

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*.

1.

A BRIEF HISTORY OF MARRIAGE AND COHABITATION IN THE WEST

1.1

Introduction

The first part of this paper explores the historical context of marriage in the West and the feminist critiques of the institution that emerged in the 1960s-1980s, the period commonly referred to as ‘second wave feminism’. I outline the doctrines of unity, coverture and consortium that originated in English common law and demonstrate that these ‘historical anachronisms’ have remained influential in the legal attitudes towards husbands and wives in western common law jurisdictions until very recently. Though I do not explore them in detail here, many European civil law jurisdictions also had *chef de famille* clauses requiring obedience to the husband, resulting in the wife “losing all civil and economic autonomy”.¹

By the middle of the twentieth century, these overtly discriminatory laws began to disappear in Europe, with some Scandinavian countries having introduced formal equality between the spouses as early as 1918² and common law jurisdictions also introducing legal reforms throughout the twentieth century that sought to bring formal equality between spouses. However, feminist critics of marriage highlighted the continuing relationship between marriage and patriarchy, turning their attention to the ways in which the structures of marriage, even with increasing formal equality, continued to support the exploitation of women less directly through, for example, the gendered division of labour within the family. Finally, I consider the rise of cohabitation. While some western jurisdictions have expanded legal recognition to these relationships, others have done so only for limited purposes. One jurisdiction in the latter category is England and Wales, where feminist property lawyers

have argued against expanding marriage-like recognition to cohabitants on the basis that women are adequately, or even better, protected outside of the family law regime.

1.2

Marriage in its historical context

“By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything.... Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.”³

¹ See further: Gautier 2005: 53.

² *Ibid.*: 55.

³ Blackstone 1765-9: 442, Chapter 15.

Women have been subordinate within the institution of marriage throughout its history in the West, with common law jurisdictions largely following the (English law) principles described above by Blackstone, and similar constraints on wives in most civil code jurisdictions.⁴ The above quote describes the doctrines of unity and coverture, which were “the embodiment of patriarchy”,⁵ justifying the legal dominance of the husband. Married women did not have a legal personality of their own and, as a result, were not able to own property or make contracts, among other things.⁶ Alongside the doctrines of unity and coverture were consortium and the duty to maintain. Consortium was:

“An abstract notion which appears to mean living together as husband and wife with all the incidents (insofar as these can be defined) that flow from that relationship. At one time it would have been said that the husband had the right to his wife’s consortium whilst the latter had not so much a reciprocal right to her husband’s consortium as a correlative duty to give him her society and her services.... The wife’s basic duty was to submit to her husband, in return for which the husband would protect and support her.”⁷

In order to enforce his right to consortium, a husband could physically restrain his wife or confine her to the house and claim for damages against anyone who interfered with this right.⁸ The duty to maintain was linked to this and referred to the husband’s obligation to support his wife. However, the wife had limited ability to enforce this obligation as it was for the husband to determine their standard of living; it only

gave the wife a right to bed and board,⁹ and it was not possible for the wife to enforce it if they were living apart for any reason other than the husband’s misconduct.¹⁰

These might be said to be historical anachronisms, but not only did they have a profound influence on the development of the legal status of husbands and wives, some remained until well into the second half of the twentieth century¹¹ and several direct consequences of these doctrines survive today.¹² Even those that seem particularly anachronistic, such as the principle that a husband could not be convicted of raping his wife, remained until relatively recently in England and Wales,¹³ and although the marital rape exemption was abolished in all US states in 1993, some continue to allow husbands to engage in conduct that would otherwise be rape. For example, rape within marriage is only an offence in some US states in cases where physical force is used or threatened.¹⁴ Therefore, although an English judge in 1979 described the doctrine of unity as a legal fiction that is “as real as the skeleton of the brontosaurus in a museum of natural history”,¹⁵ it, along with the doctrines of coverture and consortium, is not yet extinct.

Even where an attempt was made during the nineteenth and early twentieth centuries to remedy the legal disability of wives in relation to property

4 See for example: Sackville 1970 and Blackhouse 1988 on how the doctrine of unity influenced Australian and Canadian marriage law, respectively. Similarly, the French Code “deprived wives of all freedom”, but there were some exceptions such as the Swedish code of 1798 and the Prussian code of 1794, which granted legal capacity to wives (Gautier 2005: 53).

5 Lowe and Douglas 2007: 107.

6 To some extent, wealthy women who inherited land could mitigate the effects of this, but working class women could not; their wages belonged to their husband. The Married Women’s Property Acts of 1870-1908 began to end this legal disability of wives in England and Wales: see Clements 2011.

7 Lowe and Douglas 2007: 108-109.

8 Ibid.: 109-110.

9 *Lilley v. Lilley* [1960] at 178, per Hodson, L. J.; Masson et al. 2003: 73.

10 Masson et al. 2003: 73. The Matrimonial Causes Act 1878 enabled women who had been beaten by their husband to cease cohabitation. Magistrates could grant an order of non-cohabitation and order maintenance for a wife where her husband had been convicted of assaulting her (Smart 1984: 31).

11 Cretney 2003: 91. For example, Smart notes how through the 1950s, “adultery by a woman was ... still treated in terms of a ‘property’ offence by another man from whom damages could be claimed [by the husband]” (1984: 42).

12 For example, spouses cannot be convicted of criminal conspiracy together (*Criminal Law Act 1977 s2(2)(a)*). spouses are treated as a unit for some tax purposes, such as exemption from inheritance and capital gains taxes; and a person cannot be liable for defamation in respect of statements made to their spouse.

13 This was abolished through case law in 1991: *R v. R* [1991] 1 All E.R. 747.

14 Klarfeld 2011: 1834.

15 *Midland Bank Trust v. Green (No.3)* [1979] Ch. 496 at 519, per Oliver J.

ownership in England and Wales,¹⁶ the measure “unintentionally institutionalised inequality in the economic relations of husbands and wives”.¹⁷ The Married Women’s Property Acts created a system of separate property, with husbands and wives each retaining separate control of their property during the marriage.¹⁸ However, this also meant that property was not shared on divorce until the law was reformed in 1970 (see below). As Barlow notes:

“By preventing husbands getting their hands on their wives’ money, the statute denied wives rights in their husbands’ money. And in the real world it was mostly husbands who had the money.”¹⁹

This problem was illustrated in the famous Canadian case of *Murdoch v. Murdoch*, which has been credited with providing a springboard for the reform of Canada’s system of separate property.²⁰ The Murdochs jointly built a prosperous farm over their marriage of more than 20 years, with Mrs Murdoch contributing towards the purchase of the ranch as well as providing her labour (including solely running the farm for five months of the year while her husband worked away), though all the property was held in Mr Murdoch’s sole name. Her financial contribution was characterized as a loan by the trial court and her labour was dismissed

as merely “the work done by any ranch wife”.²¹ As a result, Mrs Murdoch was not entitled to any share of the family farm. Similarly, in the United Kingdom, married women could only make a claim on the family property if they had made a financial contribution to its purchase. Non-financial contributions in the form of housework and childcare did not count, particularly if they were seen as “no more than was *expected of a wife*”.²² Therefore, although provisions such as the Married Women’s Property Acts significantly improved married women’s legal position, in practice:

“...they did little to help women who had no independent means of acquiring property because marriage and other forms of sex discrimination denied them access to a reasonable income. Building societies in the 1950s and 1960s for example would not lend money to married women, conveyancing practices and tenancy agreements almost automatically gave sole ownership or tenancy rights to husbands and not wives and there was no legal provision for equal pay for women. The existence of formal legal equality was therefore quite meaningless to most women.”²³

Not only did husbands have a more powerful position in terms of their claim to the family assets, but they were also advantaged in the grounds for divorce and separation. The most used ground for legal separation in the nineteenth century (divorce being almost impossible for most people) was cruelty, and the gender inequality in its application was evident. For example, Cretney recounts the facts of two cases, one involving a husband who grabbed his wife by the throat, shook her and threw her to the ground on suspecting her of adultery,²⁴ the other involving a wife who threw a pie and bowl of milk at the husband,

16 At around the same time, similar provisions were passed in other common law jurisdictions. See Clark 2010, McCammon et al. 2014, Chambers 1997 and Sackville 1970, for example, for discussion of these provisions in the United States, Canada and Australia, respectively.

17 Barlow 2008: 505, quoting Professor McGregor. As I demonstrate in Part 2, gendered economic inequality in and after marriage has not been resolved by formal equality under the law.

18 England (and Australia) is unusual in this respect as most European jurisdictions (as well as South Africa and a number of US states) have some version of a community of property regime (see further Part 2).

19 Barlow 2008: 505. She notes in contrast that the approach taken in the nineteenth century in other EU jurisdictions, such as France and the Netherlands, was to adopt a system of community of property. This meant that all property became jointly owned and required both parties to act together. Other jurisdictions, such as Sweden, created a deferred community of property scheme, where property is held separately during the marriage, but is equally divided on divorce.

20 Clapton 2008: 197.

21 Quoted in *ibid.*: 200.

22 Smart 1984: 78, 85, citing *Button v. Button* [1968] 1 WLR 457 (her emphasis). In contrast, she notes, the work done by husbands was measured by the extent to which it contributed to raising the value of the property: “It seemed much more difficult for a wife to earn herself a share of her husband’s house therefore than for a husband to earn himself a share of his wife’s”.

23 *Ibid.*: 29-30.

24 *Smallwood v. Smallwood* (1861) 2 Sw&Tr 397.

scratched his face and “constantly abused him”.²⁵ In the former case, the court held that this was not sufficient, *repeated* acts of violence against a wife being necessary, but in the latter case it was held that once a wife subjected her husband to violence then cohabitation became impossible.²⁶ The principle adopted in 1864 was that though “the physical effects of violence by the wife are less, the moral results are immeasurably greater. How is it possible that submission, which is the wife’s lot in marriage, can be maintained by the husband if she becomes his assailant?”²⁷ It is hardly surprising that the English courts in the first case described above did not take violence against wives seriously. It was not merely permitted but almost seen as a duty of a husband to control his wife’s behaviour, through ‘reasonable’ physical coercion if necessary.²⁸ This was also the case generally in civil code jurisdictions, where community censure was reserved only for men who beat their wives “savagely and severely”.²⁹

Divorce, previously unavailable to all but the very wealthy, became more accessible in England under the Divorce and Matrimonial Causes Act 1857,³⁰ yet both gender and class inequality remained: while a husband had to demonstrate adultery on the part of the wife, wives had to demonstrate adultery plus

some aggravating factor,³¹ an inequality that was not removed until 1923.³² In addition, because the Court for Divorce and Matrimonial Causes was only in London, poor and working class people and those unable to travel could only rely on separation orders from the Magistrate’s Courts. These orders allowed the couple to separate but did not permit remarriage.³³ As such, Probert notes that “for the vast majority of the population, poverty, rather than gender, was the main constraint upon obtaining a divorce”, so the first focus of reformers was enabling working class women to legally separate from violent men, which was achieved through the Matrimonial Causes Act 1878.³⁴

In 1937, for the first time, grounds for divorce other than adultery became available in England and Wales.³⁵ Described as a “watershed in divorce law reform”³⁶—because the addition of ‘incurable insanity’ as a ground meant that for the first time divorce was available where neither party was at fault—the Matrimonial Causes Act 1937 also introduced the additional fault-based grounds of desertion for two years and cruelty. However, despite the apparent gender-neutrality of divorce law by 1923, there remained a tendency for courts to punish ‘bad’ wives and mothers through their powers to award child custody and maintenance (alimony) until the removal of the notion of matrimonial offence in 1969:

25 *Forth v. Forth* (1867) 16 LT 574.

26 Cretney 2003: 150.

27 *Prichard v. Prichard* (1864) 3 Sw&Tr 523, per Sir James Wilde. Cited in Cretney 2003: 150.

28 “The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement.... But this power of correction was confined within reasonable bounds” (Blackstone 1765-9: 432).

29 Dobash and Dobash 1981.

30 Prior to this Act, divorce required the petitioner to seek a divorce *a mensa et thoro* (separation from table and bed, allowing the parties to live separately) from the Ecclesiastical Court, as well as a judgment in common law for criminal conversion (adultery) and a private Act of Parliament dissolving the marriage (see Chapter 5 in Cretney 2003). Similarly, divorce was only available in the United States through private statute, with Massachusetts being the first state to allow judicial divorce in 1789, but it was the end of the nineteenth century before every state (except South Carolina) had followed suit. See: De Cruz 2010: 78.

31 These factors were: incestuous adultery; bigamy with adultery; rape; sodomy; bestiality; and adultery coupled with cruelty or desertion for at least two years. See: Probert 1999a. Similarly, this double standard existed in some civil law jurisdictions. For example, the French Napoleonic Code in 1804 made divorce more difficult (it had previously been relatively liberal and accessible) and introduced a sexist double standard, with a man only being liable for adultery if he brought his mistress into the family home. Divorce was then abolished entirely in 1816 until 1884. In contrast, the Prussian Code in Germany allowed for divorce by mutual consent. See: De Cruz 2010: 57-58, 63.

32 Matrimonial Causes Act 1923.

33 Cretney 2003: 196-197, 201.

34 Probert 1999b: 35.

35 In contrast, a number of fault-based grounds had been available in the United States since the mid-nineteenth century, though varying slightly from state to state, including cruelty and desertion as well as adultery. The US availability of these grounds influenced their inclusion in England’s Matrimonial Causes Act 1937: De Cruz 2010: 78, 89.

36 Redmayne 1993: 183.

“Although certain modifications were achieved [through the 1960s] they were, in the absence of statutory reforms, only conceded to the *innocent* and *deserving* wife. In this way the Court... reinforced the idea that married women did not have legal rights but only benevolent concessions which were made to them when they conformed to the ideal of the wife and mother.”³⁷

The Divorce Law Reform Act 1969 (later consolidated into the Matrimonial Causes Act 1973) created the “less adversarial and more realistic”³⁸ ground of the irretrievable breakdown of the relationship, which remains the only ground for divorce in England and Wales today. However, this ground must be demonstrated by one of five facts, most of which retain an element of fault: adultery; unreasonable behaviour; desertion; and separation for two years (with consent of the respondent) or five years (without consent of the respondent).³⁹ The no-fault element was controversial, particularly the ability to divorce after five years without the consent of the spouse. Described as “a Casanova’s Charter” by Lady Summerskill, it was criticized for allowing men to “desert their ageing wives... [who] would lose many of their rights and, at the same time, be too old to work and too unattractive to marry”.⁴⁰ As Smart notes, these critics did not consider marriage itself and the dependency that was created through a wife’s domestic role to be the problem but rather that some marriages failed.⁴¹

37 Smart 1984: 96.

38 Redmayne 1993: 199

39 Many jurisdictions have a similar mix of fault and non-fault grounds. For example, France has mutual consent; fault; or irretrievable deterioration of married life (De Cruz 2010: 58). In the United States, no-fault divorce has become common, though the “traditional fault paradigm” is still dominant in some states (Woodhouse 1994). However, several jurisdictions have only non-fault grounds. For example, in Germany the only ground is irretrievable breakdown of the relationship, demonstrated either by mutual consent of the parties to divorce or periods of separation (De Cruz 2010: 66). In Australia, the Family Law Act 1975 abolished fault as a requirement for divorce (Harrison 2002).

40 Smart 1984: 70.

41 *Ibid.*: 71.

This legislation also for the first time gave the courts wide discretionary powers to distribute the spouses’ assets on divorce, in addition to a share of a spouse’s income through periodical payments.⁴² However, as I discuss in Part 2, this legislation has not, even with its continuing evolution, removed all of the gender inequality in marriage and divorce.

It is in this context that the second-wave feminist critiques of marriage emerged from the 1960s to 1980s.

1.3

Feminist critiques of marriage⁴³

During the second wave of feminism, separate but related theories of marriage and its relationship to patriarchy emerged. For radical feminists, patriarchy⁴⁴ is the root of all other oppressions such as racist or class-based oppressions, which are an extension of male supremacy.⁴⁵ They emphasize the exploitation of biological reproductive differences and (hetero) sexuality as manifesting and perpetuating an unequal balance of power between women and men. This clearly implicates the family, as defined and idealized by the law of marriage, as the ‘chief institution’ of patriarchy.⁴⁶ For example, Firestone argues that it is not biological differences between women and men in themselves that created inequality, but the *reproductive functions* of those differences within the biological family.⁴⁷ As such, she argues that women could be freed by taking control of the means of reproduction; not only by regaining ownership of their own bodies, but also by seizing control of human fertility “as well as all the social institutions of child-bearing and child-rearing”.⁴⁸ While biological reproduction

42 *Matrimonial Causes Act 1973*, s25.

43 This section is adapted from a longer version in Barker 2012a.

44 This refers to a system of male domination, or male control not only of women but also of other males; for example, Millett describes the “principles of patriarchy” as twofold: “Male shall dominate female, elder male shall dominate younger” (1969: 25).

45 See for example, Bunch 1972.

46 Millett 1969: 33.

47 Firestone 1970: 8.

48 *Ibid.*: 11.

could, of course, take place outside marriage in an equally oppressive manner, Firestone's argument is that marriage "was organized around, and reinforces, a fundamentally oppressive biological condition [i.e. reproduction]" so that as long as marriage exists, the oppressive conditions of biological reproduction will be built into it.⁴⁹ To free women from biological reproduction would, according to Firestone, also necessitate freeing them from "the *social* unit [marriage and the biological family] that is organized around biological reproduction and the subjection of women to their biological destiny".⁵⁰ Therefore, for radical feminists such as Firestone, patriarchy exploits reproductive differences to oppress women, and one of the primary ways in which it does this is through the social ideologies of the marriage model.

The second aspect of radical feminist theories of patriarchy that particularly implicates marriage is (hetero) sexuality. For some radical feminists, hetero sex is, *in itself*, a manifestation and root of patriarchy, as it constitutes the invasion and colonization of women's bodies.⁵¹ There are two parts to this argument. First, in a heterosexual couple, love and sex "obscure the realities of [women's] oppression";⁵² allowing the illusion that women are exercising free choice to love rather than it being in exchange for the security that her sex class position denies her independent access to;⁵³ and second, that penetration is not necessary for women's or men's sexual pleasure, but is: "...an act of great symbolic significance by which the oppressor enters the body of the oppressed..."⁵⁴ Hetero sex that is not penetrative is also criticized on the basis that the "emotional accretions" of any form of hetero sex reinforce

men's class power.⁵⁵ A similar argument is presented by Rich in her famous essay "Compulsory Heterosexuality and the Lesbian Existence": that male power is maintained through enforcing heterosexuality on women,⁵⁶ ensuring "male right of physical, economical, and emotional access".⁵⁷ Marriage is romanticized as a site of sexuality, love, and reproduction,⁵⁸ and Brook argues that "vestiges of coverture" are still apparent in the consummation requirement, which enforces a patriarchal penetrative sexuality within marriage.⁵⁹ Through consummation, heterosexual penetration becomes the only legally approved form of sexual expression.⁶⁰ Thus, hetero sex and marriage are mutually reinforcing: Marriage supports and is supported by heterosexuality in providing a legally approved forum whereby men are expected to access women's bodies.⁶¹ As the outline of marriage above, particularly the doctrine of consortium and the marital rape exemption, demonstrates: "The sex act was not conceptualized as an act of mutuality at common law, but an act in which the husband had the use of the body of the wife".⁶²

In contrast to the radical feminist focus on sex and biological reproduction, socialist feminists situate patriarchy as deriving from both "class relations of production and the sexual hierarchical relations of society".⁶³ For them, capitalism and patriarchy are mutually dependent,⁶⁴ with patriarchy providing political control through the sexual ordering of society and capitalism using this to create profit.⁶⁵ Marriage supports the operation of capitalist patriarchy. For example, Pateman argues that "the employment contract presupposes the marriage contract"⁶⁶ in that it assumes that the (male) worker has a housewife to provide caretaking and housework. As such, there is an

49 *Ibid.*: 202. For example, Firestone notes that at the time of writing *The Dialectic of Sex*, the majority of Americans approved of scientific developments in artificial reproduction only if it was in the service of 'family values' such as being restricted to helping infertile married couples to conceive (p. 179). In the United Kingdom, section 13(5) of the *Human Fertilisation and Embryology Act 1990* (requiring consideration of the need of the child for a father) also testified to the enduring nature of these beliefs, until it was removed by the *Human Fertilisation and Embryology Act 2008*. See further: Sheldon 2005: 523.

50 Firestone 1970: 185.

51 Leeds Revolutionary Feminist Group 1981: 5

52 *Ibid.*: 6.

53 Firestone 1970: 124.

54 Leeds Revolutionary Feminist Group 1981: 6.

55 *Ibid.*: 7.

56 Rich 1981: 12.

57 *Ibid.*: 19.

58 See, for example, Geller 2001; O'Donovan 1993: 57; and Barrett and McIntosh 1982: 54.

59 Brook 2004: 83.

60 O'Donovan 1993: 47; see also Brook 2001: 140.

61 Pateman 1988: 2.

62 Thornton 1997: 488.

63 Eisenstein 1979: 1; see also Vogel 1983: 2.

64 Eisenstein 1979: 22.

65 *Ibid.*: 28.

66 Pateman 1988: 131.

assumption in capitalism that marriage will contribute to the 'surplus value' of labour.

The exploitation of women through the sexual division of household labour is key to, and supports, their oppression under capitalism. This sexual division of labour refers to both the domestic division and that in paid employment, argued to be cyclical and mutually supportive:

"[Sex segregation in jobs] maintains the superiority of men over women because it enforces lower wages for women in the labor market. Low wages keep women dependent on men because they encourage women to marry. Married women must perform domestic chores for their husbands. Men benefit, then, from both higher wages and the domestic division of labor. This domestic division of labor, in turn, acts to weaken women's position in the labor market."⁶⁷

Under the housewife/breadwinner model, women have a slightly different relationship to production than men have in that they do not 'own' their (domestic) labour power in the same way that men do: They cannot sell it, or can sell only part of it.⁶⁸ Furthermore, through domestic work, a woman's "whole work capacity is appropriated... by a particular individual from whom it is difficult or impossible to separate".⁶⁹ While housework is seen by women as "real work",⁷⁰ it is also different in that it takes place within the isolation of the private family and the tasks themselves contribute to the sexual hierarchy within the family. For example, when men do engage in unpaid work in the home, it is gendered and of the type that provides them with more power: for example, when a man takes responsibility for the car, it becomes *his* car, and while women's housework is considered to be necessary (and is constant and often degrading), 'men's work' such as DIY has a more voluntary character.⁷¹

67 Hartmann 1979: 208.

68 Delphy and Leonard 1992: 159.

69 Ibid.

70 Barrett and McIntosh 1982: 60.

71 Ibid.: 62-63.

However, domestic labour is not *only* for direct consumption in the home, benefitting individual men, it also provides "the capacity of a worker to work"; thus women's work within the home contributes on a societal (or structural) level to capitalism.⁷² This is what led Dalla Costa to argue that "the woman is the slave of a wage slave, and her slavery ensures the slavery of her man".⁷³ In this way, women's work within the home is both productive and reproductive. Not only do women, within the marital family, provide the next generation of workers (and transfer the ideologies of capitalist patriarchy to them),⁷⁴ they reproduce the labour force by acting as a mother to their husband, providing nurturing and care when he returns home from the alienating, cruel, masculine world of capitalist employment, and so reproducing him physically and emotionally and thus ensuring "worker stability".⁷⁵ This "removes the need for employers themselves to attend to such stability or to create contentedness".⁷⁶ Finally, the effects of women's productive and reproductive labours within the home combine to reduce the value of their paid labour power; they not only have a 'double shift' in the form of housework once they finish their paid work day⁷⁷ but are also segregated into poorly paid occupations by the existence of a 'dual labour market'.⁷⁸ As Smart argued in 1984:

"[Marriage] perpetuates an inadequate system of private economic support for women and children whilst constituting an obstacle to the development of a more adequate public system of support and benefit. Family law... on the one

72 Vogel 1983: 20.

73 Quoted in *ibid.*

74 The ideological (and moral) role of the mother in capitalist patriarchy is evident in this statement from Lord Shaftesbury, made to express his concerns about the moral effects of women working outside the home: "It is bad enough if you corrupt the man, but if you corrupt the woman, you poison the waters of life at the very fountain" (quoted in Hartmann 1979: 218). See also Chodorow (1979: 93) arguing that because of women's role as wife in providing a contrast to the immoral and competitive world of paid work in capitalism, women's own morality was strictly enforced.

