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**Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage/
Reconstructing Marriage: The Legal Status of Relationships in a
Changing Society (book review)**

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NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE / RECONSTRUCTING MARRIAGE: THE LEGAL STATUS OF RELATIONSHIPS IN A CHANGING SOCIETY

Nicola Barker / Caroline Sörgjerd

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When heterosexual couples choose marriage over cohabitation, what are they trying to achieve? When some gays and lesbians stress the absolute validity of marriage over other forms of relationship, what are they getting at? What, in other words, is the essence of marriage, the intrinsic or indispensable quality without which marriage would not be what it is?

This is one of the most significant questions in family law, with implications for such issues as same-sex marriage, cohabitation, and adoption. Yet, many of the conventional answers seem unconvincing at best and untenable at worst. For instance, Lord Millet, in his dissenting judgment in *Ghaidan v Godin-Mendoza*, describes being 'the lawful union of a man and a woman' as 'the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting, or contented'.¹ Heterosexuality, however, is not the essence of marriage; same-sex marriage is not a misnomer but the law in several jurisdictions. So, marriage without heterosexuality is still marriage. Is there another quality without which marriage would no longer be marriage, at least as we know it?

Two recent books – Caroline Sörgjerd's *Reconstructing Marriage* and Nicola Barker's *Not the Marrying Kind* – shed light on this question from different perspectives. One is a legal historical text that comes out in favour of marriage, the other a work in critical legal theory that stresses its limitations. Yet, each seems to show that the legal institution of marriage has 'no fixed, universal essence',² and that the essence of marriage is 'more than a legal contract and a civil status'.³ This review considers their discussions on the legal and symbolic dimensions of marriage to suggest that the essence of marriage is its signification of the ideal family. In other words, 'marriage' is not merely a label, provided by law, for a union that satisfies certain entry and exit requirements. Rather, the very essence of marriage is constructed through language and in particular through ideologies that represent marriage as the ideal form of family. Thinking about the essence of marriage in this way allows us to make sense of current debates and developments in family law.

Reconstructing marriage

Reconstructing Marriage provides a systematic analysis of different cohabitation models and marriage enactments that have shaped the concept of marriage in twenty-first century Sweden. Sörgjerd opens with the thesis that 'marriage is not just a legal contract concluded by two persons for the purpose of settling their financial matters during marriage and in case of divorce . . . there is also a symbolic dimension

¹ [2004] UKHL 30, [2004] 2 FLR 600, at para [588].

² N Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan Socio-Legal Studies, 2012), at p 5.

³ C Sörgjerd, *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society* (Intersentia, 2012), at p 6.

of marriage, which extends beyond the classical legal sphere, and is connected to the historical, religious and cultural functions of marriage in Swedish society'.⁴ She then proceeds, methodically and meticulously, to chart the evolution of marriage in Sweden.

The book is divided into four parts. Part I, which comprises chapter one, introduces Sörgjerd's research objectives and methodology. Part II, which consists of chapters two to six, traces the Swedish legal developments relating to marriage and alternative cohabitation models. Chapter two takes as its point of departure the Marriage Code of 1734, which introduced the requirement that a marriage, to be legally valid, has to be celebrated in the Church of Sweden. Chapter three focuses on the Marriage Code of 1920 that replaced the Code of 1734, 'standing with one foot in the "traditional" old-fashioned outlook on marriage and the other foot in the "modern"'.⁵ Chapter four deals with the progressive 'modernisation' of marriage in Sweden with the various enactments of the 1970s and the Marriage Code of 1987.

The next two chapters are probably most immediately useful to English family law scholars. Chapter five looks at the Cohabitees Acts of 1973, 1987 and 2003 to understand the substantive and symbolic differences between marriage and unmarried cohabitation. Here, Sörgjerd traces the development of the 'marriage-like' cohabitation model in Sweden, which she describes as having certain 'status features': '[I]n contrast to marriage, cohabitation without marriage is not a civil status, but it has nevertheless "status-like" traits, which connote a certain level of stability and public recognition of the relationship'.⁶ Sörgjerd queries whether maintaining a clear distinction between marriage and cohabitation should be the primary goal of cohabitation law. Rather, she proposes the adoption of a functional approach to regulation that addresses the needs of cohabitees and contributes to creating fairness when a cohabiting relationship ends.

Chapter six considers the 'controversial' adoption of gender-neutral marriage in Sweden and questions why, given the existing formal legal equality of same-sex couples, it was controversial at all. Sörgjerd describes the resurgence of the 'status function' of marriage with the Swedish Registered Partnership Act. 'In Sweden', she explains, 'the same sex marriage reform was not about acquiring mutual legal rights and duties, but about acquiring the legal status of marriage and the symbolic value attached to the concept of marriage'.⁷ In the European context, she describes how the 'status function' of marriage has been as, if not more, important than the 'contractual deal' available to same-sex couples, and how legal recognition of same-sex relationships has been turned into a human rights issue.

