

DISCUSSION PAPER

THE EVOLUTION OF MARRIAGE AND RELATIONSHIP RECOGNITION IN WESTERN JURISDICTIONS



No. 25, October 2018

NICOLA BARKER

PROGRESS OF THE WORLD'S WOMEN 2018

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PREFACE

Marriage as both a legal and social institution has long been the subject of critique for its role in the oppression of women. However, the institution has undergone significant change in western jurisdictions, particularly in the last few decades, which have seen (among others) divorce reform, the rise of prenuptial agreements and the legal recognition of same-sex relationships. These—coupled with social changes in attitudes towards gendered roles within marriage—have arguably resulted in an evolution of the institution.

In this paper, I explore the extent to which the legal institution of marriage in western jurisdictions has changed to reflect greater gender equality. I draw on a number of key illustrative examples: the gendered division of labour; division of assets on divorce; the introduction of same-sex marriage; and some examples from the

expanding ‘menu’ of relationship recognition. While significant advances have been made, particularly in terms of formal legal equality, I argue that the evidence suggests that there are still important respects in which gender equality is lacking in contemporary marriage in the West.

The aim of this paper is to give a broad overview of marriage and relationship recognition, and the examples are necessarily jurisdictionally limited and not intended to be reflective of the legal position across all western jurisdictions. I have sought to provide examples from both common law and civil law jurisdictions, though the more in-depth case studies come primarily from the former.

RÉSUMÉ

Le mariage, en tant qu’institution juridique et sociale, a longtemps été considéré comme un facteur déterminant de l’oppression des femmes. Cette institution a pourtant connu des mutations importantes dans les juridictions occidentales, notamment au cours de ces deux dernières décennies, lesquelles ont été marquées par la réforme du divorce, l’émergence des accords pré-nuptiaux et la reconnaissance juridique des relations entre personnes de même sexe. Conjointement à l’évolution de la perception sociétale des rôles genrés au sein du mariage, ces mutations ont incontestablement permis à l’institution du mariage d’évoluer.

Je m’emploie, dans ce document, à examiner dans quelle mesure l’institution juridique du mariage au sein des juridictions occidentales a évolué et reflète actuellement une plus grande égalité des genres. Je m’appuie, pour ce faire, sur de nombreux exemples clefs : la répartition des tâches en fonction du genre ;

la répartition des biens au moment du divorce ; l’introduction du mariage homosexuel ; ainsi que certains exemples en lien avec la reconnaissance juridique des relations entre les personnes. Bien que des avancées notables aient été enregistrées, notamment en termes d’égalité juridique formelle, je tente de démontrer qu’à de nombreux égards, le mariage en Occident ne remplit pas toutes les conditions en termes d’égalité de genre.

L’objectif de cette analyse est de donner un large aperçu du mariage et de la reconnaissance juridique des relations. Les exemples cités sont forcément limités au niveau juridictionnel et n’ont pas vocation à refléter les positions juridiques de toutes les juridictions occidentales. J’ai cherché à apporter des exemples tirés des juridictions relevant du droit commun et de droit civil bien que les études de cas les plus approfondies proviennent principalement de la première juridiction.

RESUMEN

El matrimonio, como institución legal y social, recibe críticas desde hace mucho tiempo por contribuir a la opresión de las mujeres. Sin embargo, la institución ha atravesado transformaciones significativas en jurisdicciones de Occidente, en particular en las últimas décadas. Algunas de ellas son la reforma del divorcio, el aumento de los acuerdos prematrimoniales y el reconocimiento legal de las relaciones entre personas del mismo sexo. Estas transformaciones, sumadas a los cambios sociales en la actitud hacia los roles de género dentro del matrimonio, han generado sin duda una evolución de la institución.

En este artículo, analizaré hasta qué punto ha cambiado la institución legal del matrimonio en los países de Occidente para reflejar una mayor igualdad de género. Me baso en varios ejemplos ilustrativos clave, como la división del trabajo por razón de género, la división de

bienes en caso de divorcio, la introducción del matrimonio entre personas del mismo sexo y algunos ejemplos del «menú» cada vez más variado de relaciones reconocidas. Si bien se han hecho avances significativos, en especial en términos de igualdad jurídica formal, las pruebas indican que aún existen desigualdades de género en algunos aspectos importantes del matrimonio contemporáneo en los países de Occidente.

El objetivo de este artículo es ofrecer un panorama general del matrimonio y el reconocimiento de las relaciones. Los ejemplos brindados se limitan necesariamente a las jurisdicciones y no pretenden reflejar la situación jurídica de todos los países de Occidente. He procurado ofrecer ejemplos de los países que adoptan tanto el *Common Law* como el Derecho Civil, aunque los estudios de caso más detallados provienen, sobre todo, de aquellos que se rigen por el sistema de *Common Law*.

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