75 Chodorow 1979: 92-96.

76 *Ibid.*: 96-97.

77 As Barrett and McIntosh (1982: 60) note, there is a certain inevitability with which women become responsible for domestic labour, even when they also have a paid job.

78 Beechey 1978.

hand appears to strive to help dependents (e.g. by introducing new but generally ineffective means of extracting money from husbands) while on the other hand lending massive ideological support to the structures of dependency within the family.”⁷⁹

It is evident, then, that second wave radical and socialist feminists critiqued the institution of marriage not only at the individual level (what happens between the parties within a marriage) but also at the structural level in terms of the role that the institution of marriage plays in society. This is significant because, while some would suggest that individual marriages in the twenty-first century are more egalitarian than they were in the past, there is little doubt that the structure of the institution, its role in society, remains largely unchanged. I would argue that at the structural level, marriage continues to perpetuate “an inadequate system of private economic support”⁸⁰ for those, usually women, who are taking care of dependents. The institution is used by the state to privatize caretaking and dependency within the family, particularly in times of austerity when provisions such as welfare benefits and state-funded childcare are rolled back.⁸¹ When care provided by the state is cut, it must be replaced with care from another source, usually within the family. Because it is most often women within the family who provide the care work, this shifting of responsibility from the public to the private sphere means that “family law is being called upon to address the economic needs of women and children at precisely the moment when the welfare state is being dismantled and public financial assistance is becoming scarce.”⁸² As a result, the economic needs of the caretaker must be met from within the family, placing women in a particularly vulnerable economic position if the relationship breaks down.

The significance of marriage in underpinning this privatization of care and dependency should not be underestimated. It allows society to benefit from what second wave feminists referred to as women’s

social reproduction work while failing to take responsibility for the economic consequences of doing this work faced by individual women, instead attempting where possible to make individual men responsible.⁸³ To the extent that this caretaking labour/social reproduction work is not shared equally between the spouses, this reinforces a more powerful position for men within the family and compounds women’s economic vulnerability. It also stigmatizes those caretaking women who do not have access to either their own or a spouse’s resources for financial support: Their poverty is said to be because they are unmarried rather than an inevitable consequence of caretaking without social structures in place that support this.⁸⁴ Moreover, this privatization of social reproduction within the family not only continues to affect the individuals who are the caretakers but also puts the family unit as a whole in a situation relative to the state and to capital that is analogous to that of the second-wave housewife: it takes responsibility for caretaking and social reproduction work but, just as in the case of the housewife, these functions are unrecognized, uncompensated and undervalued by the society that benefits from them. Though the organization of both domestic and paid labour has changed somewhat since the second wave, primarily in that many more women are now working outside the home, responsibility for social reproduction under the neo-liberal state has arguably shifted towards rather than away from the private family.⁸⁵

As the family form evolved through the twentieth century, with unmarried cohabitation increasing and same-sex couples beginning to seek legal recognition, the form that the family takes starts to become less significant to the state than the functions it provides on behalf of capitalism.⁸⁶ The state begins to recognize different types of families because “the need continues for stable, and intelligible, family forms capable of absorbing and discharging a considerable proportion of the care burden”.⁸⁷ As such, the increasing diversity of recognized family forms, including

79 Smart 1984: 230.

80 Smart 1984: 230.

81 See: Fudge and Cossman 2002: 15.

82 Cossman 2002: 169.

83 See also: Gavigan 1993.

84 Fineman 2004: 32-36.

85 Gill and Bakker 2006: 48.

86 Gavigan 1999.

87 Conaghan and Grabham 2007: 332.

legal protections for cohabitants and same-sex marriage in some jurisdictions, can be seen, “not just (or even) as a product of the success of liberal egalitarian strategies but also (or rather) as a response to the decline of the housewife family model in the context of post-industrial transformation and widescale welfare retrenchment”.⁸⁸

1.4

The rise of cohabitation: A new era of equality in relationships?

Around the same time as these second-wave feminist critiques of marriage began to emerge, and also coinciding with the sexual revolution of the 1960s, cohabitation outside of marriage began to increase in the West.⁸⁹ There are a number of reasons why cohabitants do not marry, and research has found some differences in reasons between female and male cohabitants. For example, in the United States, Huang et al. found strong gender differences in the motivations for cohabitation, with females in heterosexual relationships tending to see cohabitation as a precursor to marriage, while males saw it as “a convenient low-risk way to determine if a relationship has longer-term potential”.⁹⁰ For both female and male cohabitants, there was a fear of divorce and the sense that there would be ‘less hassle’ leaving a cohabiting relationship.⁹¹ In addition to those who were testing the relationship in this way and those who saw cohabitation as a precursor to marriage, there was another group of cohabitants who saw it as an alternative to marriage. Among this group were those who regarded marriage as too confining, as less

free than cohabitation; those who had been married before and wanted to preserve alimony payments that would cease on remarriage; and those who were concerned about the disapproval of adult children who might view remarriage as replacing their other parent.⁹² Hatch has categorized the cohabitants who are seeking an alternative to marriage into two groups: Those who are uneasy about “the meanings associated with marriage”, and those who have “concerns about what marriage does to the relationship”.⁹³ Kiernan highlights some reasons why women in particular might prefer cohabitation:

“Cohabitation may symbolize, particularly for women, the avoidance of the notion of dependency that is typically implicit in the marriage contract. Women may be anxious that the legal contract may alter the balance of power in their partnership arrangements and make the relationship less equitable. On the other hand, for some, cohabitation may be a response to insecurity. For example, the rising divorce rates may well have increased the perceived risks of investing in marriage and the emergence of cohabitation may have been a logical response to this uncertainty.”⁹⁴

While there may be, as suggested in this quote, a perception that cohabitation is better for gender equality than marriage, the research is less conclusive. For example, studies in the United States have provided evidence that, while the gap is wider for married couples, there is still a gendered division of labour in cohabiting relationships.⁹⁵ A European study suggests that the reason for an increased egalitarianism among unmarried cohabitants is that they spend less time overall on housework than married women and men so that:

“...more egalitarian distributions are mainly due to women’s lower investment in housework. Cohabiting men do not increase their dedication to female tasks significantly; nor do

88 Ibid.: 333.

89 In Canada, for example, the numbers of cohabiting couples almost tripled between 1961 and 2011 (Mossman et al. 2015: 57, citing Statistics Canada 2012). Similar increases were seen Europe (Kiernan 2004). It is worth noting, however, that the rate of increase has been uneven across western jurisdictions, with cohabitation being more common in northern European countries, such as France, Germany and Sweden, than in southern European countries, such as Italy and Spain (see further, Kiernan 2004: 39). For an explanation of these differences, see: Nazio 2008.

90 Huang et al. 2011: 889-890.

91 Ibid.: 891.

92 Gold 2012: 318.

93 Hatch 2017.

94 Kiernan 2004: 52.

95 See for example: South and Spitze 1994; Gupta 1999.

cohabiting women spend more time on male tasks.”⁹⁶

Thus, while there is a fairer division in cohabiting couples than in married couples, women in opposite-sex relationships still do more than 70 per cent of the household labour in both types of relationship.⁹⁷ As such, many of the same concerns about women’s economic vulnerability on relationship breakdown (discussed further in Part 2 in relation to marriage) exist for cohabitants, and the effects of this can be exacerbated for individual women when the cohabiting relationship lacks legal recognition.⁹⁸

There is little consistency across western jurisdictions’ responses to the rise of cohabitation. In most jurisdictions, legal recognition has been extended to these relationships for some purposes, though often it is not as comprehensive as that for spouses. One exception to this is some US states where cohabitation can be legally recognized as a ‘common law marriage’.⁹⁹ While common law marriage here is often said to originate in English canon law’s contract *per verba de praesenti*,¹⁰⁰ which existed prior to the *Clandestine Marriages Act 1753*,¹⁰¹ Probert argues that this is based on a misunderstanding as neither the term nor the concept of common law marriage existed in England at that time. Instead, the contract *per verba de praesenti* represents a contract to marry rather than a marriage.¹⁰² Therefore, she suggests that the history of common law marriage is much more recent than is generally acknowledged:

“The early colonies passed legislation regulating marriage, requiring certain formalities and punishing clandestine marriages. It was not until after the American Revolution that the seeds of what eventually became known as

‘common law marriage’ were sown [in an 1809 New York decision].”¹⁰³

Despite some cases recognizing the concept in the United States since 1809, it was not until the 1890s that the term ‘common law marriage’ began to appear in US legal texts.¹⁰⁴ In England, it remains a popular myth that there is such a concept as common law marriage, but this is not legally recognized.¹⁰⁵

In those US states that recognize it, common law marriage may be defined as:

“an informal marriage in which a man and a woman who fulfill the requirements of marriage, except for a ceremony and formal documentation, agree to live together openly as husband and wife and have the reputation in the community that they are married.”¹⁰⁶

If there is a recognized common law marriage, it is treated the same as a registered marriage and can only be terminated through divorce.¹⁰⁷ However, in the absence of formal documentation, it can be difficult for couples to evidence the required “sustained and open cohabitation” that is required.¹⁰⁸ The party claiming its existence would have to establish it through either “clear and convincing evidence” or “on the preponderance of the evidence”, depending on the jurisdiction.¹⁰⁹ It is not sufficient that a couple has merely been living together for a certain period of time.¹¹⁰ They must also consistently hold themselves out to the public as a married couple by taking the same last name, filing tax returns as spouses and declaring their marriage on documents such as leases and their children’s birth certificates; isolated references to husband/wife will not be enough.¹¹¹ They must also have a “present and mutual intent to be married” and both consent to the marriage, though consent and intent can be

96 Domínguez-Folgueras 2012: 1639.

97 Ibid.: 1636.

98 See for example: Sánchez Gassen and Perelli-Harris 2015: 432.

99 For example, the following US jurisdictions have recognized common law marriages: Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. See: Katz 2015: 16.

100 “An exchange of the vows of marriage in words of the present tense” (Probert 2008: 3).

101 Thomas 2009.

102 Probert 2008: 8.

103 Ibid.: 14, citing *Fenton v. Reed* 1809.

104 Ibid.: 18.

105 See Barlow and James 2004.

106 Katz 2015: 16.

107 Ibid.: 17.

108 Ibid.: 18.

109 Ibid.

110 Thomas 2009: 157.

111 Ibid.: 159.

implied through their conduct rather than express agreement.¹¹²

Australia also gives comprehensive recognition to cohabitants through *de facto* relationship provisions. These recognize couples that meet the criteria set out in the legislation, including that they have cohabited for two years or have a child together, but some states also provide a way to evidence the relationship through a registration scheme. This avoids the need for the uncertainty and difficulty of collecting the required evidence facing common law spouses in the United States, yet also retains recognition for those who do not register. These provisions are discussed further in Part 4.

Such comprehensive measures recognizing unmarried cohabitants have not been limited to common law jurisdictions. In many European civil law jurisdictions, pressure for the legal recognition of same-sex relationships led to the creation of registration provisions. In some countries, including France and the Netherlands, these provisions allowed not only same-sex but also unmarried different-sex couples to access many of the legal consequences of marriage. Although these were created as an alternative to same-sex marriage, these jurisdictions have retained the alternative provisions despite subsequently making same-sex marriage legal. As such, these provisions are considered further in Part 4 as part of the expanding ‘menu’ of relationship recognition.

Other civil law jurisdictions have recognized cohabitants for many purposes on the same terms as spouses without introducing a registration system. In Sweden, for example, different-sex cohabitation has been legally recognized for some purposes since 1973 and expanded on a piecemeal basis until the *Cohabitees (Joint Homes) Act 1987* and the *Homosexual Cohabitees Act 1987* “significantly extended the legal rights of cohabitees”, though the gap between marriage and cohabitation has not been completely closed.¹¹³ This legislation provides for, among other things, a property regime for unmarried couples that is similar to—though less comprehensive than—the

deferred community property scheme for spouses (deferred community property is discussed in Part 2). These legal developments followed the introduction of the ‘neutrality principle’ in 1969:

“New legislation ought (so far) as possible to be neutral in relation to the different forms of living together and different moral views. Marriage has and ought to have a central position in the family law, but one should try to see that the family law legislation does not create any provisions which create unnecessary hardships or inconveniences for those who have children and build families without marrying.”¹¹⁴

Similarly, in Denmark and Finland, some family law provisions have been extended to unmarried cohabiting couples in recognition of the fact that “legislation developed to meet the needs of married couples is also suited to the needs of unmarried couples”.¹¹⁵

Some common law jurisdictions also have less comprehensive provisions, extending only some spousal benefits to cohabitants. For example, the definition of ‘spouse’ in British Columbia’s *Family Law Act* includes cohabitants with two years of “continuous cohabitation”.¹¹⁶ This means that there are now “no meaningful differences” in the way that courts treated married and unmarried claimants seeking financial support from a partner at the end of a relationship.¹¹⁷ However, while some provinces—including Manitoba and Saskatchewan—recognize cohabitants for the purposes of property redistribution on relationship breakdown,¹¹⁸ there remains reluctance to do so in others.¹¹⁹

Where there are fewer spousal provisions extended to cohabitants, there are questions about whether women, in particular, are sufficiently protected in

112 Ibid.

113 Bradley 1989: 326. See also: Andersson 2015.

114 Swedish Ministry of Justice 1969, cited in Bradley 1989: 323, note 112.

115 Kiernan 2004: 50-51.

116 Section 3. See: Mossman et al. 2015: 450.

117 Boyd and Baldassi. 2009.

118 Sanders 2013.

119 The Supreme Court held in 2013 that Quebec’s refusal to do so did not violate the Charter: *Quebec (Attorney-General) v. A* (2013) SCC 5.

these relationships. Yet, the idea that marriage protects women is one that should be treated with some scepticism based on the history presented above (see also Part 2 for contemporary analysis of marriage). It is noteworthy that even coverture was represented by (male) legal writers at the time as providing ‘protection’ for women.¹²⁰ It is also important to remember that, as Auchmuty emphasizes, being married only protects the financially vulnerable party on divorce “to the extent that his or her ex-spouse can afford to pay”.¹²¹ This idea of ‘protection’, then, must be read alongside the literature presented above on the privatization of care and dependency within the family.

Nevertheless, in circumstances where there is a gendered, unequal relationship, marriage does provide some means to redress that on divorce when the family courts seek to achieve equality between the spouses, either through a community property regime where marital property is held jointly or through redistribution of assets in a separate property regime. The extent to which these are successful in achieving equality is discussed in Part 2. In the absence of a marriage or the legal recognition of cohabitation for this purpose, a woman who has held a ‘traditional housewife’ role, with the property held solely in the name of her male partner, could find herself economically vulnerable without access to these family law provisions. A famous example of this vulnerability, frequently featuring in debates about whether cohabitants ought to be legally recognized,¹²² is the English case of *Burns v. Burns*.¹²³

Although she had taken his name and adopted the title ‘Mrs’, Mrs Burns was not married to Mr Burns. They cohabited for almost 20 years, beginning in the early 1960s when she was 20 and he was 35,¹²⁴ and they had two children together. Mr Burns was a businessman and the property was in his sole name, a common practice at that time even within marriage,¹²⁵ while Mrs Burns was “held up to the world” as the defendant’s wife, maintaining the home and raising the

children.¹²⁶ Though she later became self-employed, she had not made direct financial contributions to the purchase of the family home but she did contribute to some household expenses and, she argued, made an indirect contribution to the cost of the family home. However, in the absence of a marriage, the case had to be decided on property law principles. The Court of Appeal found that the fact that she had contributed through housekeeping and childcare was “simply not strong enough” to imply a common intention between the parties that beneficial ownership of the family home be shared between them.¹²⁷ As such, sole beneficial ownership of their family home remained with Mr Burns despite the broader contributions of Mrs Burns to the family. The objective unfairness of this position, which was mirrored in a number of subsequent cases, coupled with a prevailing myth that common law marriage exists in England and Wales, led the Law Society and others to call for law reform.¹²⁸

However, while some family law scholars have advocated extending the spousal regime to cohabitants,¹²⁹ feminist property law scholars have recommended caution¹³⁰ or even opposed such a move.¹³¹ Bottomley notes that *Burns v. Burns* is “no longer representative of the law”, and Auchmuty argues that the concerns voiced by family lawyers based on this case misrepresent property law. For example, following the case of *Stack v. Dowden* [2007], the contributions made by Mrs Burns would be recognized in property law because intention to co-own property now “takes account of all significant contributions, direct or indirect, in cash or in kind”.¹³² In this case, it is noteworthy that it was the female partner, Ms Dowden, who had contributed significantly more (over 65 per cent) to the purchase price of their family home, which had then been conveyed in their joint names. She was seeking, and received, the protection of the law “to stop her greedy ex-partner from taking more than his fair share of the proceeds of the sale”.¹³³

120 Auchmuty 2016: 1200.

121 Ibid: 1213.

122 Bottomley 2006.

123 [1984] Ch. 317.

124 Mee 2011: 177.

125 Ibid.: 178.

126 *Burns v. Burns* [1984], at 319.

127 Ibid., at 328.

128 See: Law Society 2002; Wong 2001.

129 See, for example, Barlow and James 2004.

130 Bottomley 2006.

131 Auchmuty 2004.

132 [2007] UKHL 17, at para 31.

133 Auchmuty 2004: 121.

Bottomley and Auchmuty also suggest that the problem illustrated by the *Burns* case is not representative of all cohabitants¹³⁴ and is one that is “clearly on the decline”¹³⁵ following changes to property law that require all those purchasing property to declare whether they want to hold it as joint tenants or tenants in common. If they are joint tenants, any proceeds from the sale of the property are divided in equal shares; if they are tenants in common, they must set out what proportion share each party has.¹³⁶ Where a person is, like Mrs Burns, not a legal owner, she must establish an implied trust in order to claim a ‘beneficial interest’ (co-ownership) in the property. Coupled with rules introduced by banks since the early 1980s that require that all “homes bought by and for couples be conveyed into joint names”,¹³⁷ it would now be extremely unlikely for someone to be in Mrs Burns’ position: Even if her partner already owned his home when she moved in, “re-mortgaging or moving to a new property – common events in long-term relationships – will trigger conveyance into joint names”.¹³⁸

Furthermore, drawing on the case of *Oxley v. Hiscock*,¹³⁹ Bottomley notes that in cases involving older women who are cohabiting with a new partner following divorce, it is more likely to be the woman who brings property registered in her sole name to the relationship and less likely that either party would be economically disadvantaged by caring for children, for example, in this relationship. However, this does not mean an absence of gendered vulnerability. Ms Oxley had been persuaded by Mr Hiscock that their home, for which she contributed two thirds of the deposit and shared day-to-day expenses, should be in his sole name. When advised otherwise by their solicitor, she responded that she was ‘quite satisfied’ with this and that “I feel I know Mr Hiscock well enough not to need written protection”.¹⁴⁰ One of Bottomley’s concerns is that women in Ms Oxley’s situation are more emotionally than economically vulnerable:

“Mrs Burns exemplifies the victim who has lost everything through her commitment to the man who was the father of her children. She is the iconic figure crying out for the protection of law. Mrs Oxley is a rather more problematic figure to focus on.... [But she] does present a figure of a vulnerable woman, in that she invested her financial resources in her new relationship because she ‘trusted her man’.”¹⁴¹

Extending family law to these relationships may, Bottomley fears, cause such women “to take even fewer steps to protect their position”.¹⁴² A solution to this problem, from a feminist property law point of view, is suggested by Auchmuty: “[Make] the declaration of shares at the point of purchase mandatory, informed, and documented”.¹⁴³ While acknowledging the possibility of unequal power relationships, she sees “the ordinary property law rules and procedures as automatically beneficial to such individuals, since the starting point... is the joint tenancy, which gives rise to equal shares on sale”.¹⁴⁴ Ultimately, what Bottomley and Auchmuty both caution against is an assumption that “not only does property law fail women, but that family law does not”.¹⁴⁵ The extent to which family law ‘fails women’ is discussed in Part 2, but perhaps it is true that, as Auchmuty argues:

“The problem is not the law but the fact that family relationships are still so often unequal. These inequalities are still often gendered and structural rather than the result of poor choices. But the other side of the coin is that the certainty of property law can protect genuinely autonomous individuals while the uncertainty and discretionary nature of family law can take away that autonomy. People with property are generally going to be better off than those without it, and people who go into whatever arrangement they choose open-eyed and with equal bargaining power should be better off than those who trust in the law’s

134 Bottomley 2006.

135 Auchmuty 2016.

136 *Ibid.*: 1204.

137 *Ibid.*

138 *Ibid.*: 1205.

139 [2004] 3 All E.R. 703.

140 Quoted in Bottomley 2006: 189.

141 Bottomley 2006: 195.

142 *Ibid.*: 199.

143 Auchmuty 2016: 1208.

144 *Ibid.*

145 Bottomley 2006: 206.

protection. For this reason, it seems to me that the goals we should be aiming for are autonomy, empowerment, and properly informed choices – not protection.”¹⁴⁶

1.5

Conclusion

Marriage in the West has undoubtedly evolved over the course of the twentieth and early twenty-first centuries. There has been a move toward formal equality between spouses, with many of the historic legal disadvantages of wives, such as in relation to restrictions on their property ownership and unequal access to divorce, removed. Wives hold equal legal status with husbands within the marriage. However, this formal legal equality that developed towards the end of the last century has not necessarily led to a corresponding substantive equality between spouses. For example, the theme of women having to meet the criteria of the ‘good wife/mother’ to deserve, firstly, access to divorce and then equal shares of marital property following divorce is striking in its persistence and in some respects carries through to some of the rules of division of assets even now, as is discussed in the next part of the paper. It is, then, perhaps unsurprising that despite the improvements in formal equality between spouses, the institution of marriage itself is irredeemable to many feminists.

It is important to recognize that the feminist critiques of marriage were not only concerned with equality between spouses within individual marriages but also operated on the structural level. Thus, considerations of the role that marriage as an institution plays in the privatization of care and dependency in society not only continue to apply to heterosexual marriage but also arguably extend to same-sex marriage and other relationship structures that are modelled on marriage.¹⁴⁷ The rise of unmarried cohabitation has raised questions about whether and how women in these relationships ought to be protected. While some jurisdictions have extended some or all of the legal consequences of marriage to cohabitants, others recognize them for few purposes. However, the debate between feminist property and family lawyers in England and Wales reviewed above demonstrates that it is far from clear that a marriage-like form of recognition is necessarily the best form of ‘protection’ for gendered economic and/or emotional vulnerability.