Of particular interest to comparative legal scholars should be Part III, which places the Swedish legal developments in an international context. Chapter seven contrasts the Swedish legislation regarding same-sex couples with the similar legislation but different societal, historical and religious backgrounds of Spain and the Netherlands. Chapter eight considers issues relating to changing cohabitation models in the context of European and human rights law.

Finally, Part IV, which contains chapter nine, summarises Sörgjerd's main observations and findings and strongly affirms the role of marriage in Swedish society: 'Marriage is a multifaceted and dynamic institution which is an integral part of Swedish cultural heritage, concluded through a ritual which creates a sense of solidarity in

⁴ Ibid, at p 3.

⁵ Ibid, at p 83.

⁶ Ibid, at p 165.

⁷ Ibid, at p 214.

society . . . [It] is still needed as an official symbol of inclusion and tolerance, and as a symbol of commitment and community between the couple.⁸

Not the marrying kind

Not the Marrying Kind makes a substantive and a methodological contribution to the literature on same-sex marriage. Substantively, it provides a critical analysis of same-sex marriage from a feminist perspective, and methodologically, it demonstrates the applicability of feminist insights into the institution of marriage to same-sex marriage. Barker's intervention is important in a context where 'gay liberation has become gay rights, same-sex marriage has become a litmus test of how gay-friendly society is, and feminism is too often separated from gay rights claims, especially in relation to marriage'.⁹ Troubled by this absence of engagement, Barker draws on second-wave feminist and queer theoretical insights to critique the 'marriage model' of relationship recognition found in several jurisdictions, including the UK, the US, Canada, Australia and South Africa. '[T]he reliance on the marriage model', she argues, 'limits the transformative and transgressive potentials of law reform'.¹⁰ Instead, she calls for a 'revolutionary approach' to relationship recognition that 'rejects the marriage model and takes seriously the critiques of marriage from both feminism and queer theory'.¹¹

The book is divided into two parts. Part I, which contains chapters one to three, examines legal provisions used to recognise same-sex marriage to highlight the uncritical reliance placed on formal equality in same-sex marriage debates. Chapter one focuses on the marriage model 'both to recognize that marriage is much more an ideology than a fixed definition and to highlight the ways in which this ideology may be extended to forms of relationship that are not called marriage'.¹² Though Barker is not unique in focusing her critique on the marriage model, she provides a useful analytical framework for doing so. One of her most valuable contributions is her discussion of the key features of marriage, which she divides into its structure, consequences and ideologies. This discussion should be of interest to anyone interested in marriage, either from a legal or a policy standpoint.

Having described the marriage model, Barker shifts her focus to same-sex relationship recognition. Chapter two considers separate legal provisions used in some jurisdictions to give recognition to same-sex relationships and the extent to which such provisions are informed by the marriage model. The test Barker uses to decide whether a provision adheres to the marriage model is 'the extent to which the parameters of and access to the provision are regulated in the same way as marriage'.¹³ She finds that 'separate provisions to marriage are, to some extent, each based on the marriage model', observing that 'the ways and extent to which some of those provisions depart from the marriage model . . . raises interesting questions about how far the marriage model might be stretched and adapted'.¹⁴

Chapter three analyses common themes in legal arguments used in order to gain same-sex marriage. Barker identifies four such themes: (1) sameness and formal equality; (2) access to the legal consequences of marriage; (3) the symbolic

⁸ Ibid, at p 334.

⁹ *Not the Marrying Kind*, p 1.

¹⁰ Ibid, at p 1.

¹¹ Ibid, at pp 1–2.

¹² Ibid, at p 21.

¹³ Ibid, at p 42.

¹⁴ Ibid, at p 65.

importance of the access to the label 'marriage'; and (4) the ways in which same-sex marriage would support the institution more generally. The sameness of same-sex couples to heterosexual couples emerges as a key theme underpinning constitutional claims to formal equality.

Part II, which contains chapters four to six, deals with theoretical arguments about same-sex marriage. Chapter four analyses arguments that have been made for and against same-sex marriage to identify the strongest and weakest arguments from a feminist perspective. Here, Barker highlights the limits of formal equality approaches, arguing that 'claiming relationship recognition on the basis of sameness does not leave room for subsequent arguments of difference'.¹⁵ However, she is careful not to dismiss formal equality approaches completely, suggesting that 'by moving away from arguments of sameness, it is possible to make more radical arguments for same-sex marriage'.¹⁶ It would have been useful to have some indication of what such arguments might be, and how one might make arguments of difference within a legal framework that does not recognise equality claims unless they are made in reference to the normative standard of heterosexuality.

