

FAMILY LAW, SEX AND SOCIETY

A COMPARATIVE STUDY OF FAMILY LAW

PETER DE CRUZ



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Preface

This book is a comparative and historical study of the development of family law in a range of jurisdictions, and examines the common themes which emerge from their responses to the central questions in family law, namely, their approach to the 'family', matrimonial property, divorce and the legal position of children in these jurisdictions, usually in the context of post-divorce arrangements.

This highly selective study looks at certain common law and civil law jurisdictions, which is typical of comparativist ventures, and also includes jurisdictions such as Japan, Russia and South Africa, which is not. This book may be regarded as the first phase in an ongoing research enterprise. The first stage, which forms the content of this book, attempts to present a brief conspectus of the family law in these regions, informed, as far as possible, by a brief look at their history, sources of law, legal style, distinctive or characteristic institutions and a brief overview of the ways in which they have dealt with common problems related to family law. The objective is to identify common themes and common responses and also to seek to discover, at least in some measure, how and why the particular jurisdiction has reached its current stage of development in its family law. The second stage will attempt to explore the socio-legal environment of these jurisdictions in greater detail and the final stage will delve more deeply into non-Western jurisdictions whose particular development merits individual attention by exploring broader questions such as the impact of culture, religion and the political backdrop within which the family law in these regions has evolved. Of course, all three of these stages are examined to some extent in this book but an analysis of all the developments that have taken place in all these jurisdictions would require a book at least twice the size of this one. At this stage, this book simply hopes to stimulate interest in comparative study in family law and to lay down a marker on how such study might be undertaken.

Consequently, the book does not claim to offer definitive findings but seeks to paint a broad canvas on which an historical, cultural and legal landscape can be configured. It offers some pointers as to how communities divided by oceans, language and culture have responded to similar or common problems and how similar challenges and sometimes solutions have arisen and been selected across the world. It also considers, albeit briefly, the viability of legal transplants in family

law, a subject which has exercised comparatists for many years and will doubtless continue to do so.

No doubt the jurisdictions selected, the features highlighted and the conclusions drawn are open to debate. There are certainly other topics which I would have liked to include such as adoption, child abduction and child support. Throughout the book, comparative observations will be made, usually at the end of a chapter or a section. The final chapter seeks to bring together the various common themes which have arisen through the study and reviews the last few decades of family law in a range of jurisdictions.

Part I is an *Introductory Overview* of the basic elements in our study, examining terminological questions, then tracing the development of marriage, sex and the evolution of the Western family, divorce, the property aspects of family law and the relevance that fault still plays in various aspects of family law. It also considers the convergence/divergence debate and discusses the various methodological approaches to our present comparative enterprise.

Part II contains the *Jurisdictional Survey*. It commences with *Chapter One*, dealing with family law in Europe, which is an historical and contemporary survey of divorce and its consequences in terms of property distribution, marital property and the legal approach to children. The chapter focuses on the common law jurisdiction of England in comparison with two examples of civil law countries, France and Germany.

Chapter Two examines family law in the United States, briefly tracing the evolution of the family, divorce, property distribution and the American legal approach to children in the context of relationship breakdown. It also considers child protection in the United States.

Chapter Three deals with aspects of family law in Australia and New Zealand which are Western jurisdictions situated in non-Western localities.

Chapter Four considers family law in countries in non-Western post-colonial regions.

Africa, and South Africa in particular, is a mixture of legal systems and various foreign influences. India, Hong Kong and Singapore may be classified as common law countries as they have a strong British heritage, with case law as their main source of law, supplemented by statutes. All continue to recognise customary law from time to time.

Chapter Five examines the development of family law in the Russian Federation, which was predominantly a civil law country before it adopted a socialist system. It is closest to a civil law system with traces of its socialist history in its style of legislation.

Chapter Six explores the historical development of family law in Japan, which is also selected because of its unique mixed heritage.

Part III is a comparative study of *Cohabitation, Informal Unions and Civil Partnerships*, and includes same-sex and opposite sex unions and civil partnerships in both common law and civil law jurisdictions.

Part IV presents a comparative conspectus of *Domestic Violence* in various common law and civil law jurisdictions.

Part V is a study of the *Impact of Human Rights Law on Family Law*. The main focus is on European family law and the European Convention on Human Rights.

Part VI reviews the *Common Themes and Key Debates*, past and present, in the family law of various jurisdictions and seeks to evaluate and develop some of the ideas and issues raised in the preceding chapters.

This book has been a long time in gestation and I would like to acknowledge the assistance of Newcastle University Law Library and various law librarians who were kind enough to allow me access to materials over many years, Joanne Beswick (Staffordshire University Law School) for her help in procuring online materials, and Anne Sanders (formerly English Law Commission) for supplying me with information on recent changes in German maintenance law. I also wish to thank Jo Reddy and Sonny Leong who were the original supporters of this book and who constantly offered encouragement over the years when they were at the forefront of commissioning new works from relatively unknown authors. Thanks are also due to the staff at Routledge, for being so patient with the submission of the book, especially Lloyd Langman. I would also like to thank Frank Murphy for permission to use two lines from his poem, and for his intellectual stimulation, insights and moral support over many years. As usual, all errors and inaccuracies remain the writer's sole responsibility.

Finally, I would like to dedicate this book to my wife, Lois, for her constant love and support over three decades, and to my late parents, who first sparked my interest in comparative study, and who would have been amazed at the speed and scope of the developments in family law over the past few decades.

Peter de Cruz
Liverpool John Moores University
August 2009

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Part I

Introductory overview