The impact of same-sex marriages on gender equality within marriage more broadly is considered in Part 3 and the possibilities for greater gender equality within alternative options on the expanding ‘menu’ of relationship recognition are discussed in Part 4. In Part 2, I consider the division of marital assets and marital property (prenuptial) agreements in the context of the contemporary division of household labour in heterosexual marriages.

¹⁴⁶ Auchmuty 2016: 1219–1220.

¹⁴⁷ See Barker 2012a.

2.

MARRIAGE AND GENDER (IN)EQUALITY IN THE WEST

2.1

Introduction

This part of the paper explores gender (in)equality in contemporary marriage and divorce, focusing not only on what happens within marriages in terms of the gendered division of labour within the home and its impact on women's employment and earning capacity outside the home but also on the inequalities brought about by the legal structure of the institution itself. Two key legal aspects of the institution that have impacted on gender equality are the rules on the division of assets on divorce and the increasing acceptance by the courts of prenuptial agreements. Part 1 included a discussion of the feminist critiques of marriage that were largely formed at a time when the breadwinner/housewife model of marriage was dominant. The first section below considers the extent to which these critiques may still be applicable to marriage in the West through examining the contemporary gendered division of household labour, drawing on statistical evidence and sociological studies. This analysis then informs the legal analyses in the remaining sections of Part 2.

2.2

Gendered division of household labour and women's employment

“Unpaid work contributes not only to current household consumption (e.g. cooking) but also to future well-being (e.g. parental investments in raising children) and to community well-being (e.g. voluntary work). In all countries, women do more of such work than men, although to some degree balanced – by an

amount varying across countries – by the fact that they do less market work.”¹⁴⁸

The breadwinner/housewife model of marriage has declined and women's participation in the paid labour force in western countries has steadily increased over the last five decades.¹⁴⁹ However, this has not necessarily meant that there is now an equal division of household labour and childcare or equality in the workplace. In particular, motherhood continues to negatively impact women's employment outside the

¹⁴⁸ Veerle 2011: 30.

¹⁴⁹ For example, it has doubled in the last 50 years in the EU, with women's employment rate being 70 per cent between ages 25-54 (men's employment rate is 85 per cent). See: Miani and Hoorens 2014.

home while fatherhood positively impacts on men's employment outside the home.¹⁵⁰ Recent Organisation for Economic Cooperation and Development (OECD) statistics on women's and men's unpaid work show that women do the greater proportion of unpaid work in all countries studied. On average, women spent 2.5 hours more per day than men, and the smallest gender difference was around an hour more per day spent by women in the Nordic countries.¹⁵¹ Within the European Union (EU) overall, women spend an average of 26 hours per week on household labour, compared to 9 hours spent by men, and in the United States the rates are similar.¹⁵² Therefore, the statistics would suggest that while there have been significant changes in the patterns of women working outside the home, this has not been matched by the same level of change within the home. As such, while women are expected to work outside the home on the same terms as men—and often their income is a vital contribution to the family finances—they also continue to have primary responsibility for housework and childcare.¹⁵³ However, it is noteworthy that the recession of 2007 positively impacted on the time fathers spent on childcare, largely due to a change in men's employment opportunities, which decreased their 'opportunity cost' for spending time on childcare, their income and "their bargaining power relative to women".¹⁵⁴

Despite women's increased participation in paid work outside the home, they are still more likely to work fewer hours than men and make less money

per hour worked. In particular, gender differences in childcare labour mean that as the number of children in a household increases, so does the likelihood of a woman working only part-time, but there is no such link for men.¹⁵⁵ For example, Bianchi et al. note that while housework can be 'fit in' around work schedules, childcare cannot, and while women reduce their paid work to care for children, men do not: "Thus gendered care giving retards movement toward gender equality in the labor market, perhaps far more so than gender differences in housework".¹⁵⁶ As Hirschmann argues, the gendered division of household labour and childcare:

"drive[s] women into part-time labour, more frequent and longer interruptions in labour force participation, and lower status jobs offering more flexible work hours, all of which have a seriously negative impact on their lifetime earnings, job security and pensions in retirement."¹⁵⁷

Looking at the pay gap between women and men in full-time work demonstrates this effect. Across EU countries, for example, the pay gap is on average 16.1 per cent,¹⁵⁸ with little change over the last 20 years.¹⁵⁹ The gap is even wider for women who work part-time.¹⁶⁰ There is a 'motherhood penalty' that is not explained only by the increase in part-time working after children are born: "although fathers' earnings are unaffected by childbirth, mothers experience cumulative and persistent wage inequality over their lifetimes",¹⁶¹ including in retirement as the wage gap

150 For example, across the EU as a whole there is a 10 per cent decrease in employment figures for women who are mothers. However, there are significant differences between countries, most likely due to differences in childcare availability and affordability; availability and quality of part-time work; the prevalence of single mother households; and policies designed to encourage dual-earning households and mothers' employment. See *ibid.*: 4.

151 Veerle 2011: 11-12. As well as national differences, there are also class and race differences within the countries. See, for example: Kan and Laurie 2016; and Miller and Carlson 2016.

152 See: Hirschmann 2015: 14.

153 Of course, a reasonably well-paid career allows some to purchase the services of other women in the poorly paid 'feminine' industries such as childcare and cleaning. For accounts of exploitation of poor, ethnic minority and immigrant women working in these industries in the UK and US, see: Carby 1992; and Ehrenreich 2002.

154 Gorsuch 2016: 73.

155 Eurostat Newsletter 2016.

156 Bianchi et al. 2012: 60.

157 Hirschmann 2015. It not only has an impact on earnings, but also on leisure time, with recent EU data showing that men have more leisure time than women, though the gap is smaller in countries with the highest participation of women in the labour force (Gimenez-Nadal 2015).

158 There was wide variation between member States, with the lowest gender pay gap in Slovenia (2.9 per cent) and the highest in Estonia (28.3 per cent), but the majority of States were clustered around the 10-20 per cent mark. See: Eurostat 2016.

159 Grimshaw 2015.

160 In the UK, for example, they earn 32 per cent less per hour than a female full-time worker and 41 per cent less per hour than a male full-time worker. See: The Equalities Review 2007.

161 Grimshaw 2015: 35.

also impacts on women's pensions.¹⁶² Where both parents work, there must still be at least one parent available for emergency and out-of-hours childcare who as a result cannot make themselves available for career opportunities that would require travel or long/unsociable hours. Even taking only a short career break while children are very young often results in women "find[ing] themselves on career 'off-ramps' that can be overcome only with great effort".¹⁶³

The next question is the extent to which these statistics can be attributed to the institution of marriage as opposed to couples' individual preferences or negotiations. It is counterintuitive, perhaps even offensive, to suggest that women lack agency over the household division of labour. For example, some commentators argue that, in the twenty-first century, the oppressive aspects of marriage can be overcome: Spouses can and should negotiate egalitarian relationships, including sharing housework and childcare. For example, Marchbank and Marchbank suggest that, "We can, to a large extent, *make choices* that avoid some of the practices of patriarchy"¹⁶⁴ and Elizabeth argues that:

"Increasingly I am convinced that a single recipe for creating an egalitarian heterosexual relationship does not exist. Rather, women who *want* to craft egalitarian partnerships with men need to *strategically deploy* a variety of discourses and engage in a raft of different practices to manage the situational contexts that constitute their lives."¹⁶⁵

This inevitably poses the question of the extent to which women today are able to negotiate an egalitarian household division of labour but choose not to. Evidence suggests that it is not as simple as failing to choose equality. Dryden found that, although her interviewees were "actively engaged in challenging the legitimacy of perceived gender power imbalances with their husband",¹⁶⁶ they were doing so very cautiously and seemingly with little real success; rather

than being an equal division of labour, there was an unequal but 'justified' division, in that it appeared natural and sensible based on the working patterns of each spouse. Family structures and the structures of the wider economy are thus intertwined and mutually dependent. For example, recent research in the United States has found that:

"highly constraining institutional arrangements may lead to more traditionally gendered work-family preferences, whereas institutional arrangements that alleviate those constraints may lead to less traditionally gendered (though not entirely de-gendered) work-family preferences."¹⁶⁷

In other words, the gendered division of household labour is not solely a matter of personal choice, nor is it solely an economic one: The dominance of males in the sphere of paid employment gives them power in the family, yet the gendered, hierarchical organization of the paid labour market itself relies on the gendered division of labour within the home.¹⁶⁸ As Martha Fineman argues in the US context:

"On a structural as well as an ideological level, we need reforms that counter the pervasive assumption that the American worker is an unencumbered individual, free to participate in an inflexible nine-to-five schedule, without concern for ill children, school vacations, or other caretaking glitches, because some woman is taking care of all of that at home, for free."¹⁶⁹

Thus, despite some small policy changes in some jurisdictions to allow, for example, parental leave in limited circumstances, there often remains the same underlying assumptions as identified by second wave socialist feminists: that there is a caretaker/housekeeper working in a supporting role within the home. Therefore, the contemporary economic exploitation of married women is different to that described by the

162 Tinios 2015.

163 Tait 2015: 1266.

164 Marchbank and Marchbank 2004: 468 (my emphasis).

165 Elizabeth 2004: 429 (my emphasis).

166 Dryden 1999: 146.

167 Pedulla and Thebaud 2015: 133.

168 Boyd 1996: 165-166.

169 Fineman 2001: 36. See also, in the Canadian context, Boyd 1997: 13.

second wave feminist critiques only in that it is now through both the continued appropriation of their household labour and the resulting disadvantage in terms of the impact this has on their career,¹⁷⁰ and also combined with the increasing family reliance on the second income. This creates a double burden for wives.

The extent to which this gendered division is encouraged by the legal structure of the institution of marriage has been explored in a number of studies, which suggest that—although there is also an unequal division in unmarried cohabiting households¹⁷¹—marriage may increase ‘gender specialization’ of roles.¹⁷² A number of the legal consequences of marriage encourage this specialization. For example, in the US context:

“Within an existing marriage, a wide range of policies – including tax, social security, and welfare benefits – reward married couples that have a significant disparity in their individual incomes, and access to a spouse’s employer-sponsored healthcare often enables one spouse to exit the paid workforce. If a marriage dissolves, divorce law, while far from a comprehensive safety net, provides protection to a dependent spouse by awarding that spouse a share of property and income accumulated during the marriage and, in some instances, maintenance or alimony payments post-divorce.”¹⁷³

The nature and extent of support for ‘specialization’ of roles within marriage has varied over time and across jurisdictions. Yet, while it remains strong for intact marriages, it has significantly weakened across the jurisdictions in the one area that leaves wives in particular (as opposed to the family as a whole) more financially vulnerable. As outlined below,

divorced wives could once expect spousal support payments for life, but—despite the clear link between a gendered division of household labour (particularly when there are children) and lower lifetime pay for women—courts now favour a ‘clean break’ on divorce and marital property (prenuptial) agreements are available to preclude or restrict sharing of assets on divorce. In some jurisdictions, this structural support for specialization (and in others, an absence of measures to encourage an equal division of household labour and childcare), means that applying an assumption on divorce that gender equality exists in contemporary marriages gives rise to a situation where wives who have taken primary responsibility for housework and childcare receive little monetary compensation for their “second shift”¹⁷⁴ and lower average earnings when the marriage ends, leaving them financially vulnerable.

2.3

Divorce and division of assets: ‘Alimony drones’ and the ‘yardstick of equality’

The marriage laws of western jurisdictions share many commonalities, with the structure and ideologies of the institution being broadly similar. Divorce is relatively freely available in the West¹⁷⁵ when a marriage has irretrievably broken down, and in most jurisdictions ‘matrimonial fault’ no longer plays any part in decisions regarding division of assets—though this does not necessarily mean that fault is completely irrelevant. Some jurisdictions retain some element of fault in the grounds for divorce as a potential way to demonstrate the breakdown of the relationship alongside the no fault grounds of separation for a defined period of time. For example, as noted previously, in England and Wales one of five ‘facts’ must be relied upon, some of which are fault-based and others are not.¹⁷⁶ Similarly, Canada’s *Divorce Act 1985* provides three ways to demonstrate that the marriage has broken down: the no fault fact of separation for one

170 Okin 1989.

171 See Miller and Carlson 2016.

172 For a summary, see Widiss 2016. See also the findings by Davis et al. 2007 that “both men and women who are cohabiting report a more egalitarian division of household labour than their married counterparts” (p. 1263); and by Dominguez-Folgueras 2012 that cohabitants are more egalitarian but there are also differences between countries.

173 Widiss 2012: 727.

174 Hochschild 1989.

175 Malta became the last country in Europe to allow divorce, following a referendum in 2011 (BBC 2011).

176 *Matrimonial Causes Act 1973*, s1(2).

year and the fault-based facts of adultery or cruelty such as to make continued cohabitation intolerable.¹⁷⁷ In contrast, irretrievable breakdown in Australia is demonstrated solely on a no-fault basis, by separation for a minimum of 12 months.¹⁷⁸ In Ireland, where there was a constitutional prohibition on divorce until 20 years ago,¹⁷⁹ divorce is also on a 'no fault' basis, but this does not mean that it is easily available: The parties must have lived apart for four out of the last five years, there must be no reasonable prospect of reconciliation, and proper provision must have been made for the spouses and any dependents.¹⁸⁰ Additionally, solicitors must have discussed with the parties the possibility of reconciliation, mediation and separation as an alternative to divorce.¹⁸¹

Property regimes in western jurisdictions can be grouped into two broad categories: community property and separate property regimes. Each regime has different implications for property division on divorce, and there are also differences within the categories. This section begins with a general outline of each of these marital property regimes, considering their gender equality implications and giving particular consideration to the principles of equitable distribution in separate property regimes, which have attempted to provide some compensation for "relationship-generated disadvantage"¹⁸² resulting from a gendered division of household and childcare labour. Finally, consideration is given to gender equality in the context of spousal support payments and the trend towards encouraging a 'clean break' on divorce.

2.3.1 Community property regimes

Community property means that some or all of the marital assets are held jointly by the spouses. In theory, this is more effective in protecting the economically weaker spouse because jointly owned property can only be dealt with by both spouses acting together, and at the end of the relationship it

would be shared equally.¹⁸³ However, these regimes are not a homogenous category and so the precise meaning of community property differs. In some jurisdictions, community property is created immediately on marriage, meaning that the spouses jointly own all relevant property (and debts).¹⁸⁴ In others, the community of property is deferred until the end of the marriage,¹⁸⁵ meaning that spouses retain their separate property during the marriage but community property is created on divorce. What counts as relevant property also differs between jurisdictions:

"[A]t its most basic, it is limited to property acquired during the marriage but excludes inheritance, gifts and personal insurance proceeds even if acquired during the marriage; at its most extensive, it includes all property held by either or both spouses from before and during the marriage and includes inheritance."¹⁸⁶

For example, in the community property states in the United States, spouses generally "own equal shares of all property that either spouse acquires through labour during their marriage".¹⁸⁷ Property acquired before the marriage or through inheritance during the marriage remains separate property. However, as in Europe, the rules in the United States on what counts as community property differ between the jurisdictions, with California having the most inclusive rules and Texas the least, resulting in a much smaller shared estate.¹⁸⁸ This, in combination with "severe restrictions" on the courts' ability to award alimony in Texas, "make it more likely that a Texas divorcing spouse with a low

¹⁷⁷ *Divorce Act 1985*, s8(2).

¹⁷⁸ *Family Law Act 1975*, s48.

¹⁷⁹ See further: Crowley 2011.

¹⁸⁰ *Family Law (Divorce) Act 1996*, s5.

¹⁸¹ *Family Law (Divorce) Act 1996*, ss6-7.

¹⁸² Per Baroness Hale of Richmond, *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24, para 140.

¹⁸³ Barlow 2008: 504.

¹⁸⁴ This is the case in the Netherlands, for example, where community property includes "all of the assets and all of the debts of both spouses" unless the parties opt out of the default regime (Boele-Woelki and Braat 2012: 233). Similarly, in South Africa, community property applies to all property (with very few exceptions such as inheritance and payments for damages) and debts acquired before and during the marriage unless the parties have opted-out via a prenuptial contract. See: Robinson 2007.

¹⁸⁵ This is the default regime in Sweden, for example. See: Jänterä-Jareborg 2012: 372.

¹⁸⁶ Cooke et al. 2006: 4.

¹⁸⁷ Ellman 2012: 405.

¹⁸⁸ Oldham 2010.

earning capacity will not have adequate property to be self-sufficient after divorce”.¹⁸⁹ It should therefore not be assumed that all community property regimes are necessarily more egalitarian than separate property regimes in which the courts may use their broad discretionary powers to achieve an equitable distribution that compensates for financial disadvantage due to a gendered division of household and childcare labour. Furthermore, community property jurisdictions (as well as most separate property jurisdictions) allow the parties to opt-out of the regime by entering into a marital property, or prenuptial, agreement. These are discussed in section 2.4.

2.3.2 Separate property regimes: Equitable distribution and the ‘yardstick of equality’

Generally, when common law regimes reformed the property laws that transferred married women’s property to her husband, they adopted a separate property regime. In contrast to most jurisdictions in Europe, which tend to have community property regimes, in Australia, England and Wales, Ireland and most US states,¹⁹⁰ the spouses retain their separate property during the marriage. However, usually courts have wide discretionary powers to redistribute all assets (regardless of individual ownership) on divorce and generally do so according to principles of ‘equitable distribution’, which take into account both financial and, to varying degrees, non-financial contributions to the family.¹⁹¹ The recognition of non-financial contributions is intended to protect the economically weaker spouse¹⁹² and usually (nominally at least) recognizes household and childcare labour as being of equal value to financial contributions. However,

for a number of reasons highlighted in this subsection, equitable distribution statutes have arguably had limited success as “safeguards against economic unfairness”.¹⁹³

Equitable distribution means slightly different things in different jurisdictions and not all give equal recognition to non-financial contributions. For example, in the United States, equitable distribution means:

“Instead of asking who holds title, the court considers: which property is marital and which is separate; when and how the disputed property was acquired (while the parties were single or before marriage but while the couple was living together, during the marriage, or after the separation); who has contributed to the enhancement of its value or who has depreciated the property....”¹⁹⁴

The non-financial contributions of household and childcare labour are recognized unevenly across US jurisdictions. In one state (West Virginia), these are only recognized to the extent that they contributed to “the acquisition, preservation and maintenance, or increase in value of marital property”,¹⁹⁵ while in other states there is a presumption that marital property will be divided equally between the spouses, or equal division provides a starting point.¹⁹⁶ The issue of what counts as ‘marital property’ also has the potential to undermine the recognition not only of non-financial contributions to the family but also to a spouse’s business and of financial and career sacrifices that have been made to facilitate the higher education of one spouse. Tait argues that the promise of equitable distribution has never been fully realized in the United States, in part because the courts have “persistently undervalued the non-earning spouse’s contributions to the economic success of the marriage”.¹⁹⁷ She suggests that the restrictive definition of marital property prevents these contributions from being fully recognized:

¹⁸⁹ Ibid.: 316.

¹⁹⁰ Though it should be noted that while only nine states have community property regimes, the population sizes of these states (particularly California and Texas) mean that almost one third of Americans live in a community property state. See *ibid.*: 293.

¹⁹¹ However, it is worth noting that in Canada judges have limited discretion to depart from the principle that family property should be shared equally between the parties. This is based on a presumption that the spouses contributed equally to the marriage, which can only be rebutted in cases where “the court is of the opinion that [equal division] would be unconscionable” (*Family Law Act, s5(6)*). See further Mossman et al. 2015: 471, 548-563.

¹⁹² Barlow 2008: 503.

¹⁹³ Tait 2015: 1254.

¹⁹⁴ Katz 2015: 99.

¹⁹⁵ Ibid.: 103.

¹⁹⁶ Ibid.: 104.

¹⁹⁷ Tait 2015: 1249.

“Individual partners in a marriage should not be financially penalized for the householding arrangements that put them into low-paid or unpaid jobs for the benefit of the couple. The conventional approach of compensating the low earner at divorce through distribution or support is both inadequate and theoretically inapposite. If courts were instead to count as property one spouse’s contributions to the degree that the spouse enhances the other’s earning capacity and presume an equal division, it would positively impact how spouses bargain with one another, how diverse roles get valued in the marital bargain, and how gender is both prescribed and performed within marriage.”¹⁹⁸

One commonality between many of the separate property jurisdictions appears to be a criticism that the wide discretionary powers of the courts means that there is some sacrifice of consistency and predictability in divorce cases.¹⁹⁹ This is not the case in most European community property jurisdictions, where the parties choose a property regime at the beginning of the marriage or the default regime of equal sharing of matrimonial property is applied. In Australia, the courts have broad discretion to “make such order as it considers appropriate... altering the interests of parties in the property”²⁰⁰ as long as it is ‘just and equitable’ in all the circumstances to make the order.²⁰¹ However, there is a list of factors that the court must take into account, which include non-financial contributions to both property and the welfare of the family, “including any contribution made in the capacity of homemaker or parent.”²⁰² In practice, although it appears that breadwinner and homemaker contributions would be equally valued, there has been a tendency—as in the United States—for the Australian courts to undervalue the homemaker role because it is “vulnerable to subjective value judgments as to what constitutes a competent homemaker and parent”:²⁰³

198 *Ibid.*: 1312.

199 See, for example: Jessep 2012: 20; O’Sullivan 2016: 114; The Law Commission for England and Wales 2011: para 5.33.

200 *Family Law Act*, s79(1).

201 *Family Law Act*, s79(2).

202 *Family Law Act*, s79(4)(b) and (c).

203 Ferraro, quoted in Fehlberg et al. 2015: 528.

“Indeed, an underlying and gendered double standard is often evident in the cases, involving breadwinner husbands’ modest homemaker and parenting contributions being described and credited very generously while the paid work typically done by wives in addition to their significant domestic and parenting responsibilities, and which is often very important for their family’s financial well-being, tends to be rendered invisible in the course of reaching the common conclusion that the parties’ contributions were equal.”²⁰⁴

Due to a perception that the exercise of their wide discretionary powers has been more generous than other jurisdictions towards the economically weaker spouse, the London courts are said to have become the destination of choice for ‘forum shopping’ divorcing wives in cases involving a large family fortune.²⁰⁵ Yet, England is a relative newcomer to the principles of equitable division,²⁰⁶ and in many European community property jurisdictions an equal division would take place “as a matter of course and without scope for dispute”.²⁰⁷ It was only in 2001 in the case of *White v. White*²⁰⁸ that the House of Lords (as it was then, now the UK Supreme Court) held that there should be no discrimination between the financial contributions to a marriage and the non-financial contributions such as housework and childcare: “whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires

204 *Ibid.*: 528-529.

205 Bojarski 2014.

206 Until 2001, divorcing spouses could only claim their ‘reasonable requirements’. This was interpreted as matching the marital standard of living, so a wealthy housewife could expect to be maintained in that fashion (through either spousal support or a lump sum) for her lifetime, but it also effectively created a ceiling on awards: “£15 million was pretty much a ceiling” regardless of the extent of her husband’s wealth. See: Law Commission for England and Wales 2014: para 2.7-2.8.

