

## Radically Rethinking Marriage

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### Abstract

This special issue of the Oñati Socio-Legal Series offers inter-disciplinary, feminist perspectives that collectively 're-think' the institution of marriage, not only in the field of legal discourse and institutions but also in the humanities and social sciences as well as through activism. With a focus on jurisdictions in Europe, North America and Africa, the articles included in this issue challenge normative assumptions about marriage, reconsider forms of conjugality, re-write judicial interpretations and problematize legal and activist interventions and reasonings.

### Key words

Marriage; monogamy; polygamy; sado-masochism; polyamory; customary marriage; conjugality; consummation; same-sex marriage; prenuptial agreements; cohabitation; consent to sex; colonialism; domestic violence; kink

### Resumen

Este número especial de la Oñati Socio-legal Series ofrece perspectivas interdisciplinarias y feministas que "re-piensen" colectivamente la institución del matrimonio, no sólo en el campo del discurso jurídico y las instituciones, sino también en las humanidades y ciencias sociales, así como en los activismos. Enfocándose en las jurisdicciones de Europa, América del Norte y África, los artículos incluidos en este número cuestionan las asunciones normativas sobre el matrimonio, reconsideran las formas de la conyugalidad, reescriben las interpretaciones judiciales y problematizan las intervenciones y razonamientos legales y activistas.

### Palabras clave

Matrimonio; monogamia; poligamia; sado-masochismo; poliamor; matrimonio consuetudinario; conyugalidad; consumación; matrimonio entre personas del mismo sexo; acuerdos prenupciales; cohabitación; sexo consentido; colonialismo; violencia doméstica; fetichismo sexual

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The issue of same-sex marriage has been the focus of activism and litigation in several countries over the last fifteen years but public debates and subsequent legal victories have contained little or no critical interrogation of the institution of marriage itself. In contrast, feminist critiques not only coalesce around the gendered, racialized and classed consequences of marriage but also draw attention to its role in reproducing unequal social relations including those of gender, property, capital, and race. These critiques, once widespread in academia, have been silenced by the difficulty of interjecting in a debate strongly shaped by discourses of love and (formal) equality. Moreover, the premise of 'pro' and 'con' debates themselves have become delimited by a framing that understands marriage as an unquestioned good that should either be protected in its 'traditional' form, or available to all couples. Those critiquing the institution have also struggled to overcome the assumption that marriage is both inevitable and must be accepted in its current form as the primary indicator of familial relationships. The aim of this collection is to consider the ways in which we may radically rethink the institution of marriage, both legally and socially, and the discourses surrounding it, from feminist perspectives.

Our approach was inspired by the various feminist judgment projects that have now taken place in several jurisdictions. These projects began with the Women's Court of Canada, which aimed to "create alternative judgments on the basis of accepted legal principles but written from a new perspective – one that is "outside the box" of the mainstream while respecting the constraints of legal decision-making." (Women's Court of Canada 2008) That project focused narrowly on equality jurisprudence under section 15 of the *Canadian Charter of Rights and Freedoms*, seeking to demonstrate how equality could be 'taken seriously' under the Charter (Majury 2006, p. 6). The subsequent feminist judgments projects, beginning with the England and Wales collection of judgments, were not limited to one area of law, but rather sought to provide the missing feminist judgment in a wide variety of cases from trusts to criminal to public law (Hunter *et al.* 2010). This approach was replicated in the Australian, US, and Northern/Irish projects (Douglas *et al.* 2014, Stanichi *et al.* 2016; Enright *et al.* 2017). A similar, though not explicitly feminist, project was undertaken in relation to cases from the European Court of Human Rights (Brems 2012). This collection, then, joins this emerging trend of engaging in critique through considering how key moments in legal history might have developed differently with a feminist lens. However, we recognise that marriage is not only understood through (case) law but also through policy and social/legal discourse. As such, rather than focus exclusively on re-writing case law, this collection takes a broader, inter-disciplinary approach, with contributors also 'rethinking' the parameters of debates around marriage. This collection arises out of a workshop held at the International Institute for the Sociology of Law in Oñati, Spain in July 2015. Participants were asked to offer a rethinking, new interpretation or rewriting of either a key case/statute, or academic debate relating to marriage. The question is not only how might a case or statute be interpreted differently, but also how could we fill gaps in the debates in ways that fundamentally challenge the existing legal institution of marriage? What is at stake (politically, materially, affectively) in such an endeavour? What would "rethinking marriage" look like? Is it even possible to (re)imagine its transformative potentiality? Is there a feminist alternative to marriage?

In taking an interdisciplinary approach we sought to acknowledge that rethinking marriage happens not only in legal discourses and institutions but also in the humanities and social sciences as well as through activism. This collection also differs from the feminist judgments projects in that we did not limit our scope to one jurisdiction. The 'rethinking' occurs in the contexts of a variety of jurisdictions in Europe, North America and Africa, considering a number of different forms of marriage: monogamous, polygamous and polyamorous; customary, civil, and Muslim; and same-sex and different-sex. However, much of the discussion of these

forms of marriage takes place within the context of their place in western nations so the scope of this collection is limited by the absence of consideration of how we might rethink marriage in much of the global south, particularly Asian and Middle-Eastern states with very different legal systems and forms of marriage than those represented by our contributors. Yet, the articles in this issue collectively rethink marriage in a number of different ways. Some challenge the normative assumptions made about marriage and the discourses surrounding it (Auchmuty, Thompson) or reconsider the forms of conjugality that constitute it (Bonthuys, Goldfarb). Others re-write judicial interpretations of aspects of marriage (Koshan, Barker) and/or problematize interventions and legal reasoning (Khan, Lenon), including activisms seeking further expansion of marriage (Klesse).

Socio-legal scholarship often interrogates the role of marriage within society, or the impact of marriage (or exclusion from it) on particular groups. While we acknowledge that this is important work, this issue seeks to extend this work by problematizing how marriage might be reframed, or destabilized, as the central institution around which family law is organised. This type of work is often the 'missing voice' in the discourses surrounding marriage. By bringing together a group of interdisciplinary scholars to engage in a radical rethinking of the institution of marriage, this collection offers a unique contribution to scholarly conversations about marriage in the field of socio-legal studies.

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