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Beyond Marriage

## Introduction

The theory by Henry Maine in his *Ancient Law* (1861) of the historical move from status to contract may well be accurate when looking only at the formal shape of family and marriage regulation. In the Western countries, coercive rules have been reduced to the minimum and the spouses have large discretionary powers regarding their relationship and vis-à-vis third parties. However, the religious underpinnings of modern freedom have not vanished but appear to influence and complicate legal policies over and over again. Currently, the debates and suggestions on neutral marriage regulations securing equal rights for everyone are seriously hampered in Finland by widespread reliance on Christian heritage and argument. It is argued in this paper that the discretionary elements are only added as a thin layer onto the teleological, religious understanding of marriage without completely replacing it. Traditional marriage and contract marriage are not two separate phenomena, but even the current liberal norms carry on a very old history as their deep layer (Pylkkänen 2010). Rather than talking about moving from status to contract we should talk about the continuous tensions between them.

Drawing on a historical and comparative analysis of marriage and household regulation, this paper argues that it is time to question marital regulation in its entirety. Norms regarding equality, non-discrimination and the protection of weaker parties demand that rights and obligations must not be dependent on any person-related characteristics such as gender or sexuality. So far, family has been treated as a special case regarding the principles of equality and non-discrimination, but how grounded can such an omission actually be?

Instead of merely discussing the possibility of sex-neutral marriage, one should consider a move towards a new legal design which focuses on the regulation of joint households, irrespective of who the household members are. Laws should be completely neutral when it comes to pair relationships, which should belong to the protected privacy of individuals (unless it is a question of protecting sexual and bodily integrity). While intimacy should be a private matter, responsibilities for children, carers and other close people must be highlighted much more than has been the case so far (Fineman 2009). Marriage is often claimed to be the best way to secure these very things, but judging by the instability of marriage, poverty figures of one-parent families and other welfare indicators, it does not seem to fulfil the expectations of fairness and protection of the weaker parties as it should.

Unlike arguments promoting traditional marriage, it is argued that many contemporary problems arise because of the very construction of marriage, not because it is fading. Seeing marriage predominantly as a sexual relation and expecting both the good and the just to emanate from heterosexuality is a serious obstacle of seeing the real needs for the good and the just. In marriage, intimacy is exchanged with material resources, and sexual difference and hierarchy are upheld by the tight intertwinement of heterosexuality, property, and care. In such a construction, care is

always underrated vis-à-vis sexuality. This is why the emphasis should be removed from sexuality altogether. Such an approach would disconnect issues of care from the discriminatory religious understandings of marriage. It would also help treating all people equally irrespective of their religion.

### From Kin Contracts to Sanctification of Heterosexuality

The religious nature of marriage was introduced and gradually implemented from the 12th century onwards by regarding a heterosexual union as continuation of Creation and thus a sacrament. With this interpretation, the Catholic Church reduced at least some of the kin power on marriage contracts. The kin could no longer administer marriages against the will of the spouses themselves. Because marriage was regarded as legally valid through the consensus of the spouses, they gained a lot of power not only over their own life but also over the property relations linked with their kin. The legitimate heirs born in wedlock could inherit whereas illegitimate children could not. The kin power of choosing spouses and heirs was seriously diminished. Ever since, even after the Reformation, the understanding of marriage as being based on the joint will of the spouses has dominated in the Western world (Witte 1997, Korpiola 2009, Yli-Opas 2010).

The freedom of choosing a spouse did not signify total freedom or absence of coercive rules regarding marriage and marital life. On the contrary, the institution of marriage was regulated in many ways that discriminated against a large group of people because of their sex, sexuality, religion, social status and health. Heterosexuality and monogamy were given a nature of religious calling. Despite the fact that marriage is a universal institution, it is also a privilege. Both before and after the conclusion of valid marriage, spouses are expected to follow a myriad of rules said to be derived from 'nature' which is given a theological interpretation and a Biblical shape. Sexuality was considered sinful, but spouses had a 'conjugal debt' towards each other in order to avoid adultery (Brundage 1987). While the Catholic Church still relies on the Natural Law of St Thomas of Aquinas, the Protestant Churches see marriage as a social institution regulated by secular law. However, even Protestant theology has a teleological view on marriage. It sees the contractual elements as a thin later addition that does not replace the requirement of assuming pre-given 'natural' roles in marriage. This view forecloses many types of close relationships such as same-sex marriages, polygamy and polyamorous relations. Over the centuries, people living in other than heterosexual relations have been punished in many ways. In this respect, upholding the privileged status of married couples and discrimination against all others, States and Churches have had more or less the same goals and purposes, albeit sometimes with different reasons and emphases. Binding rights and heterosexuality together has been an efficient mechanism of power, as Michel Foucault has demonstrated in many of his books, especially the *History of Sexuality*. In sum, the very nature of marriage as the institution we know today is built on a notion of controlling people's lives. This control is difficult to remove because it is given a religious interpretation.