207 *Ibid.*: para 2.20. In four of the American community property jurisdictions (California, Louisiana, New Mexico and Puerto Rico) this is also the case, but in five of them (Arizona, Idaho, Nevada, Texas and Washington) there is an element of equitable distribution. See: Katz 2015: 99.

208 *White v. White* [2001] 1 AC 596.

that this should not prejudice or advantage either party...”.²⁰⁹

The statutory framework in England and Wales requires that, in dividing family assets on divorce, the first consideration must be the welfare of any children of the family.²¹⁰ There is then a list of further considerations, including the needs of each spouse and their contributions to the marriage including “by looking after the home or caring for the family”.²¹¹ In *White*, Lord Nicholls suggested that after weighing the various statutory considerations, a judge “would always be well advised to check his tentative views against the yardstick of equality of division”:

“As a general guide, equality should be departed from only if, and to the extent that, there is a good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”²¹²

In a subsequent joint judgment on two cases involving significant wealth, one a short childless marriage and one a long marriage with children, the yardstick of equality was described by Lord Nicholls as “an aid, not a rule, [to be applied] unless there is a good reason to the contrary”.²¹³ The House of Lords outlined three strands to determining division of assets: needs, compensation and sharing. Once the needs of both parties have been met, including an element of compensation

for relationship-generated disadvantage,²¹⁴ then any remaining assets should be shared equally. As the Law Commission has noted, the development of equal sharing through the common law, rather than legislation, meant that there was no “reliable means” for the wealthier spouse to protect his/her property from sharing and there were “no formal limits to sharing”.²¹⁵ However, there are two main circumstances in which the English courts have departed from equal sharing.

The first is in relation to ‘non-matrimonial property’, such as inheritance or wealth acquired prior to the relationship.²¹⁶ This is in line with many community property jurisdictions, which distinguish between matrimonial/non-matrimonial properties and only the former is treated as community property. However, unlike other jurisdictions, in England and Wales the distinction between matrimonial and non-matrimonial property is irrelevant until the needs of both parties have been met. It only applies to the equal sharing of the remainder of the assets. This means that a spouse must share even non-matrimonial property in order to meet the needs of, or compensate the caretaking labour of, their spouse.

The second is where one spouse can be said to have made a ‘special contribution’ to the marriage that was unmatched by the contribution of the other spouse.²¹⁷ Though ‘special contribution’ has been interpreted quite strictly—and where it is demonstrated that it would only justify awarding a maximum of a two-third share of the assets to the spouse who made the contribution²¹⁸—there is arguably an element of gender discrimination in this exception. This has been recognized, particularly in the appellate courts, who have expressed the need to “guard against gender

209 Ibid., at 605, per Lord Nicholls.

210 *Matrimonial Causes Act 1973*, s25(1).

211 The full list in the *Matrimonial Causes Act 1973*, s25(2) is: the financial resources (including earning capacity) of each spouse for the foreseeable future, including any increase in that capacity that a party may reasonably be expected to take; the financial needs and responsibilities of each spouse; the standard of living during the marriage; the age of each party and duration of the marriage; any physical or mental disability of either party; the contributions of each party; any conduct “such that it would in the opinion of the court be inequitable to disregard it” [this has been interpreted very strictly and does not include the usual fault-based grounds for divorce]; and the value of any benefit that a party would lose the chance of acquiring due to the end of the marriage.

212 *White v. White* [2001] 1 AC 596, at 605.

213 *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24, at para 16, per Lord Nicholls.

214 Compensation is a separate strand “intended to reflect what one party would have had, or been able to earn, if certain choices had not been made within the marriage”, but it overlaps with needs and the courts have been wary of ‘double-counting’ compensation. See: Law Commission 2014: para 2.18.

215 Ibid.: paras 2.22-2.23.

216 See: *JL v. SL (Financial Remedies) (Rehearing) (Non-Matrimonial Property)* [2015] EWHC 360.

217 *Charman v. Charman* [2007] EWCA Civ 503.

218 Ibid. For example, generating extreme wealth is not sufficient in itself to be a special contribution: *G v. W* [2015] EWHC 834.

discrimination” in such cases.²¹⁹ However, while the courts have said that, in principle, non-financial contributions could amount to a special contribution, in the reported cases such a contribution has only been recognized in favour of a husband who has amassed a significant fortune.²²⁰

There have only been a handful of such cases,²²¹ but one particularly concerning example is *Cooper-Hohn v. Hohn*.²²² In this case, the wife received US\$530 million of the US\$1.5 billion fortune as the husband had made an exceptional contribution to amassing that fortune through his skills as an investor. However, the wife in this case had also made a significant contribution: She was the director of the charitable foundation that they had created during a time when it grew from “a modest family foundation to one of the largest and most influential organizations of its kind in the world”, at the same time as running the household and being the primary carer of four children, including a period of two and a half years when all four children (including triplets) were under the age of 5.²²³ The judge in this case was “satisfied that there was not a spare moment of this wife’s waking day when she was not actively engaged either in discharging her role in the home or working for the Foundation.... [Her] day would often start in the early hours ... [and she] was frequently still working in her study at home after midnight when the children no longer needed her attention”.²²⁴ It is difficult to imagine what a special non-financial contribution could be if this does not meet the definition. Nevertheless, despite acknowledging that “the wife could not have done more in terms of her contribution to the home or to her work within the Foundation”,²²⁵ the judge found that the

husband’s “financial genius in his particular field”²²⁶ was a special contribution that was unmatched by the efforts of his wife in the home.

As such, although arguments based on special contribution are only available in exceptional circumstances, it is problematic for gender equality that it appears virtually impossible for non-financial contributions to qualify either as ‘matching’ a spouse’s special financial contribution or as a special contribution in their own right. This argument was recently made in the Court of Appeal in the case of *Work v. Gray*,²²⁷ where the Court does appear to have signalled a return to the non-discrimination principle. Mr Work’s financial accumulation of over £300 million was deemed to have been matched by his wife’s non-financial contribution. Interestingly, her contribution appears to be significantly less than that of Mrs Cooper-Hohn (above) in that it was simply being willing to internationally relocate several times in support of her husband’s career. However, it is noteworthy that, unlike Mr Cooper, the husband in this case was deemed to have not in fact “displayed the exceptional and individual quality that the authorities require”.²²⁸ It is unclear whether Mrs Gray’s domestic contribution would have been deemed to match Mr Work’s contribution had the latter been considered to be ‘special’.

While the Court’s recognition that in a marriage of two “strong and equal partners over 20 years” it would be “unjustifiably gender discriminatory to make an unequal award”²²⁹ is a welcome reaffirmation of the principle of equal sharing, this principle is somewhat undermined by the continued existence of the special contribution exception. That this exception will only ever be claimed in a small number of reported cases involving significant wealth is “self-evident”,²³⁰ but it is important to remember that in the vast majority of

219 *Lambert v. Lambert* [2003] 1 FLR 139, at para 38, per Thorpe LJ.

220 It has also been rejected in some such cases. See, for example: *H v. H* [2010] EWHC 158 (Fam), at para 53, where, though the husband had amassed a large fortune he was not a ‘genius’; and *E v. E* [2013] EWHC 506 (fam).

221 It was suggested in one case in 2015 that there had been only three reported cases up to that point, though the court acknowledged that it is impossible to know how many cases have been settled on the basis of one party’s special contribution: *Gray v. Work* [2015] EWHC 834 (fam), at para 130.

222 [2014] EWHC 4122 (fam).

223 *Ibid.*: para 261.

224 *Ibid.*: para 273.

225 *Ibid.*: para 280.

226 *Ibid.*: at para 283.

227 [2017] EWCA Civ 270.

228 [2015] EWHC 834 (fam), at para 153.

229 *Ibid.*: para 156.

230 “The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue”. See: *Charman v. Charman* [2007] EWCA Civ 503: para 80. This is unlikely to be the case where a ‘special contribution’ has been made within the home rather than outside it.

cases that are settled outside of court the parties are “bargaining in the shadow of the law” on the basis of principles established in these cases.²³¹ The message that this exception to equal sharing is sending to litigants is, despite the appellate courts’ protestations to the contrary, that financial accumulation matters more, that it has the potential to be more ‘special’, than homemaking and child rearing. What impact this message has on financial settlements would need to be the subject of empirical research.

Absent a special contribution, the courts in England and Wales have recognized that non-financial contributions ought to be equally valued and this is significant for gender equality following marriage. However, two other developments have weakened its impact. The first is the recognition of pre-nuptial agreements, which, less than a decade after equal sharing was introduced, began to allow wealthy spouses to protect their assets from it (discussed below). Second, these principles of equitable division or equal sharing are only useful to spouses who have capital assets to share. The majority of divorcing couples do not have the economic means of the litigants in these high-value cases, and many are struggling to meet both spouses’ needs rather than dividing additional property.²³² In such cases, property transfer or lump sum payments cannot meet the needs of the parties and certainly would not extend to also compensating caretaking labour. This “renders property distribution a useless tool and makes income sharing, i.e., spousal support, the only available economic remedy for the primary family caretaker”.²³³ However, as discussed next, there is increasing reluctance to award spousal support as courts (and sometimes litigants) prefer a ‘clean break’.

2.3.3 ‘Alimony drones’ and the clean break

Alimony, now generally referred to as spousal support/maintenance, was historically justified through the doctrine of coverture and awarded based on fault to the innocent wife and as a punishment to the guilty

husband.²³⁴ By the 1960s, there were arguments in the United States that it ought to be abolished or substantially reformed as the concept of matrimonial fault was outdated and women were now men’s equal and no longer economically dependent.²³⁵ There was particular concern that divorced women were able to lead unproductive lives due to their receipt of spousal support:

“Alimony was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent young women into an army of alimony drones, who neither toil nor spin, and become a drain on society and a menace to themselves. For, too often, alimony keeps a woman in this group from putting herself in a position where she would be induced to reorganize her life on a new and better basis. She does not work and develops no talents.”²³⁶

Similarly, in the United Kingdom, Ruth Deech has argued since the 1970s²³⁷ that alimony should only be available where a woman is caring for young children or otherwise unable to work, and in 2014 (now a Baroness in the UK’s House of Lords) she introduced a Private Members’ Bill²³⁸ that would have restricted spousal support payments to a term of five years.²³⁹

²³⁴Gaidula 1969: 201-202. See also: Smart 1984. In some European jurisdictions an element of fault remains; in Poland, for example, it plays a “relatively important role” (Martiny 2012: 77). Likewise, in some US states, only an ‘innocent’ spouse can be awarded alimony unless s/he would otherwise become dependent on the state. See: Morgan 2012: 10.

²³⁵See for example: Gaidula 1969: 201-202; Hofstadter and Levittan 1967.

²³⁶Hofstadter and Levittan 1967: 55.

²³⁷Deech 1977: 229.

²³⁸The *Divorce (Financial Provision) Bill*. A Private Member’s Bill is introduced by an individual rather than by the government and generally has little prospect of success. Though it passed all the legislative stages in the House of Lords, this Bill did not progress into the House of Commons before Parliament was prorogued. It was reintroduced in 2015-2016 Parliamentary session, but the second reading was not scheduled before Parliament was prorogued this year.

²³⁹There is an exception to this where “the court is satisfied that there is no other means of making provision... and that party would otherwise be likely to suffer serious financial hardship as a result”: *Divorce (Financial Provision) Bill* (HL Bill 60) (as amended in committee), clause 5(1)(c).

²³¹ Mnookin and Kornhauser 1979.

²³² See: Hitchings 2008.

²³³ Starnes 2011: 272.

This is known as ‘rehabilitative alimony’, which is “payable for a short but specific and terminable period of time, which will cease when the recipient is, with reasonable efforts, self-supporting”²⁴⁰ and is used in some jurisdictions in the United States and elsewhere.²⁴¹ In her speech introducing the Bill, Baroness Deech also referenced the ‘alimony drone’ and undeserving wife who will “walk off with millions”:

“When divorce was based on fault, there was a rationale for maintenance. That has gone: it is now a law in search of a principle.... The wife [of a wealthy marriage] who is least likely ever to have put her hand in cold water during the marriage is the one most likely to walk off with millions, regardless of her contributions or conduct. Hence we find that London is the divorce capital of the world for the wealthy, and the phrases ‘gold digger’ or ‘alimony drone’ have been coined.”²⁴²

Deech finds it contradictory that “the concept of female dependency on the male as inevitable continues to permeate maintenance laws” at the same time as women have equal opportunities and pay, though she does appear to acknowledge that women do not actually have these things when she notes that, “failures in those fields do not mean that the divorcing husband is responsible for them”.²⁴³ However, the statistics on the gendered division of household labour would suggest that in many cases the divorcing husband does hold some responsibility for reduction in a woman’s equal opportunities and pay and that this has a lifelong impact on women’s earning potential. Deech acknowledges that the “strongest argument” in favour of spousal support is one of compensation for a woman’s career having been undermined through [the gendered division of] childcare, but maintains that this “is a matter of choice”.²⁴⁴

240 Kelsey and Fry 1988: 2.

241 For example, recent legislation in Massachusetts limits alimony to a number of years based on the length of the marriage and it ends when the payer retires. See: Morgan 2012: 8. See also, Tait 2015: 1262

242 Baroness Deech, HL Deb 27 June 2014 c.1491.

243 Deech 2009: 1141.

244 Ibid.: 1142.

In the United States, the idea that women’s work in the home is a matter of individual choice also seems to dominate:

“...judges are often extremely reluctant to award alimony or maintenance to dependent spouses upon divorce. Since family law no longer mandates that women take on primary caretaking responsibilities, it is common for judges to characterize dropping out of or minimizing labor market participation as an ‘individual’ choice or the result of gender norms outside the reach of the law, and accordingly conclude that a dependent spouse (in different-sex couples, typically the wife) must bear the consequences of that choice.”²⁴⁵

Nevertheless, the idea of spousal support as compensation is a popular one, with many academics as well as the American Law Institute²⁴⁶ and Australian Institute for Family Studies supporting this approach:

“Conventionally the function of child rearing leads to a disadvantage for the wife at the breakdown of the marriage because she has foregone the opportunity to develop her income-earning potential. The husband on the other hand has not suffered the same disadvantage. The couple’s joint endeavor must therefore bear the cost of the wife’s disadvantage because that disadvantage is directly attributable to their joint productive and reproductive endeavour.”²⁴⁷

Despite some support for a compensatory approach to spousal support, in some jurisdictions awards of spousal support are rare, with many divorcing spouses seeming to favour a clean break²⁴⁸ and legal systems appearing to encourage ‘self-sufficiency’. For example, in Australia, it was awarded “in less than 7 per cent of divorces, [and] typically lasted two years”.²⁴⁹ Similarly,

245 Widiss 2016: 25.

246 American Law Institute 2002: Chapter 5.

247 McDonald 1986: 313-314.

248 See, for example, McMullen 2011 for consideration of guilt as a reason why women do not pursue or are unable to effectively negotiate alimony in some cases.

249 Fehlberg et al. 2015: 611, citing Behrens and Smyth.

in the United States, it is sought in “only a small minority of divorces, and granted in only some of those”, though long-term spousal support is still granted to financially dependent spouses of long-term marriages.²⁵⁰ In England and Wales, the courts are required to consider whether a clean break is appropriate,²⁵¹ and even where spousal support is to be ordered, the court must consider limiting the term that it is payable for or making a delayed clean break order.²⁵² However, while a delayed clean break is intended to allow a former spouse time to adapt to life without spousal support by, for example, re-entering the workforce, as one judge has noted this is often more a hope than a serious expectation:

“Especially in judging the case of ladies in their middle years, the judge looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustment can be made without undue hardship. All too often these orders are made without evidence to support them.”²⁵³

The English courts have also found a clean break to be inappropriate in cases involving lengthy marriages in which there has been a gendered division of labour, where there are still young children and limited capital assets and where there is uncertainty over the financial future of either spouse.²⁵⁴ Elsewhere in Europe, the principles of clean break and self-sufficiency appear to be central,²⁵⁵ with Sweden, for example, considering each spouse to be responsible for themselves after divorce with only a transitional period of spousal support available based on financial need.²⁵⁶ However, across European jurisdictions it is also generally considered important that the needs of each spouse should be met so that they and their children can maintain a similar standard of living to that during the marriage, there should be compensation for relationship-generated disadvantage and “after

250 Ellman 2012: 409.

251 *Matrimonial Causes Act 1973, s25A(1)*.

252 *Ibid.*, s25A(2). However, the courts have emphasized that a clean break order should not be made where it would produce an unfair division of assets: *F v. F (Clean Break: Balance of Fairness)* [2003] 1 FLR 847.

253 *Flawell v. Flawell* [1997] 1 FLR 353.

254 Herring 2011: 221.

255 Ribot 2011: 72.

256 Martiny 2012: 78.

divorce the family situation should remain substantially equal”.²⁵⁷ The French Code, for example, balances these aims with the clean break philosophy by providing for a lump sum ‘compensatory payment’ to make up for any detriment to one spouse. If the spouses lack sufficient funds for a lump sum, then it can be paid off over a maximum of eight years.²⁵⁸

However, the clean break ideology has not been universally embraced: The Canadian Supreme Court rejected the clean break, reversing its approach in previous case law,²⁵⁹ so that now Canada has a “very generous basis for spousal support on both ‘compensatory’ and ‘non-compensatory’ (needs-based) grounds”.²⁶⁰ While the status of having been married on its own does not entitle a former spouse to support, the ‘expansive’ compensatory basis for spousal support in Canada is “directed at redressing the economic disadvantage suffered by spouses who have sacrificed labor force participation to care for children”.²⁶¹ It also has an element of restitution, as the court:

“emphasized the need to consider the economic *advantages* conferred by the marriage, specifically the advantage conferred upon the husband, as a result of the wife’s economic sacrifices, of an enhanced earning potential because of his ability to pursue his economic goals unimpeded by family responsibilities.”²⁶²

At first glance, the Canadian approach appears to be more favourable towards women than is the ideology of self-sufficiency of most other western jurisdictions. The empirical evidence demonstrates a clear post-divorce financial disadvantage for women in general compared to men, whose income tends to increase

257 Ribot 2011: 72.

258 Martiny 2012: 78.

259 *Moge v. Moge* [1992] 3 S.C.R. 813, reversing its previous clean break approach in *Pelech v. Pelech* [1987] 1 S.C.R. 801. See: Rogerson 2004.

260 Rogerson and Thompson 2012: 242. The absence of a ‘clean break’ philosophy can also be seen in some community property jurisdictions. For example, in the Netherlands, maintenance obligations remain despite equal sharing of community property and “are generally fulfilled in the form of periodical payments” (Boele-Woelki and Braat 2012: 242).

261 Rogerson 2004: 73.

262 *Ibid.*: 83.

after divorce.²⁶³ For example, in the Australian context, Fehlberg describes the feminization of poverty:

“...various social and economic factors including (but not limited to) women’s family commitments and work patterns during marriage make it very likely that they and their dependent children will experience poverty after marriage breakdown.... [T]he consistent finding both in Australia and other western countries being that men are financially better off after the breakdown of marriage, while women are disproportionately worse off.”²⁶⁴

The Canadian approach recognizes that a clean break is problematic from a gender equality perspective. However, although there is something to be said for women being compensated for their domestic labour, through spousal support, by the men who have directly benefited from it, Boyd argues that—in the absence of broader public policy recognizing the value of domestic work—cases in which women are compensated through claims on men’s property simply shifts women’s dependence onto individual men. As such, they let society ‘off the hook’ for women’s dependency by not tackling its root cause (privatized social reproduction) or “dealing with the way in which women’s roles, responsibilities and economic dependence are entrenched”.²⁶⁵ Furthermore, Boyd also argues that this strategy of privatization relies on a woman having provided domestic labour to a man with the means to financially support her, neglecting the fact that many women will not be in this position.²⁶⁶ Similarly, Martiny notes in the European context that the problem with relying on spousal support payments to compensate a gendered division of household labour is that this is “dependent upon the creditor spouse having insufficient resources to

meet his or her needs and the debtor spouse’s ability to satisfy those needs”.²⁶⁷

More significantly, however, it fails to acknowledge the “benefit that society as a whole receives from women’s (usually unpaid) domestic labour, particularly in the context of raising children”.²⁶⁸ Writing in the US context, Fineman argues that everybody is dependent on others at some point in their lives, whether as a child, as an elderly person or during a period of unemployment. She refers to this as “inevitable dependency” and argues that it, in turn, renders caretakers (usually mothers) derivatively dependent on “material and monetary resources... [as well as] institutional support and accommodation”.²⁶⁹ Promoting self-sufficiency in the absence of social support for caretakers fails to recognize the inevitable nature of dependencies and the derivative dependency of caretakers. Taking a privatized approach—compensating responsibility for care and dependency through spousal support—therefore allows society to benefit from women’s social reproduction work while failing to take responsibility for the economic consequences to individual women, instead attempting where possible to make individual men responsible.²⁷⁰ This attempt to transfer responsibility for women’s derivative dependency to individual men stigmatizes those women who do not have access to either their own or a man’s resources for financial support. As Fineman argues, there is an illusion of independence that is maintained because the (marital) family usually takes care of derivative dependency, which therefore only becomes evident when the family breaks down. It is this illusion that allows social conservatives to argue that the solution to such dependencies is marriage.²⁷¹

As Smart has argued:

“Abolishing maintenance for ex-wives does not give women their financial independence, it just means that even more women have to rely on inadequate [welfare benefits]

²⁶³ A recent study in the UK concluded that, controlling for household size, men’s household income increases after divorce by around 23 per cent, whereas women’s decreases by around 31 per cent and that subsequent recoveries in women’s household income are largely driven by repartnering (Fisher and Low 2009, cited in Herring 2011). For a summary of similar findings in Canada and the United States see: Mossman et al. 2015: 367-368.

²⁶⁴ Fehlberg et al. 2015: 9.

²⁶⁵ Boyd 1994: 67.

²⁶⁶ *Ibid.*

²⁶⁷ Martiny 2012: 79.

²⁶⁸ Boyd 1994: 67.

²⁶⁹ Fineman 2004: 36.

²⁷⁰ See also Gavigan 1993: 589.

²⁷¹ Cossman 2005: 436-437.

(assuming they cannot work outside the home or cannot earn a living wage). On the other hand, arguing that individual men should pay for their privileges ignores the fact that many simply cannot afford to pay. But in addition this argument has the deleterious effect of containing the ‘problem’ within the private sphere, with the consequences that women’s dependency remains a private issue and a personal conflict and does not become a matter of public policy.”²⁷²

Therefore, both requiring life-long spousal support to compensate for caretaking labour and abolishing spousal support to create a clean break can exacerbate gender inequality depending on the broader social framework for recognizing and compensating caretaking labour. In order to promote gender equality, a self-sufficiency approach must be combined with “an appropriate social security and labour market policy”.²⁷³ For example, writing in the UK context in 1982, O’Donovan argued that spousal support should only be abolished when the following material conditions are met:

“(a) Equality of partners during marriage including financial equality; (b) Equal participation by both partners in wage earning activities; (c) Wages geared to persons as individuals and not as heads of families; (d) Treatment of persons as individuals and not as dependents by State agencies, such as social security and tax departments; (e) Provision for children by both parents, including financial support, child care, love, attention and stimulation.”²⁷⁴

More than 30 years later, some of these conditions remain unmet according to the data presented above on the gendered division of labour and its impact on women’s careers and financial security. I would add a further condition of the introduction of social policy designed to encourage an equal division of household labour and childcare and to recognize the important social contribution of childcare labour. In the absence

272 Smart 1984: 223.

273 Martiny 2012: 78.

274 O’Donovan 1982: 428.

of such policy, a self-sufficiency approach merely compounds women’s relationship-generated disadvantage, while a (privatized) compensatory approach to spousal support renders women vulnerable to there being inadequate family resources to compensate their labour and meet their financial needs, as well as rendering invisible and unrecognized the important societal benefit of this labour.