Chapter five, which is arguably at the heart of Barker's project, revisits the history and context of feminist theorising on marriage. Barker shows that contemporary factors, like the continuing gendered division of labour and the increasing privatisation of care, mean that feminist concerns about marriage are neither less significant today nor less relevant to same-sex marriage. Finally, chapter six addresses the challenge to Barker's argument that lesbian and gay subordination is fundamentally separate from gender oppression. Barker concludes that injustices against gays and lesbians are not only cultural (requiring recognition) but also economic (requiring redistribution).

Two dimensions of marriage

Is the essence of marriage to be found in its legal requirements? Lord Penzance in *Hyde v Hyde and Woodmansee* defined marriage as 'the voluntary union for life of one man and one woman, to the exclusion of all others'.¹⁷ Barker moves away from the *Hyde* formulation, identifying the key features of marriage instead by examining the structure, consequences and ideologies of marriage. She goes on to show that the legal structure of marriage, that is, its entry and exit requirements, is not really its essence. For instance, a marriage that has not been consummated and that is neither monogamous nor committed does not cease to be legally valid. Nor are the legal consequences of marriage of the essence. Barker notes that people marry for a variety of reasons, and there tends to be little awareness of the consequences of marriage. Further, Barker considers the ideologies of marriage invoked by courts in deciding what marriage is (or what marriage ought to be). She argues that 'these understandings are not part of a consistent, coherent "definition" but instead are deployed at specific moments to . . . defend a particular ideal of marriage'.¹⁸

Barker's treatment of legal marriage indicates 'contradictions, inconsistencies and a surprising level of departure from the *Hyde* "definition"'.¹⁹ The case-law she examines demonstrates that 'the "essential" characteristic of marriage differed, sometimes significantly, and often depended on the desired outcome of a particular case'.²⁰ For

¹⁵ *Ibid.*, at p 111.

¹⁶ *Ibid.*, at p 113.

¹⁷ (1866) L R 1 P&D 130.

¹⁸ *Ibid.*, at p 38.

¹⁹ *Ibid.*, at p 38.

²⁰ *Ibid.*, at p 38.

instance, the procreation function of marriage is really only emphasised in cases involving claims for same-sex marriage.²¹ For Barker, this examination 'casts doubt on any assumption . . . that [marriage] is an essential, universal and natural institution'.²² She concludes that 'looking at the *Hyde* formulation as an ideal rather than as a definition is, therefore, a useful way to think about marriage and invites consideration of what the essence of marriage actually is in contemporary UK law'.²³

Sörgjerd does not directly engage with the idea of legal marriage having no fixed, universal essence; her approach is to highlight the symbolic dimension of marriage as a part of its essence. Yet, her historical account of the Swedish legal development illustrates the shifting 'essence' of marriage. Marriage has been, at various times, a gift from God, about equality between two people, and about the autonomy of each individual. Moreover, the lived experience of marriage has not always reflected its ideology. Sörgjerd observes, for instance, that under the Swedish Marriage Code of 1920, 'modern values, centering on the principle of equality between husband and wife, appear to have remained primarily relevant on a theoretical level. Married women were legally emancipated, but in practice, nevertheless, the traditional roles played by husband and wife remained intact'.²⁴ It therefore appears that the essence of marriage is not to be found in the legal institution of marriage. Yet, marriage has another, symbolic dimension that might better capture its essence.

Sörgjerd examines marriage on two different levels, namely '(1) on the classical legal level, as expressed by the substantive marriage regulation, and (2) in respect of the symbolic dimensions of marriage, expressed through the values attached to the marriage regulation and to the marital status in society'.²⁵ The first, legal level accounts for past law reforms to identify 'what interests have been considered to be worth protecting by law, and why these interests have had priority over others'; and the second, symbolic level analyses 'what the institution of marriage has symbolized in the past and what it symbolizes today'.²⁶ 'Together', writes Sörgjerd, 'these two levels can be seen as characterizing the essence of marriage in Sweden'.²⁷

For Sörgjerd, the Swedish legal development really only makes sense when viewed in light of the symbolic dimension of marriage. To illustrate this point, she examines the Swedish same-sex enactment of 2009:

'Why was adopting a gender-neutral marriage concept controversial in Sweden, where the basic idea since the 1970s has been to avoid moral input in family law legislation as far as possible? . . . Why was registered partnership not an adequate legal institution for same-sex couples in Sweden, and how did the institution of marriage become a symbol of full equality between same-sex and different-sex couples? What's in a name?'²⁸

Sörgjerd suggests that 'answers to what the essence of marriage is – and why introducing a gender-neutral marriage concept in Sweden was controversial – can be

²¹ *Ibid.*, at p 36.

²² *Ibid.*, at p 21.

²³ *Ibid.*, at p 21.

²⁴ *Reconstructing Marriage*, p 83.

²⁵ *Ibid.*, at p 6.

²⁶ *Ibid.*, at p 6.