### Secular and Religious Norms Intertwined

Secularisation of the norms regarding marriage are usually connected to the Enlightenment and the separation of State and Church(es). In a large part of Europe, civil marriage became obligatory and secular legal codifications started to shape the normative framework instead of religious norms. Piecemeal reforms took place during a long time span, from the late 18th to the early 20th century.

In the Nordic countries, States and Lutheran Churches were intrinsically intertwined in the process of the nation-making, but from the early 20th century, the Churches withdrew from influencing the secular marital law reforms. Much later, the other European countries have followed suit. The basic understanding of marriage did not change in any part of Europe, though. Marital and family regulation still conveys today a premodern tradition in which people are predestined to a pre-given place in a hierarchical and unequal social order. Individuals are still often seen to follow their nature and calling rather than their free will and rational choice. The modern freedom of contract has not altered these unequal structures and notions when it comes to sex and sexuality. The couple's consent and the heterosexual union within a gender hierarchy are the main planks of the secular model as they used to be in the theological one. Within emerging modernity, the framework of religious calling was only geared towards a capitalist economy, but the gender division or the heterosexual norm did not change. In fact, the gender division and the public/private distinction only became much deeper within the emerging modernity. One of the most important factors of change towards secularism was the fact that legal personality was now understood in the context of individual use of property in the market. This is why (male) individuality was first highlighted in the modernisation of law. The public sphere became the arena for autonomous male individuals, whereas the private sphere was the designated life context of women. Later on, women's movement(s) wanted to assimilate women into the model of possessive selves and gain access to the public sphere and the market (Pylkkänen 2009).

Why was marriage not 'modernised' in such a way that we would not have the campaigns we have today about same-sex marriage, religious pluralism and so on? Religious interpretations of marriage, in the shape they received in the 12th century and onwards, fairly well corresponded to the emergence of modern (male) individuality, which meant a more or less owning self controlling his labour and property--and denying these rights from women. Having access to sexual intimacy and reproduction was an essential part of such male individuality, whereas women were not in command of their body and sexuality. For example, the marital rape exemption was a widespread rule in most penal codes even in the Western world up until quite recently. The tension between individual freedom and binding religious norms has not been resolved despite introduction of contractarian elements to secular law, because the normative heterosexuality and gender hierarchy still underpins the seemingly neutral regulation.

Modernity signifies the invisibility of social identities and power relations in the law. Modern law does not speak of gender or any other personal characteristics but treats everyone in a formally equal way. The contract model of marriage is reflecting this gender--blindness. Adapting a contractarian model to marriage by ignoring the gendered and sexed construction of marriage usually only leads to failure with regard to real equality between the partners. This is why the gendered model of marriage and the formally equal contractarian model are in constant tension with each other and do not resolve any of the problems linked with justice in the family.

Towards Neutrality and Secularism?

From the early 20th century onwards, the Nordic countries have been in the vanguard of treating marriage as a secular institution opened for state interventions when it comes to national health, gender equality, and economic prosperity. The Nordic countries created between 1909 and 1919 a

specific Nordic model of marriage, which regarded marriage as a private institution based on gender equality. It was understood to be in close connection with the modernisation of society and as one of the main building blocks of the Nordic welfare state. The most important new innovations of the Nordic Model were free divorce, equal rights of children, equality of the spouses, and control of reproduction because of health reasons. The national state churches withdrew from the law-making, in which the main actors were liberal politicians, lawyers, and physicians, together with representatives of women's movement(s). However, the Churches still kept their right to solemnise marriage--a compulsory civil marriage was never suggested, because of the division of tasks between the State and the Church. For example, churches were for a long time the primary institutions for civil register. (Melby et al 2006).