2.4

For love or money: Prenuptial agreements and gender equality

Until relatively recently, prenuptial agreements were invalid in a number of jurisdictions for public policy reasons:²⁷⁵

“The fear was that this would encourage separations. The wife might be encouraged to leave her husband if she knew what he would have to pay her if she did. Perhaps worse, the husband might be encouraged to leave his wife or agree to her leaving him if he knew in advance what he would have to pay.”²⁷⁶

The purpose of prenuptial agreements (also known as financial agreements or marital property agreements) differs depending on the type of marital property regime that exists in a jurisdiction. In separate property regimes, prenuptial agreements provide a way to either avoid the courts’ wide discretionary powers and equitable distribution on divorce or provide an additional factor for the courts to take into account in the division of assets.²⁷⁷ The use of an agreement could be interpreted in a number of ways: as a means for wealthy spouses to avoid sharing assets; as a way for the spouses to avoid the

275 They were recognized in Australia in 2000, when Part VIII A of the *Family Law Act 1975* came into effect (see: Jessep 2012: 26-27). However, they have been around for longer in the United States (since the 1970 Florida Supreme Court decision in *Posner v. Posner*: Katz 2015: 24) and Canada: see Mossman et al. 2015. In the Irish context, see: Crowley 2012: 215. See also: Law Commission 2014: 41.

276 Hale 2011: 6.

277 Law Commission 2014: 60.

uncertainty of the exercise of wide judicial discretion; or simply as a way for the spouses to enter a marriage having contemplated together what may be a fair distribution in the event of divorce while there is no ill feeling between them and to avoid the expense of potentially having to litigate.²⁷⁸

In community property jurisdictions, rather than a means of “contracting out of discretion” they are a means of choosing which marital property regime will apply.²⁷⁹ For example:

“The rubric of the French secular wedding ceremony itself entails the public identification of the type of property regime selected, with any pre-nuptial agreement reached having to be presented to the person officiating at the wedding and recorded on the marriage certificate.”²⁸⁰

In the absence of a prenuptial agreement the default regime will apply, and in some jurisdictions the general satisfaction with the default regime means there are few prenuptial agreements. For example, in Germany, where the default regime is considered to be “sensible for the majority of couples”, there are estimated to be prenuptial agreements in less than 10 per cent of marriages.²⁸¹ In contrast, in the Netherlands, where there is an expansive community of property regime that includes all (with few exceptions) present and future assets and all debts of the spouses, around 25 per cent of marriages include a prenuptial agreement.²⁸²

In general, a prenuptial agreement is valid “if both the process by which it was negotiated and its terms are fair”.²⁸³ Fairness usually requires certain proce-

dural safeguards such as full disclosure of assets and independent legal advice,²⁸⁴ but agreements may also be set aside for substantive unfairness or unconscionability. For example, in the United States, an agreement could be unconscionable, “when the result of enforcement would leave the parties in an extraordinarily unequal position, especially where there has been a provision for the wife to receive no support payments”.²⁸⁵ In some jurisdictions, there is protection not only for economically vulnerable family members but also the public purse, as provisions can be set aside if they would result “in a dependent qualifying for public support”.²⁸⁶ Agreements may also be set aside if a party has caring responsibility for a child and there has been a material change in their circumstances since the agreement was made that would result in hardship.²⁸⁷

Though these procedural safeguards and substantive unfairness/unconscionability provisions can go some way towards preventing profoundly inequitable settlements, they do not protect the economically weaker spouse to the same extent as the default rules would. In Australia, for example, unlike a consent order on divorce under the default rules, a financial (prenuptial) agreement:

“does not have to be ‘just and equitable’, may in some circumstances require a lesser degree of financial disclosure, and does not expose a party’s financial affairs to any scrutiny on the part of the court.”²⁸⁸

278 Vardag and Miles 2015.

279 Law Commission 2014: 60.

280 Vardag and Miles 2015: 120.

281 Dutta 2012: 160. According to Dutta, the default regime is that spouses’ property is kept separate during the marriage but they equally share any increase in its value and any further economic gains during the marriage. Spouses can choose instead a separation of property regime with no redistribution on divorce (*Gütertrennung*) or a community of property regime where all pre- and post-marriage property becomes commonly held and equally shared on divorce (*Gütergemeinschaft*).

282 Boele-Woelki and Braat 2012: 254.

283 Katz 2015: 24.

284 It is by no means universally required though. For example, there is no requirement for the parties to receive independent legal advice in Ontario, but other provinces (Alberta) do require it (Mossman et al. 2015: 402). In most US jurisdictions, it is not required though “its presence or absence, or some alternative source of explanation of the agreement’s terms and significance” is an important factor in determining whether it was voluntarily entered into (Ellman 2012: 422). There is also no requirement to receive independent legal advice in the UK. See: *Radmacher v. Granatino* [2010] UKSC 42, at para 114-117, per Lord Phillips.

285 Katz 2015: 26, citing the *Uniform Premarital Agreement*, s6.

286 See, for example, Ontario’s *Family Law Act*, s33(4); Mossman et al. 2015: 401.

287 See, for example, Australia’s *Family Law Act 1975*, s90K(1)(d); Fehlberg et al. 2015: 601.

288 Jessep 2012: 40-41.

Furthermore, there is also no guarantee that manifestly unfair agreements would be set aside. For example, writing in the US context, where prenuptial agreements have only been considered unconscionable in “quite exceptional circumstances”,²⁸⁹ Younger outlines cases where the decisions to uphold extremely one-sided agreements²⁹⁰ reveal “a lamentable disregard” for the spouse who gives up paid work in the interests of ‘the joint family enterprise’ and as a result carries “the whole financial risk when the marriage fails”.²⁹¹ She also points to the “mythification” of procedural fairness, noting that in most (US) jurisdictions there is no requirement that parties be independently advised by a lawyer, only that they have opportunity for this, and arguing that the courts’ sense of procedural fairness is “just as deficient as their decisions on substance”:

“The litigated cases reveal a recurring pattern: the prospective spouse with the greater assets and earning power wants the agreement, has it drafted by his lawyer, and presents it to the other spouse very close to the time of the impending marriage.... More often than not the proposed agreement is accompanied by an ultimatum that if she does not sign it, the would-be husband will cancel the wedding. She signs it, and when the relationship deteriorates, the voluntariness of the agreement often becomes an issue. As the cases demonstrate, the prevailing view is that prospective husband’s ultimatum is not the kind of coercion that makes an agreement involuntary. Interestingly the only case in which the court of last resort found the agreement coerced was one that husband had signed at wife’s insistence.”²⁹²

Further, Thompson argues that while cases of “clear duress” would result in an agreement being set aside, the courts fail to recognize many situations of

(gendered) power imbalance: “As pressure and power imbalance is so common in the context of prenups... in many cases, the court is desensitised to more subtle power imbalance”.²⁹³

Even in the absence of obvious power imbalances and deficiencies in procedural fairness, recognition of these agreements replaces the equitable distribution principles of separate property regimes in a context where women often remain the economically weaker spouse as they still hold responsibility for the majority of household and childcare labour. It may be the case that at the beginning of the marriage, if there are not (yet) any children and both parties work full time, that it would be considered acceptable to both parties to keep property separate. However, by the time the agreement actually takes effect on divorce, particularly where it is many years later, the economic circumstances of both parties could be dramatically different if there has been an unequal division of household labour and caring responsibilities where one spouse has sacrificed their career to take on caring responsibilities on behalf of the family.²⁹⁴ In some jurisdictions there are provisions for agreements to be set aside for such material change in circumstances, but it is by no means certain that they would be. In the United States, for example, the old test in *Button v. Button*²⁹⁵—which included consideration of whether the terms of the contract were fair not only at the time it was agreed but also at the time of divorce—has been largely abandoned in favour of the *Uniform Premarital Agreement Act* (UPAA), which has been described as closer to the approach in *Simeone*.²⁹⁶

“The possibilities of illness, birth of children, reliance upon a spouse, numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable. If parties choose not to address such matters in their prenuptial agreements, they must be regarded

²⁸⁹ Thompson 2015: 128.

²⁹⁰ For example, cases where agreements favouring a wealthy ex-spouse have been upheld even where it leaves the other spouse in such financial disadvantage as to require public assistance, such as *DeMatteo v. DeMatteo*, 762 N.E.2d 797 (Mass. 2002).

²⁹¹ Younger 2007: 421-422.

²⁹² *Ibid.*: 423.

²⁹³ Thompson 2015: 197.

²⁹⁴ Fehlberg et al. 2015: 595.

²⁹⁵ 388 NW 2d 546 (Wis 1986).

²⁹⁶ Ellman 2012: 415.

as having contracted to bear the risk of events that alter the value of their bargains.”²⁹⁷

This approach emphasizes autonomy and freedom of contract at the expense of gender equality. Courts tend to take a gender-neutral view of prenuptial agreements, which means that “issues of power are missing from the court’s analysis”.²⁹⁸ As the only female judge on the UK’s Supreme Court has noted:

“Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that... the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually though by no means invariably she – would otherwise be entitled.... Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing no limit on the claims that might be made against her, and then limited her claim to a pre-determined sum for each year of marriage regardless of the circumstances, as if her wifely services were being bought by the year?... In short, there is a gender dimension to the issue which some may think ill-suited to a decision by a court consisting of eight men and one woman”²⁹⁹

It is noteworthy that the eight men on the court in this case did find that agreements would be upheld unless they were unfair, with Lady Hale as the only dissenting voice arguing for, “a more context-specific conception of autonomy than is evident in the majority opinion”.³⁰⁰ In Lady Hale’s view, the test to be

applied to a prenuptial agreement ought to be: “Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?”³⁰¹

Nevertheless, even where a context-specific approach is taken that considers the potential for a power imbalance, the gendered power dimension is inherent in prenuptial agreements because they are used to protect the assets of wealthy spouses, who are usually male, and “contribute to the financial vulnerability of women as a class”.³⁰² In doing so, they “magnify society’s unequal distribution of resources along gender lines”.³⁰³ Even in the United Kingdom, where the perceived generosity of the courts made London the ‘divorce capital of the world’ for economically weaker parties and where prenuptial agreements have only recently been recognized by the Supreme Court, the effect is that parties can now:

“[Use a prenuptial agreement to] exclude the equal sharing principle altogether, in addition to restricting (though not failing to meet) the ‘needs’ of the financially weaker spouse. Needs may still be more or less ‘generously interpreted’, but the trend in practice is to honour properly entered agreements increasingly, even tough ones, providing they do not engender real hardship.”³⁰⁴

It is unfortunate that no sooner have courts recognized (women’s) household and caring contributions to the family as being equal to (men’s) financial contributions, than the language of equality in the case law shifts to an emphasis on ‘autonomy’ and ‘choice’ to depart from the principles of equitable distribution and once again render those who have taken primary responsibility for household and childcare labour

²⁹⁷ *Simeone v. Simeone* 581 A 2d 162 (Pa 1990), at [166], quoted in Ellman 2012: 428. The American Law Institute has formulated some principles (*Principles of the Law of Family Dissolution*, §7.05(2)) that are followed in some US jurisdictions, which include allowing a ‘second look’ at fairness at the time of enforcement in circumstances where a certain number of years have passed, children have been born or there has been a change in circumstances that has had a ‘substantial impact’ but that they did not anticipate the change or its impact at the time of executing the agreement. However, these are not binding or universal.

²⁹⁸ Thompson 2015: 146.

²⁹⁹ Per Lady Hale, *Radmacher v. Granatino* [2010] UKSC 42, at para 137.

³⁰⁰ Thompson 2015: 188.

³⁰¹ *Radmacher v. Granatino* [2010] UKSC 42, at para 169.

³⁰² Brod 1994: 229, cited in Thompson 2015: 9.

³⁰³ *Ibid.*

³⁰⁴ Vardag and Miles 2015: 123.

financially vulnerable on divorce.³⁰⁵ Ironically, this is done on the basis that we have already achieved gender equality in marriage and that it would be “paternalistic and patronizing to override [the spouses’] agreement simply on the basis that the court knows best”.³⁰⁶ The data presented earlier suggests otherwise.

2.5

Conclusion

The empirical evidence suggests that there remains a gendered division of labour that is particularly acute in relation to time spent on childcare and that this negatively impacts on women’s career earnings. Sociological research has found that childcare, more than other forms of domestic labour, impacts on women’s careers because it cannot be ‘fit in’ around paid work and so tends to result in the primary carer reducing her hours or leaving the workforce. Care work, then, can have the effect of pushing women into part-time and/or lower paid, lower status jobs offering more flexibility and creating a wage inequality that is cumulative and persistent across their lifetimes. While it may be argued that it is motherhood rather than marriage that causes this, the presence of children per se does not have to result in these inequalities. The gendered division of labour within the family has its roots in wider structural inequalities, and I would suggest that these are supported by the legal structures of the institution of marriage. As research in the United States has demonstrated, some of the legal consequences of marriage encourage ‘gender specialization’ of roles rather than co-parenting by, for example, ‘rewarding’ spouses who have a significant disparity of income through tax breaks and social

³⁰⁵ See for example Diduck 2011, analysing the case law in England and Wales leading up to the recognition of prenuptial agreements. Thompson’s research (2015: 198) also found that there is an increasing emphasis on autonomy in New York to the extent that “the court’s limited desire to scrutinize prenups on divorce meant that it did not address many power imbalances and instances where autonomy was not exercised by both parties”. Ribot (2011: 86) also notes a trend in Europe towards, “the combination of, on one side, weakened maintenance [alimony] claims and, on the other side, the increasing exercise of autonomy to opt out of statutory community property regimes”.

³⁰⁶ *Radmacher v. Granatino* [2010] UKSC 42, per Lord Phillips, at para 78.

security benefits. However, when the marriage breaks down, women who have taken a career break can be left economically vulnerable by legal rules that assume gender equality within marriage.

In many western jurisdictions, non-financial contributions to the family are treated the same as financial ones and there are provisions for equal sharing of marital assets, in some even an element of ‘compensation’ for career breaks in order to look after the family. This is a significant improvement on the position prior to these reforms, where (in England and Wales, for example) wives had little claim on separate property held in the sole name of the husband other than, perhaps, having her reasonable needs met.

However, in some respects formal equality has still not quite been achieved, or it has been undermined to some extent by subsequent legal developments. Legal scholars in Australia have argued that although the breadwinner and homemaker roles are supposed to be equally valued, there remain stereotypical assumptions of the ‘good wife’ (see Part 1 for the historical context) that has led to a gendered double standard where a husband’s home-making/childcare contributions are very generously credited in comparison with the undervaluing of women’s work. We can also see some evidence of this double standard in the some of the English cases on ‘special contribution’, a mechanism to justify a departure from equal sharing where it was considered that one spouse had made a special contribution to the family that was unmatched by the other spouse. Despite the case law being clear that there was to be ‘no discrimination’ between the money-earner and homemaker roles, in practice special contributions have only been found in cases where a husband has amassed a significant fortune through work outside the home. There are few reported cases, but as parties bargain ‘in the shadow of the law’ it is important to be cognizant of the message that these cases send to litigants who settle outside of court about the relative significance of financial versus non-financial contributions. A recent intervention by the Court of Appeal, reaffirming the high threshold that the ‘special contribution’ must meet, is welcome in going some way towards reasserting the principle that there ought to be no

discrimination between the homemaker and the money earner. Yet, while the exception exists there will be scope, however limited, for it to undermine gender equality. This, alongside the apparent prioritization of 'autonomy' and 'freedom of contact' over gender equality in the courts' reluctance to review prenuptial agreements for power imbalances, means that wives in wealthy marriages appear to be particularly 'at risk'

of inequality. Meanwhile, the increasing limitations on ongoing spousal support payments in many jurisdictions pose similar risks for wives from marriages where there are insufficient assets to create a 'clean break'. As such, the conclusion must be that while substantial progress has been made towards gender equality, there still remains some potential for formal equality to be undermined in some circumstances.

3.

TOWARDS 'EQUAL MARRIAGE'? THE RECOGNITION OF SAME SEX RELATIONSHIPS IN WESTERN JURISDICTIONS

3.1

Introduction

The campaign for same-sex marriage has been successful in numerous countries across both the West and the Global South, with the smallest country to allow same-sex marriage being the Pitcairn Islands, a British Overseas Territory with a population of approximately 50 people, and the most recent being Germany.³⁰⁷ The Netherlands became the first country to introduce same-sex marriage through legislation, while recently Ireland became the first to introduce it following a referendum vote.³⁰⁸ In between, there was a spate of litigation and legislation that resulted in same-sex marriage in a diverse range of jurisdictions from North America to South Africa.³⁰⁹ One of the most recent jurisdictions to introduce it, Bermuda,

³⁰⁷At the time of writing, the countries/territories allowing same-sex couples to marry are: Bermuda (2017); Germany (2017); Malta (2017); Colombia (2016); Isle of Man (2016); Puerto Rico (2016); Finland (2015); Ireland (2015); Greenland (2015); Guam (2015); Pitcairn Islands (2015); United States (2015); Luxembourg (2014); Scotland (2014); Brazil (2013); England and Wales (2013); France (2013); New Zealand (2013); Uruguay (2013); Denmark (2012); Argentina (2010); parts of Mexico (2010, 2011, 2015); Iceland (2010); Portugal (2010); Norway (2009); Sweden (2009); South Africa (2006); Canada (2005); Spain (2005); Belgium (2003); The Netherlands (2000).

³⁰⁸For analysis of this, see: Tobin 2016.

³⁰⁹For an overview of this see: Barker 2012a: Chapter 3.

did so following litigation³¹⁰ and, despite same-sex marriages already having taken place on the island, it is possible that they may become the first country to abolish it following the introduction of legislation that would remove marriage from the anti-discrimination provisions of the Human Rights Act.³¹¹

Despite the diverse routes to same-sex marriage and the very different national contexts, one constant discourse has been that of equality; indeed the activists fighting for access to marriage began seeking 'equal marriage' or 'marriage equality' rather than 'same-sex marriage'.³¹² Where campaigners brought litigation, the precise terms were dictated by reference to the relevant constitutional requirements (most often equal protection and non-discrimination), but the South African Constitutional Court made perhaps the strongest statement of equality:

"...our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on

³¹⁰*Godwin and Deroche v. The Registrar General and others* [2017] SC (Bda) 36 Civ (5 May 2017).

³¹¹Strangeways 2017.

³¹²See, for example, the campaign group currently seeking 'marriage equality' in Australia: Marriage Equality Australia Ltd. Undated.

equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough.³¹³

“The exclusion of same-sex couples from the benefits and responsibilities of marriage... represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.”³¹⁴

The discourse of ‘equal marriage’, though, can be jarring when considered alongside the feminist critiques of the institution. This part of the paper considers whether/how same-sex marriage might be more ‘equal’ than heterosexual marriage and what impact same-sex marriage might have on the gendered nature of the institution as a whole.

3.2

Does ‘equal marriage’ promote equality within marriage?

Some feminists have argued that same-sex marriages would be more egalitarian and that their existence would destabilize gendered roles within marriage. The seminal work in this regard is Hunter’s argument that same-sex marriages would “disrupt both the gendered definition of marriage and the assumption that marriage is a form of socially, if not legally, prescribed hierarchy”:

“It would create for the first time the possibility of marriage as a relationship between members of the same social status categories. However valiantly individuals try to build marriages grounded on genuine equality, no person can erase his or her status in the world as male or female, or create a home life apart from culture. *Same-sex marriage could create the model in law for an egalitarian kind of interpersonal relation*, outside the gendered terms of power, for many marriages. At the least, it would radically strengthen and dramatically illuminate the claim that marriage partners are presumptively equal.”³¹⁵

More recently, Case highlighted the connection between the prohibitions on same-sex marriage in the United States (prior to the recent US Supreme Court case of *Obergefell v. Hodges*) and “constitutionally impermissible sex stereotyping”.³¹⁶ She argued that:

“To grant civil marriage licenses to couples regardless of their sex would be to eliminate the last vestige of sex stereotyping from the law of marriage in the United States. It would complete the evolution away from sex-role differentiated, inegalitarian marriage law that began with nineteenth-century efforts to ameliorate the effects of coverture and continued in legislative reform and constitutional adjudication through the last third of the twentieth century.”³¹⁷

There are, therefore, two key related arguments: First, that same-sex marriage would be a more egalitarian version of marriage and could have a positive impact on the institution as a whole; and second, that same-sex marriage would prevent the sex stereotyping in family law that has underpinned gender inequality. The early case law on the dissolution of same-sex marriages discussed in the next section goes some way towards illuminating the extent to which the second argument has been borne out. In relation to the first argument, the remainder of this

313 *Minister of Home Affairs and Director-General of Home Affairs v. Fourie and Bonthuis* (2005), per Sachs, J. at para 59.

314 *Ibid.*: para 71.

315 Hunter 1995: 112-113 (my emphasis).

316 Case 2010: 1223

317 *Ibid.*

section demonstrates that the empirical evidence has been mixed.

There is certainly an expressed ideal of egalitarianism in same-sex relationships, with partners aspiring to an equal division of household labour,³¹⁸ and gendered expectations of female and male roles within the family are arguably absent.³¹⁹ Household tasks are usually divided according to ostensibly different considerations than gender, such as who has more time or ability or the partners' preferences,³²⁰ and negotiation has been found to play an important role.³²¹ For example, in a recent study of 30 married same-sex couples in Canada, the spouses described: "...a highly egalitarian domestic division of labour organized by individual interests and desires, rather than predetermined, role-differentiated tasks..."³²²

However, the evidence suggests that—despite the absence of sex differences—other indices of power within the relationship do exist for same-sex couples and these are not isolated from gender. For example, in a study with same-sex couples in San Francisco, Carrington found that the division of household labour in same-sex relationships primarily reflected the influence of paid work. There was more likely to be an egalitarian division of labour where both partners worked in feminine-gendered occupations, such as teaching or public sector administration.³²³ Likewise, households where both partners worked in (usually higher-paid) masculine-gendered occupations were able to achieve equality through reliance

on the service economy.³²⁴ However, Carrington found that in the vast majority of households, where one partner worked in masculine-gendered and the other in feminine-gendered occupations, there was an *unequal but justified* division of labour. The justification was based on the paid work of each partner, with the partner with the lower-paying (usually feminine-gendered) occupation taking on a disproportionate share of household labour.³²⁵ Similarly, a more recent US study has found that, as in heterosexual relationships, same-sex partners with the greater resources or power performed the fewest household tasks.³²⁶

There is also some evidence of differences based on the ethnicity of the partners and the type of family structure. In a study on black lesbian step-families, Moore found that although her respondents supported the *ideology* of egalitarianism:

"Black women's relationships contain a stronger emphasis on enactment of economic independence and a weaker practice of feminist egalitarian ideologies *vis-à-vis* the division of household chores.... Biological mothers perform more of the household organizing tasks and assume more responsibility for making sure chores and activities are implemented smoothly. They are also more likely to see the household and its efficiency as a representation of themselves as good partners and good mothers."³²⁷

This appears to be in line with heterosexual relationships, where statistics suggest that having children exacerbates the gendered division of labour, with mothers doing much more household labour even where both parents work full time (see Part 2). As in heterosexual relationships, Moore's participants expressed frustration with the inequality, though this was often accompanied by a certain acceptance, and "a modest boasting of their superior cleaning and organizational skills – a superiority that gives them

318 Dunne 1997; Weeks et al. 2001.

319 Though this is not necessarily the case: "gendered presentations of self in black lesbian relationships are associated with the types of household tasks that partners perform" (Moore 2008: 343). See also: Giddings 1998.

