

# Book Review: Law for Pacific Women - A Legal Rights Handbook

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**Title: Law for Pacific Women - A Legal Rights Handbook**

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Upon arrival at the University of the South Pacific to teach Family Law in 1996, I found very few relevant secondary sources and had difficulty in tracking down the primary sources required for the development of the course. I was, however, fortunate to receive from Imrana Jalal a draft copy of her book, *Law for Pacific Women - A Legal Rights Handbook*, since published in 1998 by the Fiji Women's Rights Movement in Suva, Fiji. This book contains a great deal of information and commentary, much of which an individual researcher would have difficulty in unearthing.

The chapter headings provide a good indication of the scope of the book - it begins with *The Law and Women's Lives* and ends with *Strategies for Change*. Other chapters deal with areas which we would categorise as Family Law - marriage, separation, divorce, custody and guardianship of children, access, maintenance, matrimonial property, de facto relationships and affiliation proceedings. Women and the criminal law system is dealt with in Chapters 4 to 6 whilst Chapter Two is headed *Constitutional Status, Citizenship and Customary law* and Chapter Three deals with *Land Rights*. The topic of *Women and Work* is dealt with in Chapter 13 and *Women Lawyers and Legal Aid for Women* is discussed in Chapter 14.

The fifteen chapters are referenced by notes collected at the end of the book. Although this is not the most convenient location for those of us who are concerned with citations and explanations, the content illustrates the extent to which Ms Jalal has been able to collect the inputs of many individuals working within the legal systems of nine jurisdictions (all member states of the University of the South Pacific) in the region. As such, this book represents an important collection of authorities and information in the region. It follows the previous valuable contribution of Mere Pulea in her book *"The Family, Law and Population in the Pacific Islands"*, published in 1986 by the University of the South Pacific.

The information is presented in *Law for Pacific Women* as simply as possible with an attempt to explain legal concepts and ideas in non-technical language. There is a comprehensive glossary, bibliography, index and case list. Diagrams, cartoons, comparative tables and the use of different type settings for emphasis or case descriptions add to the readability of the book.

Although this is not an academic text and is not aimed at an academic audience, many will find it a useful point of reference for case examples and some legislative provisions. Its main objective, however, is to politicise the position of women in the Pacific. Ms Jalal's work is driven by her *"anger at the injustice that is caused to women in the Pacific, because they are women"* (Preface ix) and in her introductory chapter she argues that "Pacific Island feminism" will pave the way for equality for women in the region. She argues for one feminist theory, based on individual rather than collective rights, which can embrace the diversity and complexity of cultures in the region.

Ms Jalal uses the material she has researched to show that women are often severely disadvantaged and oppressed by the formal legal system and by custom law. The issues of maintenance, guardianship and custody of children are also discussed and the unpalatable concept of ownership of women and children is mentioned. A description of the legal status of children drawn into matrimonial causes disputes shows how lack of local research, different judicial approaches and different legislative provisions have led to varied and confusing approaches within the region. This review of Ms Jalal's book has narrowed its focus to a discussion of children's rights in the context of matrimonial disputes.

The interests of children in custody disputes and children's rights are treated inconsistently in the region and in particular the concept of "ownership" of children needs to be challenged. For example, in *Subhaigam v Rakoso and Permallamma*, Unreported, Court of Appeal, Fiji, 1/1987, part of which is reproduced at the beginning of Chapter 9, the Fiji High Court states that custody may be crudely described as "title to a child" in much the same way as title to a house property is held by a proprietor. The case is mentioned again on page 287 with the comment that:

*The idea of ownership has been very strong in modern parents..... The idea that children are the property of their parents is linked to the idea that wives are the property of their husbands.*

However, it needs to be pointed out that this area of the law is undergoing some changes. Readers might have benefited from knowing that Fiji, Kiribati, Nauru, Tonga, Tuvalu, Vanuatu and Samoa are parties to the *United Nations Convention on the Rights of the Child* which emphasises the rights of children and the responsibilities of parents. The Convention is mentioned only briefly at the end of Chapter 9 but its provisions are important in countering the concept of child **ownership**. For example, Article 18 (1) states that:

*State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern*

Other cases in the region also demonstrate a shift away from the rights of parents to the rights of children and might have been included in the discussion. For example, in the Solomon Islands case of *Helen Choi v Choi Myung O*, Unreported, High Court, Solomon Islands, CC249/90, Mr Justice Palmer, when considering an application for custody said, at page 4, that:

*The primary concern naturally is that the interests of the children are considered and placed above those of the parents or parties in this case.*

Although His Honour indicated that the child belonged to the parties (page 4) he did stress, at page 6, that:

*Ultimately, the responsibility lies with the parties. They brought this child into the world. They therefore should have the character, the love, and the strength to make decisions, and sacrifices for the good of this child.*

Some legislation in the region states that the welfare of the child is of paramount importance in determining custody issues although approaches within the region are not uniform. For example, as Ms Jalal's book notes in Table 9.3 the relevant legislation concerning custody in Tuvalu is the *Custody of Children Act (Cap20)*. Section 3 (3) states that :

*In exercising jurisdiction under this section the court shall regard the welfare of the child as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father.*

It is interesting to note that the *Matrimonial Proceedings Act (Cap 21) (Tuvalu)* in Part IV which is headed "Related Matters" states that:

*In any matrimonial proceedings concerning a marriage of which there are children .....the welfare of the children is of paramount importance, at least equal to that of the parties to the marriage.*

Courts in the region (and particularly within the same jurisdiction) must maintain a consistent approach in determining cases involving the custody and guardianship of children. If the interests of the children in a custody dispute are paramount, the court will have regard to the emotional, physical and educational well being of the child. This is not the same as trying to "*decide which parent the child loves best and feels most comfortable with*" (Jalal:305) or adopting some other test. Adherence to the paramount interest principle would clear up many of the ambiguities relating to the "tender age doctrine" (which suggests that mothers are the most appropriate caregivers of young children) and remove any preoccupation with the behaviour or moral standards of the parties unrelated to the welfare of the child. This means however that the focus must be on the rights of children. For example, access should be seen as the **right of a child** to see the non-custodial parent rather than concluding from case law that:

*The lesson for women is that if they have custody they must give trouble-free access to the father or risk losing custody* (Jalal:16).

Given the lack of comparative research in the region, the reliance by Ms Jalal on foreign material is understandable. Some of this material has limited relevance however, especially the decisions of courts in countries which now have a completely different legislative framework for approaching divorce and other family law matters. The regimes in the Pacific which are described in the book have a fault or partial fault based system of divorce where the courts are obliged by legislation to investigate the behaviour of the parties. Custody is an ancillary matter and it may be difficult, although assuredly it is bad law, to prevent a finding of say, adultery, from influencing custody proceedings in such a regime. Until this legislation is changed, the stigma associated with a "matrimonial fault" such as adultery may override the "best interests of the child" when the issue of custody is being determined. In Tuvalu, for example, the Resident Magistrate apparently has a policy of denying custody to any "parent" who has committed adultery (Jalal:p315). Discrimination against women is only part of the story as all parties may be disadvantaged by such a policy.

Aside from the issues of feminism in the Pacific and the rights of women and children, the book is critical of the formal legal system and custom law in the Pacific. Ms Jalal criticises custom law which may deny representation to women such as in Kiribati where "*custody always goes to the father, and mothers are often denied access*" (Jalal:318) On the other hand the formal legal system is said to encourage "fighting over ownership" of children. The author goes on to say that "*it is very sad that Pacific people rejected the Pacific Way and adopted some of the worst aspects of colonial law as far as children are concerned*" (Jalal:338). Yet one is left without a description or definition of the "Pacific Way". If the "Pacific Way" means custom law then it would seem, according to the material presented, that custom and custom law have not been abandoned by many people in the Pacific.

The legal systems outlined in the book often reflect "*poorly drafted legislation, poorly trained magistrates, ineffective procedures and poor allocation of resources to the courts*" (Jalal:324). While this criticism may be justified, the efforts of a large number of dedicated and hard working officers should not be undervalued. Most would welcome practical reforms, the need for which has been highlighted in the book, or a framework for lessening the tensions sometimes occurring between the formal legal system and custom law .

Ms Jalal's book provides its readers with much valuable information in an accessible form. It also raises many issues, including that of the legal status of children, which require further research and discussion. These aspects of the work will and should motivate all those with a stake in the legal systems of the Pacific to take up the challenge of research, enquiry and reform and to strive for better legal systems for everyone.