ideological challenge of Maori customary law to the supposed neutrality of New Zealand family law in the Atkin and Austin chapter is followed by a discussion of African customary law. In this chapter, Koker looks at the debate about the compatibility of African customary law and human rights principles. She provides an historical perspective to lend weight to her argument that the 'invented' tradition of African customary law, prevalent in Africa today, continues to discriminate against women and will remain the legacy of the past unless that legacy is rejected outright. This again illustrates the struggle involved in seeking to influence family law at the conceptual level.

Whilst the articles by Zaal on South African child care proceedings and by Sloth-Neilson & Van Heerden are of general interest, Chapter 22 deserves special mention. In South Pacific jurisdictions the best interests of the child are of paramount concern in determining child custody disputes. There is, however, no legislative guidance as to what constitutes the best interests of a child in any particular matter, although the courts refer to the United Nations Convention on the Rights of the Child. This is also the case in South Africa but in *McCall v McCall* (1994 (3) SA 201 (C)) at 205 the Court listed a detailed set of criteria to assist in determining such matters. The criteria reflects an individualistic approach with which we are all familiar, despite Goolam's contention that African society stresses the importance of the group and the extended family. Goolam also considers the approach of Islamic law to direct our attention from 'very eurocentric' perspectives. It would be useful for those interested in the South Pacific to compare this chapter with the article by Brown, K. entitled "Customary Rules and the Welfare Principle: Post-Independence Custody Cases in Solomon Islands and Vanuatu" (in Corrin Care, J. (Ed)(1997), 21 *The Journal of Pacific Studies*).

The article by Steyn on rights for gay families, and gay rights generally, in South Africa will be of particular interest to Fiji Human Rights and Family Law lawyers given recent Constitutional reforms in that country, as well as the current furore about gay rights in that country. Constitutionalising family law is, however, dealt with specifically in Part IV. For a comparison between constitutional rights in South Africa and the United States, the chapter by Woodhouse is significant and constitutional rights are further discussed by Robinson, Ncube and Sinclair.

The Convention on the Elimination of all Forms of Discrimination against Women is dealt with by Banda in the African context. This is of relevance to the South Pacific region where the Convention continues to be debated. Women in Tuvalu, for example, have been pushing for recognition of the Convention since 1998, even though Tuvalu is not recognised as a separate state by the United Nations.

In Family Law we are always asking 'what is the nature of the family'? This is the central problem contemplated in Part V of the book which comprises six chapters dealing with changes to family structures, artificial reproduction technology and the family, adoption law, nuclear families and social parenthood. The article by Eekelaar and Maclean in particular demonstrates the worth of a sociological approach to family law in that it provides data on the importance of social parenthood. Their research, and more importantly their approach to perceptions of family, can pave the way for more effective policy decisions.

Legal pluralism underlies much of the work in this book and the only mention of its critics comes from Freeman, himself a supporter of the pluralist approach. In his concluding article, which makes up Part VI of the book, Nhlapo lends support for the concept and for the balancing exercise involved in a pluralist approach to legal problems. He argues that the preference for this approach, as outlined by Justice Albie Sachs in the Introduction, will allow for a more flexible approach to conflicts than the familiar technique of an absolute ranking of rights. This approach suggests that the positions of protagonists on different sides may also alter over time. For example, Nhlapo states at page 625 that:

*"In the constitutional era the focus should be on how communities may free themselves from rules which work for the benefit of some, but not all, the members. This may involve a head-on collision with patriarchy, but it is also true that a breakthrough here would do much to reclaim customary law from the scrapheap to which it is relegated by those who believe it has no capacity to accommodate modern rights and entitlements."*

All in all, this is a very useful book with much to interest Family Law academics and practitioners. References listed at the end of each chapter would have improved ease of access to current literature but the content is generally excellent. Although it lacks input from this region, the book does provide a legal pluralist approach worthy of serious consideration in the South Pacific. It should also give impetus to socio-legal research here.

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