320 Adeagbo 2015.

321 Esmail 2010.

322 Green 2010: 421. This is a small study, but similar findings are also evident in a number of similar studies in South Africa, the United Kingdom and the United States. See: Dunne 1997; Weeks et al. 2001; Moore 2008; Giddings 1998; and Adeagbo 2015.

323 Carrington (1999: 186) suggests this is because these occupations offer family-friendly working policies, which provide a more conducive environment for both partners to do some family work.

324 This of course means reliance on the working-poor, "for the most part Latino-, Asian-, and African-American women, and young gay men and lesbians" (ibid.: 185).

325 Ibid.: 188.

326 Sutphin 2010.

327 Moore 2015: 343-345.

the final say over the way they run their households”,³²⁸ and was “central to the construction of an identity as a good mother”.³²⁹

Even where inequalities exist in time spent on household labour, same-sex partners were nevertheless likely to describe the division as ‘equal’ or ‘fair’.³³⁰ A significant factor in same-sex relationships perceiving the division of labour as fair even when one partner did more household work may be the process of negotiation that has been found to exist in the absence of gendered norms and expectations: “...where partners describe an unequal domestic division of labour, it is not ossified gender roles that guide who does what but, rather fluid and pragmatic considerations associated with time and financial earnings”.³³¹ Associated with this negotiation may be a greater recognition and appreciation of the time that a partner spends on household tasks: Moore found that while male heterosexual partners in dual-earning relationships tended to underestimate the time their partner spent on household labour, in lesbian households the non-biological mother tended to over-estimate the time her partner spent, suggesting “a greater acknowledgment or respect for stereotypically female household work”.³³² The extent to which this negotiation and acknowledgment takes place in the absence of gender, however, must be questioned in light of Carrington’s findings that the (gendered) occupation of each spouse has a significant relationship to their level of equal participation in household labour and Moore’s findings that biological mothers in lesbian relationships tend to perform more household labour even where both partners work full time outside the home.

Therefore, the overall conclusion of the empirical evidence appears to be that, as Green contends,

³²⁸ Ibid.: 346.

³²⁹ Ibid.: 348.

³³⁰ For example, Sutphin 2010 found that 86 per cent of her respondents described the division as fair despite also finding that partners who earned more participated less in household tasks. This sense of fairness despite inequality has been attributed to a variety of reasons, such as one partner having more time or having a higher standard of cleanliness (Esmail 2010).

³³¹ Green 2010: 421. See also: Esmail 2010.

³³² Moore 2015: 345.

same-sex couples who marry do take on some of the gendered practices of marriage, but it is more complex than simply assimilating: “same-sex marriages both consolidate and subvert the ‘traditional’ marital form of 20th century, middle-class North America”,³³³ Tait argues that:

“If same-sex couples assign and perform household work according to either financial earnings or conventional gender lines, gender stereotypes will continue to inscribe themselves in marriage. If courts persistently fail to capture unpaid contributions when dividing marital property, gender will likewise continue to inhere in marriage, to the detriment of the feminized party upon divorce.”³³⁴

The next question, then, is the extent to which gender stereotypes have continued to operate in same-sex divorce cases and whether courts have adequately captured non-financial contributions when dividing property in these cases.

3.3

From equal marriage to equal divorce? Dissolving same-sex relationships

With same-sex marriage being only 15 years old globally and the vast majority of divorces in the West settled outside of court, there are few reported same-sex divorce judgments, especially from appellate courts, to indicate what their impact may be on gender equality in the division of assets. For example, the main issue regarding ‘equal divorce’ in the United States prior to the recent US Supreme Court ruling in *Obergefell* has appeared to be the problem of spouses who reside in states where same-sex marriage is not recognized being unable to divorce after they have married elsewhere due to residence requirements.³³⁵ However, there is an early example from the Court of Appeal in England and Wales. *Lawrence v. Gallagher*³³⁶ involves

³³³ Green 2010: 401.

³³⁴ Tait 2015: 1272.

³³⁵ See, for example: Stinson 2011.

³³⁶ *Lawrence v. Gallagher* [2012] EWCA Civ 394.

the dissolution of a civil partnership (see further Part 4) rather than a marriage, but Lord Justice Thorpe begins his judgment by saying that it is “of little moment” that this is a civil partnership rather than a marriage as the legal principles are exactly the same.

In line with the English law principles introduced in the cases of *White* and *Miller; McFarlane* (discussed in Part 2), non-financial contributions are to be weighted equally with financial contributions and the ‘yardstick of equality’ should be applied. At first instance the High Court had awarded Mr Gallagher (who as an actor earned significantly less than Mr Lawrence, an equity analyst at JP Morgan) roughly 45 per cent of the couple’s £4.1m assets. This was a long-term childless relationship of 11 years and 7 months, and no mention is made in the judgment of the domestic division of labour or any career sacrifice or ‘special contribution’ made by either spouse that would justify a departure from equality. On the basis of the case law in *White* and *Miller; McFarlane*, the division of assets should proceed on the basis that once each spouse’s needs have been met—and on the assumption that there is no call for compensation in this case—the remaining assets should be subject to equal sharing. However, the Court of Appeal appears to have made a retrograde step in placing emphasis on ‘fairness’ in the context of the ‘history of acquisitions’ (which receives its own heading in the judgment) before and during the relationship rather than equal sharing principles, thus appearing to favour Mr Lawrence’s financial contributions. The only mention made in the Appeal judgment of non-financial contributions is the following quote extracted from the High Court judgment, in which Mrs Justice Parker dismisses Mr Lawrence’s “very inadequate” proposals for a division of assets which fails to even meet Mr Gallagher’s needs:

“They do not meet DG’s needs for a house of reasonable standard and amenity and his need for capital to provide income; they ignore the length of the partnership, their shared lives and finances, standard of living, and *the work he carried out on both country properties* but especially the Amberley property”.³³⁷

³³⁷ *Ibid.*: para 20 (my emphasis).

The absence of discussion of non-financial contributions may be symptomatic of the court’s difficulty in moving beyond sex stereotyping to consider a man as economically vulnerable and an “inability to conceive of a relationship between two men as entailing codependency and shared lives”.³³⁸ It could be that, on the facts of this case, Mr Gallagher did not make much of a non-financial contribution—though this is unlikely, as the extract from the first instance judgment quoted above notes the work he carried out on their country properties. I would therefore concur with those who argue that “the possibility of male economic dependency and male homemaking does not appear to have received the degree of judicial recognition that is, more often, accorded to women”.³³⁹ This suggests that sex stereotyping is still a significant factor for the court, though this may be challenged more effectively in a same-sex divorce involving children, where the spouses have a more ‘traditional’ (or recognizable) division of wage-earner and homemaker than Mr Gallagher and Mr Lawrence, who both worked outside the home, albeit with a significant disparity of income.

More broadly, Lord Justice Thorpe mentions ‘fairness’ or ‘fair sharing’ to the exclusion of ‘equality’ or ‘equal sharing’ in the conclusion of his judgment. In the context in which fairness is emphasized, it is clear that he is concerned with protecting the appellant’s greater financial contribution to the relationship rather than creating fairness in the sense of ensuring that both parties leave the relationship with an award that reflects their joint contributions to their shared lives and economic partnership: “[the High Court] does not express why a division of assets in proportion 55:45 per cent was fair given the appellant’s *crucial contribution* of [a property in London], soaring in value during the relevant period”.³⁴⁰ On this basis, he reduces Mr Gallagher’s award to around 37 per cent of the assets,³⁴¹ thus moving further away from equal shares. By emphasizing Mr Gallagher’s ‘needs’, and a notion of fairness in the context of who made the greater financial contributions, the Court, as

³³⁸ Bendall 2013: 306.

³³⁹ Monk 2015: 192.

³⁴⁰ *Lawrence v. Gallagher* [2012] EWCA Civ 394, at para 49 (my emphasis).

³⁴¹ Bendall 2013: 305

Bendall argues, has almost taken Mr Gallagher back to the position of wives prior to the introduction of the yardstick of equality in the *White* case:³⁴² his needs are met, but the bulk of the property is retained by the spouse who owns it.

This may be a result of a reluctance to cast men as economically vulnerable, but it may also be part of a more general trend by the Court of Appeal to increasingly move back towards the pre-*White* situation where financial contributions were valued above all others,³⁴³ in combination with a tendency for “some members of the senior judiciary to resist equal sharing of assets”.³⁴⁴ As Monk argues:

“One explanation for the approach adopted by the Court of Appeal is to view it as part of a general shift away from the principle of ‘equal sharing’, itself a relatively recent development, towards a more individualistic approach that emphasizes financial autonomy and a norm of independence between partners (at least or especially where no children are involved). This latter approach emphasizes gender equality as an ideal... [but] overlooks deeper structural gendered economic inequalities.”³⁴⁵

It remains to be seen whether same-sex divorce could challenge sex stereotyping once it becomes more prevalent, but the early indications from the first reported UK case suggest that its impact may, for now, be limited. The challenge it would pose to a stereotypical notion of masculinity arguably played a role in the Court’s reluctance to recognize Mr Gallagher’s economic vulnerability. More worryingly, in rendering gender invisible in this case, the Court appears to have taken another step towards a formal equality approach that assumes gender equality already exists, leaving women vulnerable where it does not exist on the facts of a particular case. To the extent that this assumption of gender equality permits further retreat from the principle of equal sharing, which operates

“to correct gender imbalances”,³⁴⁶ this is a retrograde step for gender equality more generally.

3.4

Conclusion

The legal recognition of same-sex marriages is increasing rapidly, with most western jurisdictions now having introduced it, many within the last few years. The reasons for this differ slightly between jurisdictions, as do the method by which it was introduced and the level of opposition it faced. However, one common theme in both the lobbying for legislative change and the litigation before the courts is the discourse of equality, with some feminist advocates of same-sex marriage recognition arguing that it would destabilize gender roles within all marriages. Given the evidence presented in Part 2 of an ongoing gendered division of household labour in heterosexual marriages, it would be welcome if same-sex marriage could have the effect of creating a more egalitarian marriage. However, there appears to be a gendered division of labour in same-sex relationships, influenced by the gendering of the occupation of the spouses. As such, the research examined above suggests that the societal and structural factors that encourage women and men into gendered roles within the home remain strong, influencing even same-sex relationships that are seeking to uphold ideals of equality. Thus, while there may be some positive impact of same-sex marriage on gender equality, it is likely to be limited absent broader social change.

The second way in which same-sex marriage could bring about a ‘degendering’ of the institution is through challenging sex stereotyping in family law. For instance, in resisting the impositions of gendered assumptions about the role of the ‘good wife’ or ‘good mother’, cases involving a same-sex relationship may undermine these assumptions completely. There are insufficient numbers of case reports so far to be able to demonstrate or disprove this hypothesis conclusively, but one early case in the English Court of Appeal seems to indicate that a lower-earning male spouse in a same-sex relationship was treated less favourably

³⁴² Bendall 2014: 271.

³⁴³ See, for example: Diduck 2011.

³⁴⁴ George 2012: 361.

³⁴⁵ Monk 2015: 191.

³⁴⁶ *Ibid.*: 192.

than a wife in the same position in a different-sex relationship ought to have been under the prevailing rules on division of assets. Some commentators have suggested that this is precisely because the Court had difficulty overcoming the stereotype that a man would not be the economically vulnerable party. However, it also could be part of an apparent trend in the English courts to roll back the principle of equal division, which I discussed in relation to heterosexual relationships in Part 2.

The conclusion so far, then, must be that while there have been a number of major strides towards formal equality in marriage in western jurisdictions, with

same-sex marriage being the latest example, there are still a number of ways in which gender equality has not yet been achieved. One significant underlying factor appears to be the gendered division of household labour. Although courts in many western jurisdictions have attempted to ensure that there is equal division of assets on divorce, this has been undermined in the various ways outlined above, and the preliminary indications from (albeit one) same-sex divorce suggests that the positive influence of same-sex marriage may not be as great as had been hoped. In Part 4, I consider the ways in which the expanding 'menu' of relationship recognition across the various western jurisdictions may impact on gender equality.

4.

BEYOND CIVIL MARRIAGE: GENDER EQUALITY AND THE EXPANDING 'MENU' OF RELATIONSHIP RECOGNITION

4.1

Introduction

In western and post-colonial countries that follow English common law traditions, marriage has historically been tied to Christianity and this link remains evident in a number of rites and rules associated with marriage. However, there is now limited recognition in some jurisdictions of other religious traditions—particularly Jewish and Muslim divorce—through a mechanism of religious alternative dispute resolution, and there have been (unsuccessful) arguments that polygamy should be decriminalized in Canada and the United States. However, it is not just religious diversity that has been recognized (to a limited extent) in western jurisdictions. Separate but marriage-like provisions have been introduced for same-sex couples and in some jurisdictions expanded to heterosexual relationships, creating something of a 'menu' of relationship recognition possibilities.³⁴⁷ In England, where civil partnership remains available only to same-sex couples, heterosexual couples who reject the patriarchal and Christian history of marriage have sought access to it as a secular alternative to marriage. This part of the paper explores what these developments may mean for gender equality before considering

³⁴⁷ Millbank and Morgan 2001.

proposals that have been made for relationship recognition to move in a more radical direction in the future, away from conjugality as the basis for accessing the package of legal entitlements and consequences normally associated with marriage.

4.2

Religious marriage and divorce

The definition of marriage in common-law western jurisdictions is based on the judgment in an English case from 1866, in which Lord Penzance held that marriage 'in Christendom' is "the voluntary union for life of one man and one woman to the exclusion of all others".³⁴⁸ However, this has been said to be more of a *defence* than a *definition* of marriage; indeed, as a definition of marriage in English law it is "positively misleading".³⁴⁹ The case involved a marriage entered into by a British Mormon couple in Utah at a time when polygamy was legally practiced there. Mr Hyde

³⁴⁸ Per Lord Penzance, *Hyde v Hyde and Woodmansee* [1866] L Rev 1 P&D 130, at 133.

³⁴⁹ Probert 2007. This 'definition' has been undermined by evolutions in the law relating to marriage, most recently same-sex marriage (*Marriage (Same Sex Couples) Act 2013*), but it has been argued that it was never wholly accurate given that divorce was available before 1866. See: Poulter 1979.

subsequently renounced Mormonism and polygamy, was ex-communicated from the Church and returned to London, where he sought a divorce. Probert argues that the statement on marriage ‘in Christendom’ was made in the context of a perceived threat not only to monogamous marriage but also to Britain’s role as an imperial power:

“Since Mormon polygamy was practiced by white Westerners it challenged the easy equation that was made between monogamy and Western superiority. It could not be dismissed as an exotic curiosity. Nor could it be ignored as a practice confined to the wilds of Utah, since the Mormon Church had won a number of converts in Britain.... [Therefore] marriage was defined as Christian to differentiate ‘true’ English Christianity from Mormonism, as monogamous to emphasise that English men and women were more civilized than those over whom they ruled, and as ‘for life’ because of fears [with the increasing accessibility of divorce] that it no longer was.”³⁵⁰

The *Hyde* case dealt with a potentially—rather than an actually—polygamous marriage. English law no longer refuses to recognize potentially polygamous marriages; indeed, it will recognize actually polygamous marriages if they were entered into outside of England and Wales and neither party was at the time of the marriage domiciled there.³⁵¹ While bigamy is a criminal offence in England and Wales,³⁵² polygamy is not if only the first marriage is legally registered, though subsequent (religious) marriages are not legally recognized. Canada and the United States go further than simply not recognizing polygamous marriages, having criminalized polygamy even where subsequent religious marriages were not legally

registered.³⁵³ Justifications for the continued prohibition of polygamy in western nations now tend to focus on gender equality concerns, but the elements of defending a Christian view of marriage and juxtaposing ‘civilized’ monogamy with ‘barbaric’ polygamy remained evident in a recent Canadian judgment, as I discuss below. First, I consider two examples of where religious rites and requirements have been recognized by law: the recognition of religious alternative dispute resolution for divorces and the introduction of covenant marriage in some US states. These have also raised gender equality concerns and, in the case of potential recognition of such dispute resolution for Muslim couples, there have also been echoes of the discourses of the civil(ized) versus the barbaric ‘other’ that were evident in *Hyde*. During the controversy that followed the announcement of an Islamic Institute for Civil Justice to arbitrate disputes between Muslims, there were discourses of “Muslim barbarians knocking on the gates of Ontario”.³⁵⁴

4.2.1 Religious alternative dispute resolution

The civil courts took over jurisdiction for divorce from the ecclesiastical courts in England and Wales in 1857,³⁵⁵ and divorce was always a civil matter in North America. Yet, this does not mean there has been no religious involvement in the dissolution of marriages. For example, in North America there is a long history of Jewish religious courts, the *Beth Din*, arbitrating divorce settlements for members of the Jewish faith; and the Institute for Christian Conciliation offers non-binding conciliation and mediation as well as binding arbitration, all of which may “involve the use of Biblical scripture as a guide to decision-making”.³⁵⁶ In the United Kingdom, religious tribunals have operated for centuries, not only in the form of the ecclesiastical courts of the established Church of England (whose

³⁵⁰ Probert 2007: 328, 331.

³⁵¹ *Matrimonial Causes Act 1973*, s11(d). It is possible for all parties to a legally recognized polygamous marriage to be present in the UK, but only the first wife and husband can use a spousal visa. Any subsequent spouses would need to be eligible to immigrate in their own right. See: Fairbairn 2016.

³⁵² *Offences Against the Person Act 1861*, s57.

³⁵³ The Canadian *Criminal Code*, R.S.C., 1985. c. C-46, s293(1)(a) states that it is a criminal offence to practice or enter into any form of polygamy or any kind of conjugal union with more than one person at the same time. In the United States this is a state matter, but the Utah Code Annotated §76-7-101(1), for example, provides that a person is guilty of bigamy when they marry or cohabit with another person.

³⁵⁴ Kutty 2010: 566-567.

³⁵⁵ *Divorce and Matrimonial Causes Act 1857*.

³⁵⁶ Walter 2012: 519-520.

decisions are subject to judicial review), but also Catholic Tribunals, *Beth Din* and *Sharia* Councils.³⁵⁷ Recent research found that these “busy, vibrant institutions... play an important role in the lives of some believers”.³⁵⁸ However, in the last decade an increased public awareness of Islamic religious dispute resolution created something akin to a moral panic on both sides of the Atlantic about the introduction of ‘Sharia law’, despite the long history of religious arbitration/mediation in these jurisdictions.³⁵⁹

The controversy that erupted in Ontario in relation to the use of Islamic religious arbitration on divorce is illustrative of the problems both of ensuring gender equality in religious tribunals³⁶⁰ and overcoming Islamophobia in the West, including the latter’s impact on Muslim women.³⁶¹ Ontario’s Arbitration Act 1991 allowed for binding arbitration with “anyone as arbitrator and any law as the criterion for resolution”, avoiding the need for compliance with Canadian law.³⁶² It had been in operation for many years and some religious tribunals operating under it had been “voluntarily complying with secular norms”. For example, the Orthodox Jewish *Beth Din* of Toronto had asked parties to sign an agreement that any award must be “made in accordance with” Canadian civil law in order to be enforceable in court, but the Arbitration Act does not require this.³⁶³ In the absence of such an agreement, there were clear implications for gender equality where the relevant religious law differs from

civil law provisions on division of assets, for example. However, controversy only erupted in 2003 following the announcement of the creation of the Islamic Institute of Civil Justice (IICJ), which would provide binding arbitration for family disputes, among other issues, in accordance with Islamic law. Despite the fact that the creation of the IICJ did not change existing law in relation to religious dispute resolution, the controversy led to a review of the Arbitration Act, and the Family Law Amendment Act 2006 now requires family arbitration to be conducted in accordance with Canadian law. This followed enormous political pressure from organizations including the Canadian Council for Muslim Women (CCMW), the National Association of Women and the Law (NAWL), and the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC).³⁶⁴ For example:

“CCMW believes that the use of religious laws through private arbitration to settle family matters, under the *Arbitration Act*, violates the hard won equality rights guaranteed under the Canadian Charter of Rights and Freedoms, and creates a two-tiered, fractured justice system.”³⁶⁵

The CCMW identified a number of specific problems with the Arbitration Act as it stood, including that the arbitrator does not need any legal or other training, a party cannot withdraw once arbitration has begun and the award is legally binding and can only be overturned by a court challenge. In relation to gender equality specifically, they said:

357 Sandberg et al. 2013: 264-265.

358 Ibid.: 267.

359 For example, the state of Oklahoma changed its constitution to prevent “judges from considering sharia law in their decisions” (Walter 2012: 516-517).

360 However, this is not to suggest that religious tribunals are always necessarily more disadvantageous to women than men. In empirical research on Jewish and Muslim religious divorce in Canada, Fournier (2012: 65) found that “the participants’ invocation of religious law was often strategic, serving distributional purposes. For instance, if the women could get benefits from the religious sphere that she would not be able to secure under the secular legal system, she would follow this advantageous path. Such empirical knowledge helps disenchant the idea that religious law is systematically used as a *punishing* force that makes women worse off economically or morally inferior.”

361 For details of the vociferous ‘No Shari’a’ campaign see: Kutty 2010: 566-567.

362 McGill 2005: 53, 54, quoted in Walter 2012: 536.

363 Walter 2012: 537.

364 Hogben 2006.

365 Ibid.: 133. Similarly in the United Kingdom, Baroness Cox has introduced the Arbitration and Mediation Services (Equality) Bill, which has been described as seeking to “limit sharia law”, into the House of Lords four times since 2011. See: Family Law Week undated. Speaking at the second reading debate in 2012, she cited support for her Bill from prominent Muslim women’s organizations (including Inspire, the Iranian and Kurdish Women’s Rights Organisation, the Henna Foundation, Karma Nirvana and British Muslims for Secular Democracy) and said: “The Bill seeks to address two interrelated issues: the suffering of women oppressed by religiously sanctioned gender discrimination in this country; and a rapidly developing alternative quasi-legal system which undermines the fundamental principle of one law for all” (HL Hansard, 19 October 2012: Column 1683).