Since the 1970s, other European states have gradually adopted the same view on marriage and reformed their legislation. In the 2000s, a new European marriage model is being created by a group of academics (Boele-Woelki, ed. 2003). The big trend has been to accommodate marital regulation to the needs of the economy and the free movement of individuals. Exactly as in early 20th century Scandinavia, the focus is today on harmonising laws in order to avoid "limping relations" and on making women economically active individuals. Yet the main model of regulation of the EU and many of its Member States is still derived from a breadwinner model: one person is responsible for the maintenance of the whole family. In family law, the move is towards treating everybody as (economically) independent individuals, but in social security legislation, a manifold of dependency patterns is discernible. The subsidiarity principle allocates the power to legislate on social security benefits to the national level, and in many countries, maintenance and care responsibilities are predominantly lodged on families.

The current religious pluralism in Europe makes it difficult to achieve any universal solutions. How can polygamy and monogamy be reconciled with each other? It is also very difficult to achieve any unanimity between Catholic and Protestant countries. To find the smallest common denominator between the regulations of each European state is a difficult task. As always in such a task, liberties are highlighted: property rights and freedoms. It is much more difficult to achieve unanimity on the substantive contents of some equality-related rights. The Nordic type of welfare state which gave substantive contents to the legal (formal) equality already in the 1920s is not a product that could be exported to other countries. In many countries, marriage is the sole or primary source of welfare of the carers on the basis of the subsidiarity principle. Any law reform that would presuppose economic activity during and after marriage for all without any family-related benefits or rights would be devastating for many carers. If and when access to the labour market or work-related social benefits are restricted or non-existing for those who have stayed home to look after children or the elderly, families tend to retain the traditional breadwinner shape.

Current trends are thus almost contradicting each other: one emphasising economic individuation of everyone, and another highlighting the necessity to care for family members in a breadwinner model framework. Care for the elderly is increasingly called for. Both trends take place in a world with an increasing divorce rate and pluralism of lifestyles. Family life is increasingly defined by a multiplicity of public and private codes of ethics, both religious and secular. Religious pluralism may lead to a pluralism of marital norms as well. How can the states guarantee that this pluralism is not (again) violating individual human rights?

## Alternative Legislation on Joint Households

As an alternative way of regulation, many countries have introduced laws based on joint households: the Netherlands, France, Canada and the USA. In all these countries, both heterosexual and homosexual couples have access to some kind of regulation regarding their joint household. The aim is to secure the rights of the spouses during and at the dissolution of partnership. Such regulation is always an alternative to marriage, some kind of a 'lesser' marriage, which does not contain the same religious elements or rituals as marriage. Since same-sex couples are denied religious ceremonies, they are considered of lesser value than relationships between heterosexuals. This hierarchisation of rights on the basis of religiously motivated rules regarding accepted forms of sexuality is a common phenomenon everywhere.

In Canada and the USA, some movements have taken a step towards moving beyond marriage and created new legal design that would value all families in an equal manner (beyonddmarriage.org, Law Commission of Canada 2002, Polikoff 2008). The choice of family members would be free and everyone would be allowed to commit themselves to a family arrangements of their choice. All other legislation is expected to follow and recognise these choices. The aim is to protect individual autonomy and security, not the institution of marriage. The focus is on the joint household, not on pair relationships. Obligations to raise and support children would come automatically at birth as they do today in most Western countries.

None of the already existing household models replaces marriage, even though the Canadian Law Commission did make such a suggestion in 2002. In France and the Netherlands, both heterosexual and homosexual couples can opt for a joint household pact. In Sweden and Finland, the regulation of cohabitation also covers all couples. Despite high divorce rates, the institution of marriage does not seem to have lost its popularity, however. Also same-sex couples campaign for an inclusion in those countries where sex-neutral marriage does not yet exist. Interestingly enough, marriage is even more popular than in the 1970s when there was a widespread belief that regulation would totally disappear in due course (Rydström 2011). Marriage has become a token issue in the postmodern world of pluralist and multicultural societies which struggle with a manifold of inequalities. Marriage interconnects many topical issues such as discrimination, racism, economic and social security, and human rights. Marriage is often called upon for strengthening social cohesion, but sadly enough, it only seems to uphold inequalities and divide people. The more traditional Christian marriage is criticised, the more it is being defended. The same applies to many other religions. This situation efficiently forecloses any fundamental reform. What actually happens in many countries when criticism increases is that regulation is reduced, but one can ask if this is a very good policy. The reduction of regulation usually favours and supports strong individuals who know how to defend their individual (property) rights.