²⁷ *Ibid.*, at p 6.

²⁸ *Ibid.*, at p 167.

sought in sources outside of the traditional legal sphere'.²⁹ The answer she proposes is 'about accessing the symbolic dimension of marriage, and about the right to label the relationship "marriage"'.³⁰

Barker describes the essence of marriage in the sense of there being 'a consistent shared understanding of what marriage is',³¹ and considers marriage to be a 'signifier of the ideal family'.³² From studying UK judicial pronouncements, she suggests that the ideal marriage is a relationship that provides 'some level of intimacy, companionship, commitment and interdependence between two people who live together'.³³ Barker contends that the 'statistical decline in the numbers of people getting married is not a statement about a declining significance of marriage in terms of an ideal'.³⁴ For '[t]he ways in which people are defining and living their intimate (or couple) relationships remain to a large extent modelled on marriage'.³⁵

Barker and Sörgjerd's discussions lend support to the view that the essence of marriage is its signification of the ideal family. Across different jurisdictions and cultural contexts, marriage represents the 'gold standard' of family and relationship. This appears true even in jurisdictions where law confers equal protection upon married and unmarried couples, because it still saves the greatest legitimacy and respectability for marriage. Often, it is precisely the 'ideal' character of marriage that distinguishes it from non-marital relationships that are otherwise identical in substance. The answer to the question – 'What's in a name?' – is that the ability to label a union 'marriage' is the ability to assert the absolute validity of that union over other forms of relationship.

This way of seeing the essence of marriage helps to explain other forms of relationship recognition. Sörgjerd observes that although the Swedish Cohabitees Acts were adopted to solve practical problems relating to couples' choice to cohabit instead of marrying, '[a]n outspoken aim in the Swedish preparatory work has been to avoid creating a "second-class marriage" which would compete with marriage. In fact, the fear of undermining marriage has prevented the adoption of a more extensive regulation, even if such regulation could well be claimed to increase the level of fairness upon dissolution of a cohabitee relationship'.³⁶ The concern about creating a 'second-class' marriage also pervades the same-sex marriage debate. Barker observes, 'For some, recognizing same-sex relationships through a separate provision (which is, for them, inherently lower-status because it is not marriage) is discriminatory... [F]or them, anything "less" than marriage necessarily conveys second-class citizenship'.³⁷

To represent the ideal is the very essence of marriage. The legal structure of marriage could change to a point and it would still be 'marriage': the inclusion of same-sex relationships into the definition of marriage is just one example. However, marriage would be a fundamentally different institution if it changed to a point where it no longer represented the ideal. The marriage model is the mechanism that ensures that marriage does not transgress this boundary. By perpetuating marriage as the ideal form of family, the marriage model reaffirms the absolute validity of marriage over

²⁹ Ibid, at p 6.

³⁰ Ibid, at p 1.

³¹ *Not the Marrying Kind*, p 21.

³² Ibid, at p 131.

³³ Ibid, at p 34.

³⁴ Ibid, at p 152.

³⁵ Ibid, at p 152.

³⁶ *Reconstructing Marriage*, p 164.

³⁷ *Not the Marrying Kind*, p 41.

other forms of relationship and thus preserves the essence of marriage. The state acts as moral custodian to ensure that relationships that adhere to the marriage model are privileged, while others receive less respect. Recognition of same-sex relationships is not independent of, but contingent upon, filling the marriage mold. This further entrenches the symbolic hierarchy of relationships, with marriage at the top, 'marriage-like' relationships in the middle, and relationships that bear no resemblance to marriage at the very bottom.

Thus, marriage has a symbolic dimension that captures its essence, and it is here that we find the key difference between Sörgjerd and Barker. Both authors appreciate the symbolic significance of marriage. But while Sörgjerd perceives marriage as a powerful symbol of inclusion, Barker considers feminist and queer insights on marriage to highlight, quite rightly, the extent to which marriage is not inclusive and the ways in which inclusion itself is problematic.

Reconstructing Marriage and *Not the Marrying Kind* provide a host of insights into questions that are at the heart of family law reform in the UK and elsewhere. Should both civil partnership and marriage be made available to same- and opposite-sex couples alike? Would this in effect create a 'second-class' marriage? Is civil partnership 'less' than same-sex marriage? Would the inclusion of same-sex couples 'lessen' marriage? Understanding the signifying function of marriage as its essence allows us to make sense of these questions. Being the signifier of the ideal family is not only the essence of marriage; it is also its elixir. The law may confer equal protection upon married and unmarried couples, but so long as marriage represents the ideal family, its place at the pinnacle of relationship recognition is secure. One might expect that recognition of different forms of relationship will challenge the ascendancy of marriage, but this is not necessarily so. Any family law reform that affirms the absolute validity of marriage over other forms of relationship will only preserve the essence of marriage.

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