“Although the welfare of women is considered in some Muslim family laws, these laws do not have the equality of women as a foundational principle. This means that divorce can be a male right only, the custody of children tends to be given to the father, there is very limited financial support after divorce, and there is no concept of shared financial assets.”³⁶⁶

This is concerning in that it would put Muslim women who used religious arbitration in a potentially vulnerable position. However, others argue that prohibiting faith-based arbitration also results in oppression by “devaluing the significance of religion and emphasizing the primacy of liberal values”:

“In the faith-based arbitration debate, the minority (secular Muslims and even some non-secular Muslims who did not want the choice) oppressed a subgroup who wanted to order their lives in accordance with their faith. The secular or less orthodox minority could opt out and, in fact, had the choice to not participate or accept the jurisdiction of these tribunals. Religious individuals, similarly, had the right to opt in or accede to its jurisdiction. In this case, the liberals (including some secular Muslim women) set the agenda and effectively denied arguably more religious women and even Islamic feminists the opportunity to order their lives in accordance with their deeply held beliefs.”³⁶⁷

While acknowledging that the concerns of secular and Muslim feminists should not be trivialized or minimized, Kutty argues that the concern about women being pressured into consenting to religious alternative dispute resolution ignores pressures that exist in the secular context, particularly where many parties settle out of court and “compromise for less than their legal entitlements”.³⁶⁸ This is also particularly evident in other western jurisdictions such as the United Kingdom, which have withdrawn legal aid funding for most family law cases and pressure

parties into settling disputes through mediation rather than going to court, ignoring gendered power dynamics that make this unsuitable in some cases. As Kutty notes, “the hypocrisy was glaring given that the legal system itself allows and encourages private dispute resolution and allows for the opting out of the statutory family law regime without any active court oversight or sanction”.³⁶⁹ Similarly, Douglas et al. argue in the UK context that while vulnerable parties may find themselves subject to a less advantageous settlement from a religious tribunal, the same may well be true of those who take part in mediation or even lawyer-supported negotiation.³⁷⁰ Moreover, the belief that Muslim women in particular are likely to be pressured, “fails to validate or recognize that for some women the desire to decide their dispute in accordance to their core values and principles may take precedence over any secular understanding of the right choice”.³⁷¹

Perhaps the most concerning aspect of the prohibition on religious binding arbitration in Ontario from a gender equality perspective is the fact that Muslim parties, like any divorcing parties, remain free to come to their own agreement and settle their dispute without recourse to the civil law and can do so by taking any advice from any source they want to. In this sense, religious alternative dispute resolution will always exist, and people are “abiding by decisions as if they were the word of God” but with no oversight from the civil courts to ensure that basic constitutional protections are observed:

“Formalizing the process would have opened the door toward greater transparency and accountability.... Indeed this could have created a safe space between the patriarchy and oppression based on certain interpretations of religious laws and the paternalism and racism from the broader mainstream community.”³⁷²

In other words, by recognizing and overseeing Islamic arbitration, Ontario could have contributed to the evolution of Islamic law by ‘indigenizing’ its rulings,

366 Hogben 2006: 134.

367 Kutty 2010: 597.

368 Ibid.: 565.

369 Ibid.: 601-2.

370 Douglas et al. 2012: 154-155.

371 Kutty 2010: 601.

372 Ibid.: 602.

enabling Muslim Canadians to maintain their (religious) identity while developing their practices “in an ‘organic’ manner”.³⁷³ On this basis, Kutty concludes that the ‘real losers’ on the Ontario decision were women; particularly those who seek to live a ‘faith-based life’. It is difficult to disagree with this conclusion. Marion Boyd, former Attorney General and women’s rights advocate, recommended that religious arbitration be permitted subject to 46 recommendations, which would have overcome some of the concerns outlined above.³⁷⁴ For example, she recommended that the law be changed to require mediation and arbitration agreements to be “legally treated in the same manner as marriage contracts and separation agreements”;³⁷⁵ requiring that parties receive independent legal advice as to their rights under Canadian law and the law of arbitration and the remedies available to them under each; and increasing the legal oversight and accountability of the mediation and arbitration decisions. Allowing religious alternative dispute resolution subject to these recommendations could have gone further towards promoting gender equality for religious Muslim women in Ontario than the current situation of no legal oversight.

4.2.2 Covenant marriage

The introduction of covenant marriage in some jurisdictions of the United States, beginning with Louisiana in 1997,³⁷⁶ did not meet with the same controversy.³⁷⁷ This is arguably due to both its presentation as being linked to a traditional (Christian) notion of marriage

rather than to Islam or other religious traditions, and also that it furthered the secular state goals of reducing divorce and promoting marriage. In Louisiana, Nock et al. conducted interviews with legislators and found two stated aims in introducing covenant marriage, which were both related to public policy rather than explicitly tied to religion, though those entering covenant marriages are significantly more likely to be religious (Baptist or Protestant) than those entering standard marriages³⁷⁸ and its creation has been attributed to the influence of some Christian groups.³⁷⁹ These aims were, first, to challenge so-called “divorce culture”³⁸⁰ and second, “the law intends that couples ask questions of themselves and their intended spouses about the nature and depth of their commitment to the relationship”.³⁸¹ To this end, covenant marriage requires putative spouses to take part in pre-marriage counselling, attest to their understanding that marriage is a life-long commitment and agree to divorce only on fault grounds³⁸² or after an extended no fault waiting period of two years, and in any case only after completing compulsory counselling.³⁸³

Covenant marriage would not, therefore, prevent divorce, but rather “slow the process, inflict some penalties on guilty parties, and increase the faith one could put in the equity of the system”.³⁸⁴ It is worth noting that the extended waiting period of two years, rather than six months, for no fault divorce is the same as the normal separation period to divorce with the spouse’s consent (i.e., no fault) in the United Kingdom and remains significantly shorter than that in some other western jurisdictions, such as Ireland, where it is four years.³⁸⁵ In those contexts, research has shown that “delaying divorce or making it more difficult does not in fact strengthen marriages; it merely leads to an increase in unhappiness, hostility,

373 Ibid.: 560. See also in the UK context: “Asians learnt to adapt to English law but rather than abandon their customary traditions, they built the requirements of English law into them. The result has been that new British Muslim, Hindu and Sikh law, unique to Britain, has emerged, differing in some important aspects from the Indian, Pakistani or Bangladeshi laws and customs” (Bano 2007: 45). Though there are also arguments that the availability of review by a civil court is an inadequate safeguard and that “the idea of the state using access to secular legal powers as a means to pressurise religious bodies to change their religious law is unlikely to succeed and involves inappropriate interference with religious freedom” (McCrea 2016: 214).

374 Boyd 2004.

375 Kutty 2010: 564.

376 Baker et al. 2009: 149.

377 Though it also did not receive overwhelming support from those choosing between covenant and standard marriages. Only around 2 per cent of couples in Louisiana opted for covenant marriage (Rosier and Feld 2000: 386).

378 Nock et al. 2003: 179.

379 Moore 2015: 2.

380 See also: Flory 2000.

381 Nock et al. 2003: 172-173.

382 These are: adultery; a felony conviction resulting in life imprisonment or the death penalty; physical or sexual abuse of a spouse or child of the spouse; and abandonment: Baker et al. 2009: 149-150.

383 Rosier and Feld 2000: 385.

384 Ibid.: 386.

385 Moore 2015: 7.

and anger”.³⁸⁶ Indeed, it may be dangerous in the case of abusive marriages.³⁸⁷

Rosier and Feld found that those who entered into a covenant marriage already believed in the strength of their marriage based on their own values, commitment and faith, so the value of covenant marriage lies in its symbolism, not only of their commitment to one another but also “their beliefs about how marriage should be viewed and practiced”.³⁸⁸ Similarly, Nock et al. found that the beliefs and behaviours of those in covenant marriage were more likely to produce more stable marriages, making the covenant marriage “primarily symbolic”.³⁸⁹ The question is what the *gendered* symbolism of covenant marriage is. Research has found that gender roles in these marriages tend to be more ‘traditional’ than in other marriages,³⁹⁰ with all the problems that this brings for women (see Part 2), though this is not necessarily attributable to the legal requirements of covenant marriage per se, but rather the more traditional values that those entering these marriages hold. Nevertheless, as Rosier and Feld note:

“[When] both members of the couple are so in love and convinced of the husband’s devotion and benevolence toward his wife, such arrangements [gendered division of labour and wife submitting to husband] may work well for both members of the couple. But it is reasonable to expect that if and when they experience difficulties in their marriage in the future, his exertion of power may be considerably less benign and more self-serving. And if and when her happiness ceases to be a driving force behind his decisions, obviously she more than he will pay a dear price for the power arrangements they have negotiated.... With little real power in the relationship she has collaborated with her husband to put her best interests at the mercy of his ongoing devotion. Given their joint agreements concerning proper rules and roles in their marital relationship, such women

may have few alternatives besides enduring their husband’s abuse of power or exiting from the marriage. In this unhappy scenario, the latter would be considerably more difficult for the women represented here... [who] would have to wait a full two years to extract herself from the marriage.”³⁹¹

It is, therefore, difficult to concur with arguments made by those who introduced the legislation in Louisiana that “those concerned with women’s rights and issues could find much to like in the alternative marriage contract”.³⁹² In fact, some have argued that covenant marriage is “anti-feminism wrapped in a pro-family package”.³⁹³

Nevertheless, by introducing covenant marriage in their jurisdiction, state legislators have (no doubt unintentionally) set a precedent that may be used by others seeking alternative forms of marriage or alternatives to marriage. As Baker et al. argue:

“Thus, rather than reinstitutionalize marriage by emphasizing its singular lifelong permanence, covenant marriage may ultimately be yet one more form of intimate union for a unique subgroup, among a vast proliferation of legal and nonlegal intimate unions.”³⁹⁴

As the proliferation of parallel institutions to marriage outlined in the following sections demonstrate, albeit in a different context, this may well be the case.

4.2.3 Polygamy and gender equality

Polygamy is an umbrella term used to denote multiple spouses, whether in the form of polygyny (multiple wives) or polyandry (multiple husbands). It also sometimes incorporates polyamory, though there is a distinction between these in that polyamory, or ‘poly’, is a sexual identity as well as a relationship practice and does not have the religious connotations

386 Ibid.: 26.

387 Cade 2010: 232.

388 Rosier and Feld 2000: 393.

389 Nock et al. 2003: 187.

390 Baker et al. 2009.

391 Rosier and Feld 2000: 391-392.

392 Ibid.: 386.

393 Ibid.: 393.

394 Baker et al. 2009: 173. See also: McShain (1998: 639), who argues that “covenant marriage offers a thinly disguised attempt to eliminate no-fault divorce, and devalues traditional marriage as a result”.

that polygamy usually has, nor is a polyamorous relationship necessarily structured as a marriage as it refers more generally to “relationships where an adult intimately loves more than one other adult”.³⁹⁵ As such, while it includes multiple partners in a marriage-like relationship with the same person, it also includes group ‘marriage’ open relationships, intimate networks and even people who are open to the possibility of multiple partners but are currently single.³⁹⁶ Polygamy and polyamory are, therefore, different in significant ways:

“Although sexism and heterosexism continue to pose a problem within poly communities, there are marked differences between gender-neutral conceptualisations of polyamory (that developed out of counter-cultural notions of free love) and patriarchal definitions of polygamy (derived from religious doctrines and mythologies). Proponents of polyamory and heteronormative polygyny have therefore frequently distanced themselves from each other.”³⁹⁷

Nevertheless, considering polyamory alongside polygamy may help to clarify and disentangle those concerns that could be inherent in the *structure* of having multiple simultaneous relationships from those that may be associated with broader (though arguably related) concerns that have been expressed, such as male dominance and abuse of women and children in the Fundamentalist Mormon communities that practice polygamy in North America.³⁹⁸ It also may assist in resisting some of the objections to polygamy that are rooted in racialized discourses of civilization that were evident in both *Hyde* (above) and the recent Canadian *Reference* case heard in the British Columbia Supreme Court.³⁹⁹

“While ‘race’ was not central to the reference, echoes of the racialized rhetoric around the

prohibition of Mormon polygamy [in Canada and the United States] were heard in discourse that engaged stereotypes of the ‘civilized’ West and the ‘backwards’, ‘barbaric’ East. This discourse was evident in some of the argumentation concerning the harms to women caused by polygamy and the need to preserve democracy through monogamous marriage.”⁴⁰⁰

In contrast, the recent challenge to the criminalization of polygamy in Utah brought by the family in the US TV show *Sister Wives* has been criticized for not centring gender equality when it found that prohibitions were subject to “strict scrutiny” and there was “no state interest sufficient to justify [the criminalization of polygamy]”.⁴⁰¹ However, there is no consensus on what the gender equality implications of polygamy are, as I demonstrate in this subsection.

The recent judgment of the British Columbia Supreme Court in *Reference* devoted 311 paragraphs to the ‘Alleged Harms of Polygamy’. These included evidence from one evolutionary psychologist that “greater degrees of polygyny are associated with increased inequality between the sexes... as men seek more control over women when women become scarce”.⁴⁰² There was also evidence given that the increase in demand for brides in polygynous communities drives down the age of marriage for women and increases the age gap between husbands and wives,⁴⁰³ resulting in early sexual activity, pregnancies and childbirth and shorter gaps between pregnancies, which have negative health implications for young girls and limit their socio-economic development.⁴⁰⁴ However, Chief Justice Bauman dismissed the concerns expressed in the testimony of a second evolutionary psychologist

395 Loving More, “About Polyamory”, cited in Emens 2004: 303.

396 Ibid.

397 Klesse 2016: 1352.

398 See, for example: Alberta Civil Liberties Research Centre, The 2005; Benedet 2013; Chamberlin and Guiora 2014; Bala 2009.

399 *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588.

400 Sweet 2013: 10. See also: Lenon 2016; Ertman 2010; Denike 2010.

401 Strassberg 2015: 1821. The 10th Circuit Court of Appeals subsequently overruled this decision, finding the claim was moot due to the Utah County Attorney’s Office having changed its policy to only prosecute cases where there was misrepresentation or a collateral crime such as fraud or abuse: *Brown v. Buhman* (United States Court of Appeals for the Tenth Circuit, 11 April 2016).

402 *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588, at para 499.

403 Ibid. at para 523.

404 Ibid. at para 784.

who noted that male sexual jealousy in *monogamous* relationships was a leading cause of psychological, physical and sexual abuse of women, saying that the fact that harm also existed in monogamous relationships was “beside the point”.⁴⁰⁵ Chief Justice Bauman summarizes the harms to women in polygynous relationships (although he acknowledges that it is unclear whether some of these negative outcomes have a causal connection with polygamy):⁴⁰⁶

“Women in polygynous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygynous relationships face. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They lack reproductive autonomy, and report high rates of marital dissatisfaction and low levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.”⁴⁰⁷

He also found that even where polygyny could theoretically give women more power, as there is more competition for wives among men, this does not usually result:

“The natural economic consequence of polygamy is increased market value for women, though the women themselves do not realize the economic benefit of their greater value. Rather, women tend to be treated more like commodities in polygamous societies, and their freedom to manage their own economic circumstances and destiny is reduced. This loss of control by women in polygamous civilizations is seen in the early and arranged marriages,

which are so prevalent, along with the practice of paying a bride price.”⁴⁰⁸

The ability to take additional spouses in polygynous marriages is reserved for the husband, which creates an unequal relationship structure that is “premised on sex and sex role stereotypes that ascribe to men and women different attributes and characteristics that ostensibly warrant an unequal distribution of rights and obligations in marriage”,⁴⁰⁹ though many feminists would no doubt agree with Kaganas and Murray’s observation that: “The notion of a woman acting as a wife to more than one man suggests greater oppression, not liberation”.⁴¹⁰

In short, the British Columbia Supreme Court found that: “Patriarchal hierarchy and authoritarian control are common features of polygynous communities”.⁴¹¹ Polygyny “institutionalizes gender inequality”,⁴¹² and the harms of polygyny are “universal” rather than limited to “particular cultures or geographical locations”.⁴¹³

In light of this judgment it is, perhaps, surprising that some feminist scholars have been more equivocal than courts in the West about either the harms of polygamy or whether the appropriate legal response to those harms is criminalization or non-recognition of polygamous marriages.⁴¹⁴ For example, one early feminist response to gender equality concerns about polygamy was made by Kaganas and Murray, writing in the South African context in 1991:

“The first concern, that there is something inherently unequal in a family structure which comprises one man and many women, is dubious. It is not self-evident that the

405 Ibid. at para 544.

406 Ibid. at para 593.

407 Ibid. at para 782.

408 Ibid. at para 595.

409 Ibid. at para 602.

410 Kaganas and Murray 1991: 127.

411 *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588, at para 787.

412 Ibid. at para 787.

413 Ibid. at para 788.

414 There are plenty of academic commentators, including feminist ones, who unequivocally support the courts’ conclusions that polygamy is harmful. See for example, Alberta Civil Liberties Research Centre, *The 2005*; Benedet 2013; Chamberlin and Guiora 2014; Bala 2009.

apparently symmetrical relationship of one woman to one man provides the *only* formula for equality within marriage. A variation of the argument might be that the relationship is unequal and degrading for women because, while each woman in a polygynous marriage is committed to a single man, she has to compete with a number of other women for his attention and a share of the family's material resources. This also fails to withstand scrutiny. It is possible, outside the very specific and historically quite recent notions of romantic love and companionable marriage, that each wife's attentions are also divided among her husband, other members of her family and the community in which she is living. This point is well made in a study on polygyny in Nigeria by Ware when she notes that '[w]hether one considers that women who have to share a husband are underprivileged depends on the value placed upon husbands.' Furthermore, while it is true that wives are dependent on their husbands for access to resources, they are not necessarily prejudiced by the introduction of new wives; in many polygynous societies, additional wives increase the wealth of the group rather than deplete it."⁴¹⁵

Arguing that "law reform is unhelpful where it threatens to exclude or disadvantage women who do not conform to a prescribed norm", they suggest that "we should re-examine the basis of objections to polygyny and choose our responses carefully".⁴¹⁶

A report by Campbell, whose expert evidence in the *Reference* case was dismissed by Chief Justice Bauman as "frankly somewhat naïve",⁴¹⁷ provides the more nuanced analysis that Kaganas and Murray call for, while emphasizing commitment to gender equality.⁴¹⁸ She concludes that it is "impossible to draw a single unqualified conclusion as to whether polygamy harms women" because the ways that polygamy is

practiced across the globe are so heterogeneous and women's experiences are shaped by social and cultural forces.⁴¹⁹ For example, while acknowledging that harmful negative relationships can exist between co-wives, Campbell also references research showing that these relationships can in some circumstances be experienced as "enriching and valuable", by providing economic support, help with childcare, friendship and companionship.⁴²⁰ Criticizing global responses to polygamy that assume it to be "universally harmful or benign to women, without any real analytical justification", she concludes that "legal and policy approaches must target factors detrimental to women (such as abuse, poverty, coercion and nefarious health consequences), rather than just the practice of polygamy on its own".⁴²¹

Patriarchy is not exclusive to polygamous communities (see previous sections as it relates to monogamous marriage). In fact, some feminists in the West have advocated non-monogamy (in the form of polyamory rather than polygamy) as a way to *resist* patriarchy. For example, Robinson argues that heterosexual monogamy rests on a man's ownership of a woman in order to maintain patrilineal lines of inheritance, that individual men "benefit from women's over-investment in one man both emotionally and physically"⁴²² and that monogamy in heterosexual relationships serves to isolate women from each other.⁴²³ Similarly, Auchmuty argues that heterosexual monogamy serves patriarchy, "by ensuring that each woman is kept under the personal control of a man".⁴²⁴ As such, Robinson suggests that non-monogamy may be a way to "reconstruct the gendered power relationships of heterosexuality".⁴²⁵ This is not to suggest that non-monogamy/polyamory would necessarily be a utopian feminist alternative to patriarchal monogamy: as Klesse notes, polyamory is "accused of masking patriarchal domination behind the rhetoric of gender egalitarianism".⁴²⁶ For example,

415 Kaganas and Murray 1991: 127-128.

416 *Ibid.*: 134.

417 *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588, at para 752.

418 Campbell 2005.

419 *Ibid.*: 1-2. See also Calder and Beaman 2014.

420 Campbell 2005: 5-6.

421 *Ibid.*: 34.

422 Robinson 1997: 145.

423 See also: Rosa 1994.

424 Auchmuty 2004: 122.

425 Robinson 1997: 152.

426 Klesse 2016: 10.

Sheff describes the fetishization of the (female) “hot bi babe” among some poly men, and other feminists have linked non-monogamy with a libertarian politics that is about men’s exploitation of women rather than women’s sexual freedom.⁴²⁷ However, Sheff concludes that while it can in some ways reinforce gendered power structures (such as scheduling and “emotion work” falling mainly to female partners), there was also a “markedly increased gender flexibility” available to poly men and attempts to create equitable power structures within relationships, though with varying degrees of success.⁴²⁸

The fact that non-monogamy has been argued to be both a means of liberation from patriarchy (when it is in the form of polyamory) and a source of, or support for, patriarchy (when it is in the form of polygamy) suggests that it is not the fact of non-monogamy per se but rather the religious, cultural or political values associated with it and how it is lived that determine whether it is considered to be oppressive, exploitative or liberatory for women. This is inevitably tied up with the racialized considerations of ‘civilized’ monogamy as opposed to ‘barbaric’ polygamy evident in the discourses of the courts, particularly where patriarchal practices associated with monogamous marriage are so easily brushed aside as irrelevant, despite anthropological research suggesting that abuse of women in polygynous communities is committed by those who “possess personalities that would be abusive to others in mainstream society as well”.⁴²⁹

West Coast LEAF (Legal Education and Action Fund), a Canadian feminist non-profit organization, intervened in the *Reference* decision arguing that the criminal prohibition should be “read down” to include only “the exploitative practice of polygamy” and not polyamory.⁴³⁰ This has been criticized by Lenon, who argues that, while West Coast LEAF “offered one of the most nuanced interpretations” of how the criminal law on polygamy should be read in relation to harm,⁴³¹ its position nevertheless “conceals racialized relations

of power that, however unwittingly, give weight to and indeed *require* the racial logic of the white settler colonial project articulated in the Polygamy Reference’s overall narrative”:⁴³²

“Given how West Coast LEAF frames polygamy’s harms, we are left with an understanding of women and girls living in polygamous marriages as victims within (religious) patriarchy in need of protection; exploited, with neither agency, autonomy, resistance nor complexity to their lives. This is not to suggest that polygamous marriage cannot be critiqued or that it is *not* a site of harm. Rather, it is to suggest a rather impoverished hegemony of experience on the pages of West Coast LEAF’s submissions.”⁴³³

As noted above, there are different approaches to polygamy in western jurisdictions. While it is criminalized in some countries, including North America—meaning that even victims such as young girls trafficked for marriage may potentially be prosecuted—in the United Kingdom it is not subject to the criminal law but not recognized as a valid marriage either. Both of these approaches may exacerbate harm to women in polygamous relationships. Bailey et al. suggest that polygamy should be decriminalized in Canada because criminalization is “not the most effective way of dealing with gender inequality in polygamous relationships” and child and spousal abuse are already criminalized separately in other provisions.⁴³⁴ They also suggest that polygamous marriages entered into in jurisdictions where polygamy is legal ought to be recognized in Canada, because: “Women in such marriages are particularly likely to need the benefits and protections of marriage and to suffer if their marriages are not recognized.”⁴³⁵ As Kaganas and Murray noted in the South African context, before customary (polygamous) marriage was given legal recognition through the *Recognition of Customary Marriages Act 1998*, the consequences of non-recognition could be

427 See, for example: Jeffreys 1990.

428 Sheff 2006.

429 Duncan 2008: 337, citing Bennion 1998.

430 See: West Coast LEAF undated.

431 Lenon 2016: 6.

432 Ibid.: 6-7.

433 Ibid.: 25-26.

434 Bailey et al. 2005: 19. See also Duncan 2008, arguing in the US context that legalization would allow for better regulation of polygamous groups.