## Joint Household Regulation for All Families--A Suggestion for Reform

The common understanding in the Western world places family in the protected sphere of privacy. Regulation and interventions should be reduced to the minimum. However, this non-interventionist tradition often masks serious violations of individual rights. On the other hand, it does not give substantive support to those in need. This is why I suggest a new division of public and private as

well as a model for regulation which would take interconnected care relations as well as the material and immaterial resources put into the joint household as its point of departure.

First of all, all sexual relationships should belong to the sphere of protected privacy and outside any type of regulation. In terms of justice, sexuality need not be categorised, registered or assessed. The bind of rights and sexuality should be cut off. To the contrary, any violations of sexual integrity require strong protection, not weak protection as is often the case when violence is labeled as 'private'.

Secondly, minimum regulation should apply to all established households when it comes to the terms of dissolution. Nobody should be left to threadbare when the common household is dissolved because of sacrifices they have made to the benefit of others. Justice is needed in the private relations just as much as ethics.

Thirdly, it should be possible to conclude a household pact which defines in detail what the rights and obligations of each household member are. The sex or number of household members should not be defined in the law, neither would the contents of the pact. However, safeguards are necessary for those who might face risks of being taken advantage of. The household pact model would apply to couples, siblings, extended families with grandparents, foster children...to many relations where people care for each other. Even when such a pact would be completely voluntary and form-free, it would give some shape and support for carers about what their investments in the joint efforts is. In old European legal history, this type of model would have been called 'joint gains' focusing on the property of the spouses, but some more modern laws speak of 'joint efforts' which can cover many types of investments, material and immaterial.

The voluntariness would not apply to biological children, for whom parents always must care for. But it would be good to define this obligation in detail in the household pact, especially regarding possible changes in living arrangements. One of the main issues of a household pact would be: How to secure the upbringing of children during 18 years irrespective of changes in the pair relationships of their parents? Such proactive planning could at best help avoiding conflicts and pave the way for peaceful collaboration as parents in all conditions. The current situation in which rearrangements of child custody and contact is usually negotiated simultaneously with a pair conflict is quite problematic for children and focuses on sexuality instead of care that should be the main concern.

Fourthly, the households should be recognised in the social security system, taxation, family reunification and so on. If anyone wants to care for others, this should never be discouraged. The size and scope of different methods of social protection must of course be assessed in each context. But what if nobody wanted to commit themselves to anything in terms of care? This is an issue for which the law can never give any guarantees anyway. So far, marriage has been expected to secure the basic care and maintenance, but it is evident that legal institutions based on sexuality are no longer adequately serving those needs. Since marriage can be ended unilaterally within a few months, other mechanisms are needed to secure the fulfilment of caring and maintaining obligations. Earlier, post-divorce arrangements for spouses were connected with faults, and this fact often was experienced as oppressing and upholding gender stereotypes. But removing faults has not proved a solution either, since a large part of single-parent families end up in poverty. The new

household pact model would highlight caring rights and obligations of everybody, not just for the 'traditional' carers, the mothers (perhaps assisted by fathers).

#### A Plea for Liberal Values?

There are several problems linked to the household pact model. One of the most severe questions can be directed to the plausibility of such a model in achieving all the good effects I am suggesting. I am aware of the problems and will write about them in another context. I am also aware of the fact that a contract model can be just as easily interpreted as a formal device toning down the real-life inequalities and gendered and sexed constructions of subjectivity. Being aware of all the critique towards liberalism and its inherent problems and divisions, I still want to make a plea for liberal values. Instead of pre-modern, pre-given and discriminatory norms justified with religion, we should protect and appreciate the human dignity, rationality and integrity of individuals. Sexual identity or other personal characteristics cannot be chosen by individuals themselves. It is against the very idea of justice in Western liberalism to tie rights with such characteristics that are beyond one's own choice. This is why it is about time to start protecting individuals in their care relationships and leave sexual relations to protected privacy.

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