435 Bailey et al. 2005: 9.

serious, particularly for the “discarded spouse”.⁴³⁶ For example, Selby gives an example of how the state’s efforts in France to discourage polygamy caused particular suffering to polygamous women. The state encouraged immigrant men to “reject ‘excess’ wives by promising to renew their residence permits” once they were no longer polygamous, with the result that “their other wives, who often lack French legal papers and a means of financial support, are sometimes forced to live in squats with their children”, thus increasing the social precariousness of women who are often first-generation immigrants.⁴³⁷ Thus, Selby argues that they are doubly victimized: “by the social and economic conditions under which they live and by the French state, which refuses to otherwise grant legal visas”.⁴³⁸

In polyamorous relationships there is often an additional dynamic where, if there was a marriage between two of the partners, it was (particularly before marriage was available to same-sex couples) usually different-sex partners who were married, with an unmarried partner of the same sex of one of the spouses. In this context, Klesse has argued that the unequal legal relationship of married/not married partners is reflected in an interpersonal dynamics within the relationship, particularly when this also feeds into heteronormative privileging and prioritizing of other-sex relationships over same-sex ones.⁴³⁹ Australia does not recognize polygamous marriages, but there is some recognition under the federal *de facto* relationships regime (discussed below), in that courts have found a *de facto* relationship to exist simultaneously with another relationship or marriage. This provides some protection to second and subsequent wives who may otherwise be rendered more vulnerable through non-recognition.

436 Kaganas and Murray 1991: 122.

437 Selby 2014: 127.

438 Ibid.: 128.

439 Klesse 2006: 162.

4.3

Registered/civil partnerships

The model of registered/civil partnerships as an ‘alternative’ to marriage originated in Denmark in 1989 as a way to recognize same-sex relationships without the label of marriage because the National Association for Gays and Lesbians anticipated that the public and parliament would reject claims for marriage.⁴⁴⁰ They were, therefore, effectively a compromise provision; a way to secure some legal recognition for same-sex couples while avoiding the political debate over the term marriage. The Danish *Registreret Partnerskab* was a national and comprehensive provision that paralleled marriage in that it conferred on registered (same-sex) couples most of the same legal and economic rights and obligations as married (different-sex) couples.⁴⁴¹ This model of recognizing same-sex relationships was followed in numerous countries, with many of those (including Denmark) subsequently introducing same-sex marriage.⁴⁴²

Initially, this type of provision was not really a true alternative to marriage: it provided neither a choice for couples—as the provision they were able to enter depended on their sexuality—nor an institutional framework that was significantly different from the one they would have through marriage. The entry requirements are similar to marriage, with a few relatively minor exceptions such as that it is not permitted to register a partnership in a Church. Similarly, there are few differences in the legal consequences, though the implications of these were in some cases significant as they related to access to reproductive services and legal parenthood for non-birth parents of children born during the partnership.⁴⁴³ Generally, these differences were removed subsequently to

440 Merin 2002: 62-63.

441 Lund-Andersen 2001: 417.

442 For a list of European countries with these provisions, see: ILGA Europe 2016.

443 Previously, access to reproductive services in Denmark was legally restricted to married or cohabiting different-sex couples, thus excluding registered partners, but this was repealed from January 2007 (Larsen 2006). The original Danish Registered Partnership Act also prevented joint adoption and custody, but an amendment in 1999 reversed this provision except where the child was adopted from a foreign country (Lund-Andersen 2001: 417). Similarly, the registered partnership provisions in Iceland, the Netherlands, Norway and Sweden, which originally excluded adoption, were subsequently amended (Waalwijk 2005b).

create parity with marriage, but even recently enacted provisions, such as Italy's civil union, do not necessarily include automatic legal parenthood for non-birth parents.⁴⁴⁴ The dissolution requirements are generally also similar to marriage, though a common exception is the requirement for fidelity. This is the case in the United Kingdom, where it is arguably a result of Parliament's disinclination to attempt a redefinition of adultery in the context of a same-sex relationship (as the definition is currently explicitly heterosexual and penetrative) rather than the absence of a monogamy requirement.⁴⁴⁵

However, some jurisdictions have allowed different-sex couples to register a partnership as an alternative to marriage, usually extending the provision to them at the same time as creating same-sex marriage.⁴⁴⁶ Greece was anomalous in introducing a registered partnership provision that was reserved for different-sex couples until the European Court of Human Rights ruled that it was discriminatory to exclude same-sex couples.⁴⁴⁷ The Netherlands allowed both same- and different-sex couples to register from the beginning of its registered partnership provision in 1998, and when it subsequently became the first country to allow same-sex marriage it provided all couples with a choice between registered partnership and marriage.⁴⁴⁸ No significant legal differences exist there between marriage and registered partnership,⁴⁴⁹ so while it provides an 'alternative' to marriage in the sense that there is a choice between the institutions, the choice is not between significantly different legal frameworks. Nevertheless, in the United Kingdom where there is also no significant legal difference between the institutions, different-sex couples have sought access to civil partnership, citing greater

gender equality in civil partnerships as one reason. This is discussed below.

In France, the registered partnership provision, *pacte civil de solidarité* (PaCS), is also available to both same- and different-sex couples and is arguably more distinct from marriage. The PaCS has been described as somewhere between cohabitation and marriage in terms of its scope.⁴⁵⁰ It is defined in the Civil Code as a "contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their common life".⁴⁵¹ There are two significant structural differences between PaCS and marriage. First, rather than the legal consequences being imposed by the state, the PaCS is an agreement between the couple to organize their common life. As such, in contrast to marriage—which is commonly described as a status or contract whose terms are set by a third party and unalterable by the parties themselves⁴⁵²—parties to a PaCS can largely create the terms of their contract,⁴⁵³ although the state requires certain minimum rights and responsibilities.⁴⁵⁴ However, while these minimum obligations are far from comprehensive, they are marriage-like in the obligations that they impose on the couple.⁴⁵⁵ For example, there remains an obligation of 'spousal support' on relationship breakdown;⁴⁵⁶ the partners are jointly liable for debts to third parties;⁴⁵⁷ and, unless they agree otherwise in the PaCS, a separate property regime will apply.⁴⁵⁸ For this reason, it has been described as "a replica

444 Kirchgaessner 2016.

445 See, for example, Baroness Scotland's speech: HL Hansard 10 May 2004: GC19. See further: Barker 2006: 241.

446 See: Wintemute 2016.

447 *Vallianatos v. Greece* (2014) 59 E.H.R.R. 12.

448 Waaldijk 2005a.

449 However, there are two differences between same-sex and heterosexual marriage: Inter-country adoption is only available to different-sex married couples; and a female in a same-sex marriage is not presumed to be the father of a child born to her partner during the marriage (Waaldijk 2005b: 138).

450 Borrillo 2001.

451 Borrillo and Waaldijk 2005: 94. The phrase 'common life' has been interpreted as meaning 'life as a couple'; so the PaCS is only available to couples rather than any two people sharing a household. See: Borrillo 2001: 484; and Steiner 2000: 1.

452 See, for example: Diduck and Kaganas 2006: 57.

453 Barlow and Probert 1999: 477; Stychin 2001: 350.

454 Richards 2002: 317. This provision is criticized because there is no requirement for the provisions of the PaCS to be verified by any state authority or a lawyer. As such, Martin and Théry argue that many provisions will be illegal: "For example, many people believe that a PaCS is a means for bequeathing money or property to the other, but it is not. They might then illegally include some dispositions for inheritance in their convention, causing serious problems for the future survivor" (2001: 152).

455 Stychin 2001: 350.

456 Borrillo and Waaldijk 2005: 97.

457 Richards 2002: 317.

458 Butruille-Cardew 2012: 417.

of marriage”,⁴⁵⁹ though it is perhaps more accurate to say that it “both resembles and dissociates itself from the marriage model”,⁴⁶⁰ particularly because of the second difference: the ease of dissolution. A PaCS is dissolved immediately on the marriage of one partner or by a joint notification to the court clerk if both parties consent, and it can also be unilaterally dissolved by one party simply notifying the court clerk and the other party.⁴⁶¹ The division of assets is also carried out by the parties themselves rather than by a court unless they are unable to agree.⁴⁶²

The circumstances in which these provisions were introduced, as a compromise to avoid same-sex marriage, mean that generally they do not stray too far from the marriage model. While there are some differences, ranging from minor to significant, they can all be said to bear some hallmarks of the institution of marriage to varying extents. However, one commonality between them is that they lack the name and historical connotations of marriage. The question is what the significance of this is for gender equality: Can moving away from this historical context mean that a similar legal structure to marriage could be more gender equal? Two sets of heterosexual couples in the UK have argued that this is the case and that their exclusion from civil partnerships is discriminatory.

The first case, *Ferguson v. UK*, involved an unsuccessful application to the European Court of Human Rights (ECHR) by four heterosexual couples who had attempted to give notice of their intention to register a civil partnership and four same-sex couples who attempted to give notice of their intention to marry.⁴⁶³ Both groups were claiming discrimination as a result of their exclusion from the relevant institution. Two of the litigants said: “We want to secure official status for our relationship in a way that supports the call for

complete equality and is free of the negative, sexist connotations of marriage”.⁴⁶⁴

Although the *Ferguson* litigants had no success in the ECHR because their application was deemed inadmissible,⁴⁶⁵ another different-sex couple took their case to the English High Court because—while they wanted their relationship to be recognized—they had “deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature”.⁴⁶⁶ They therefore sought access to civil partnership, which they thought better reflected the gender equality in their relationship. The court held that the United Kingdom’s denial of civil partnership to different-sex couples was not an unlawful interference with their right to private and family life and there was “no lack of respect afforded” to them on account of their being a different-sex couple.⁴⁶⁷ The judgment rests heavily on the fact that marriage is available to the claimants and an assumption that marriage and civil partnerships are equivalent: “The only obstacle to the Claimants obtaining the equivalent legal recognition of their status and the same rights and benefits as a same-sex couple is their conscience”.⁴⁶⁸ It does not address the substance of their complaint that marriage is historically patriarchal whereas civil partnership can be equal, but this argument is well made by Baxter (2014):

“Civil partnerships, essentially, strip away all compulsory ceremony from the proceedings... Importantly, civil partnerships also include the names of both parents of each partner on the certificate, rather than merely the names of the fathers. This is what sells civil partnership to me most as a heterosexual woman: the fact that the institution of marriage is still saturated in sexist trappings and traditions that once recognized women as less legitimate and less equal to their partners... The father-only certificate is the irritating hangover of

459 Steiner 2000.

460 Stychin 2001: 350.

461 The dissolution takes effect three month’s later. See: Merin 2002: 139; Richards 2002: 320.

462 Richards 2002: 320.

463 The case was ruled inadmissible by the Court so there is no judgment, but the application is available online. See: Equal Love 2011.

464 Gabbatt and Mueller 2010.

465 Tatchell 2015.

466 *Steinfeld and Keidan v. The Secretary of State for Education* [2016] EWHC 128 (Admin), at para 2.

467 *Ibid.* at para 39.

468 *Ibid.* at para 39.

that long tradition of women-as-chattel. For a lot of us, that reminder is enough to make us want to opt out altogether. Civil partnerships are modern unions created in a time where sex discrimination was illegal rather than actively encouraged. For heterosexual couples who want to avoid 'husband and wife' but stick with 'partners', leave behind the bad track record of marriage but make a legal commitment to one another in the presence of their family and friends, this should be available."⁴⁶⁹

As I have argued elsewhere,⁴⁷⁰ some of the 'sexist connotations' of marriage would certainly relate to some historical aspects that are no longer part of the institution and therefore are not present in civil partnerships, not least its history of wives losing their personhood and property upon marriage. However, many of those aspects of marriage that were (and remain) problematic for gender equality are also replicated in civil partnerships, albeit in gender-neutral language. For example, O'Donovan notes that the regulation of marriage historically served two purposes: controlling women's sexuality; and ensuring the smooth transition of property.⁴⁷¹ What is arguably a modern-day version of these purposes can be found in the arguments that were made in favour of introducing civil partnerships, which focused on property transfer in the form of access to inheritance tax exemptions and encouraging responsible sexual behaviour (by gay men).⁴⁷² As noted previously, there remain significant gender equality problems with the institution of marriage and, while some of these are inevitably rooted in its history, many are inherent in its legal structure and the gendered division of labour that it, along with broader social policy, supports.

Despite lacking some of the historical context of marriage, in replicating the legal structure and consequences of marriage (which are, after all, built from its historical context), civil partnerships are arguably a repackaging of these gendered historical aspects of marriage rather than a departure from them. A stronger argument may be made that PaCS is a departure from the historical connotations of marriage. However, more analysis would be needed on the gender equality implications of PaCS, particularly the element of individual contracts, because they are likely to be subject to the same critiques as prenuptial agreements in terms of recognizing the gendered power dynamics at play.

4.4

De facto relationships

In Australia, *de facto* relationship provisions were created to give unmarried different-sex couples access to the law "in times of crisis and dispute"⁴⁷³ and subsequently were expanded to include same-sex relationships. The New South Wales (NSW) legislation in 1984 was the first of its kind in recognizing cohabiting (heterosexual) relationships as spousal for a number of purposes⁴⁷⁴ and it was extended to same-sex relationships in 1999.⁴⁷⁵ Similar provisions were subsequently adopted in other states and territories and, in 2009, amendments to the *Family Law Act 1975* created a federal definition of *de facto* relationships.⁴⁷⁶ A *de facto* relationship exists where the parties are not legally married to each other or related by family and, "having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis".⁴⁷⁷ The existence of a *de facto* relationship is to be evidenced by

469 Baxter 2014.

470 Barker 2012b.

471 O'Donovan 1986: 44-45.

472 For example: "I support the Bill, in one way for the most simple of reasons: one must surely be more in favour of stable homosexual relationships than those that are not.... In some ways, that is a very important aspect of the Bill" (Lord Higgins, HL Hansard, vol 660, col 427, 22 April 2004).

473 Millbank 1999: 16.

474 Graycar and Millbank 2000: 230.

475 Originally, the *De Facto Relationships Act 1984* defined such relationships as those who were "living together as husband and wife on a bona fide domestic basis" (ibid.: 232). The *Property (Relationships) Legislation Amendment Act 1999* inserted the gender-neutral definition, making it available to same-sex couples and changing the name of the legislation to the *Property (Relationships) Act*.

476 s2F *Acts Interpretation Act 1901* (Cth); *Family Law Act s4AA*. See: Fehlberg et al. 2015: 89.

477 *Family Law Act 1975*, section 4AA(1).

a set of criteria,⁴⁷⁸ though no single factor is required, recognizing that “the human experiences of relationships differ and that there can be no single model of what a committed relationship looks like”.⁴⁷⁹ There are two aspects of the Australian *de facto* relationship recognition that potentially signal an alternative to marriage.

First, though they are not included in the federal legislation, at state level non-sexual relationships can be recognized in four jurisdictions, beginning with the Australian Capital Territory (ACT) in 1994.⁴⁸⁰ They have slightly different names in each. In the ACT all relationships (sexual and non-sexual) are grouped together as ‘domestic relationships’. In Tasmania and Victoria, non-sexual relationships are termed ‘caring relationships’.⁴⁸¹ In New South Wales (NSW), non-sexual relationships are termed ‘close personal relationships’.⁴⁸² These provisions recognize relationships of care and interdependence outside of a sexual and (in the ACT, Tasmania and Victoria) even cohabiting relationship. For example, in Victoria, the definition of a caring relationship is:

“[A relationship] between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof.”⁴⁸³

In NSW, close personal relationships require cohabitation and are defined as: “two adult persons, whether

or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care”.⁴⁸⁴ The NSW definition was initially interpreted ‘restrictively’ in terms of domestic support and personal care, requiring assistance with mobility, personal hygiene and physical comfort.⁴⁸⁵ However, later cases have broadened the definition to include cases where former partners continue to share property.⁴⁸⁶ The recognition of non-sexual caring relationships moves away from a marriage framework in that they are based on recognizing financial and emotional interdependencies that occur outside of a sexual and cohabiting relationship. Millbank and Sant argue that:

“The concept of a domestic relationship is in some senses a radical departure from traditional laws about the family, because it redefines family obligations around love, interdependence and choice, rather than blood and marriage or ‘marriage-like’ relationships. In doing this it arguably destabilises heterosexuality and the hetero-nuclear family.”⁴⁸⁷

However, when the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* was drafted to extend *de facto* recognition to the federal jurisdiction, the Human Rights and Equal Opportunity Commission recommended that the federal government should not recognize non-sexual relationships in order to “contain the scope of entitlements available to people who are not in a couple”.⁴⁸⁸ This means that non-sexual relationships can only be recognized at state/territory level, where there is no jurisdiction to legislate on issues such as pensions, income taxation, social security and immigration.⁴⁸⁹ As such, there is a more limited set of legal rights/responsibilities attached to non-sexual than to sexual *de facto* relationships.

478 The duration of the relationship; the nature and extent of common residence; whether or not there is a sexual relationship; the degree of financial dependence or interdependence and any financial support; ownership, use and acquisition of property; the degree of mutual commitment to a shared life; whether the relationship is registered (where available in state/territory law); the care and support of children; the reputation and public aspects of the relationship: *Family Law Act*, s4AA(2).

479 Fehlberg et al. 2015: 92.

480 *The Domestic Relationships Act 1994*.

481 *Relationships Act 2003*, s5(1) (Tasmania); *Relationships Act 2008*, s5 (Victoria).

482 *Property (Relationships) Act 1984*, s5(1)(b).

483 *Relationships Act 2008*, s5.

484 *Property (Relationships) Act 1984*, s5(1)(b).

485 Fehlberg et al. 2015: 99, citing *Dridi v. Fillmore* [2001] NSWSC 319.

486 *Ibid.*, citing *Burgess v. Moss* [2010] NSWCA 139.

487 Millbank and Sant 2000: 203.

488 Human Rights and Equal Opportunities Commission 2007: para 4.3.4.

489 Millbank and Morgan 2001: 307.

The second way in which *de facto* relationships could provide an alternative to marriage is that there is potentially recognition in the federal legislation for “overlapping, multiple or concurrent” relationships,⁴⁹⁰ and state courts have recognized concurrent or overlapping relationships.⁴⁹¹ The *Family Law Act* provides that “a *de facto* relationship can exist even if one of the persons is legally married to someone else or in another *de facto* relationship”.⁴⁹² This was vociferously opposed by Christian groups, among others, who considered it tantamount to legalizing polygamy.⁴⁹³ The Attorney-General responded by suggesting that this provision was only for circumstances where a couple were separated but not yet formally divorced when one party commences a new *de facto* relationship with someone else.⁴⁹⁴ However, Millbank argues that:

“With respect to the Attorney, the wording of the legislation is plainly much broader than those circumstances and could, for example, encompass a situation where a person conducted two simultaneous *de facto* relationships over many years or a long-term affair while still married... if such relationships were also accompanied by a high degree of emotional and/or financial commitment – even if only in the mind of one of the parties. This breadth of approach reflects the developing interpretation of comparable state law and in my view rightly directs the focus of inquiry in any contested relationship upon the degree of commitment to a shared life... between the partners themselves, rather than on sexual exclusivity or infidelity.”⁴⁹⁵

The courts have since recognized the existence of a *de facto* relationship “in circumstances where other relationships have been conducted simultaneously”.⁴⁹⁶

In *de facto* relationships, then, there is some recognition that relationships may be structured and lived differently to the marriage model. Even though an

unregistered relationship must inevitably resemble marriage in some key ways in order to be recognizable to the courts,⁴⁹⁷ it is possible in some jurisdictions to register a *de facto* relationship, which avoids the need to provide evidence that the relationship meets the indicative factors in the legislation and thus permits scope for less normative relationships. For example, in Tasmania, registration is available through filing a Deed of Relationship with the Registry of Births, Deaths and Marriages, in addition to *de facto* recognition for unregistered relationships.⁴⁹⁸ Therefore—though (perhaps inevitably) similar to marriage in some ways—these *de facto* provisions provide more of an alternative to marriage than do the European registered partnerships, particularly those provisions that provide comprehensive recognition of non-sexual caring relationships on a similar basis to sexual relationships. The potential effects of recognizing caring relationships on gender equality and arguments around implementing a more general shift from conjugality to care are considered in more detail next.

4.5

Beyond conjugality?

While the mechanism for recognizing non-sexual relationships had been created in Australia, this was unusual as most other jurisdictions focused on same-sex relationship recognition. However, there have recently been calls to move ‘beyond conjugality’ and recognize care, rather than sex, as the central defining feature of legally recognized relationships in Canada, the United Kingdom and the United States. This movement began with a ground-breaking report from the Law Commission of Canada (LCC) in 2001, called *Beyond Conjugality*.

The LCC proposed “a fundamental rethinking of the way in which governments regulate relationships”.⁴⁹⁹ This involved focusing on a key set of values, including

490 Fehlberg et al. 2015: 95.

491 Millbank 2009: 4.

492 s4AA(5)(b).

493 Millbank 2009: 4.

494 Ibid.

495 Ibid.: 4-5.

496 Fehlberg et al. 2015: 95.

497 The onus is on the applicant to demonstrate the existence of a *de facto* relationship: *Taisha & Peng and Anor* [2012] FamCA 385, cited in *ibid.*: 91.

498 *Relationships Act 2003*. In Victoria, registration is required for recognition: *Relationships Act 2008*, s3.

499 Law Commission of Canada 2001: ix.

those of equality and autonomy.⁵⁰⁰ Equality includes equality *within* relationships, as well as between different types of relationships, with particular mention made of inequality between women and men and the need for the state to ensure the personal security (physical, psychological and economic) of those in relationships.⁵⁰¹ It also means the state should focus on the functional characteristics of the relationship rather than its status, particularly where there is emotional and/or financial interdependence and “not accord one form of relationship more benefits or legal support than others”.⁵⁰² In order to protect privacy, legal rules that require intrusive examinations into the intimate details of relationships should be avoided.⁵⁰³ Finally, in order to promote the principles of coherence and efficiency, laws should have clear objectives and their legislative design should correspond with the achievement of these objectives.⁵⁰⁴ Taken together, these values mean that rather than focusing on a ‘one size fits all’ framework, such as marriage, registered partnership or *de facto* relationship, the Law Commission recommended that the focus be on each individual legal provision that “employs relational terms”. In other words, rather than asking whether certain categories of relationships (such as same-sex couples, or non-sexual relationships) deserve access to the legal consequences of marriage, they would ask four questions of each law that uses marriage as a way to distribute legal entitlements/responsibilities:

“First, are the objectives of the law still legitimate? If the objectives of a law are no longer appropriate, the response may be to repeal or fundamentally revise a law rather than to adjust its use of relational terms.

“Second, if a law is pursuing a legitimate objective, are relationships relevant to the objective at hand? If relationships are not important, then the legislation should be redesigned to allocate the rights and responsibilities on an individual basis.

500 Ibid.: 13.
501 Ibid.: 19.
502 Ibid.: xi.
503 Ibid.: 21.
504 Ibid.: xii.

“Third, assuming that relationships are relevant, could the law allow individuals to decide which of their close personal relationships should be subject to the law?

“Fourth, if relationships do matter, and self-definition of relevant relationships is not a feasible policy option, is there a better way for the government to include relationships?”⁵⁰⁵

This is a radical departure from the current legal structure of relationship recognition in any jurisdiction under consideration here, and such a radical departure is, perhaps, what is required to shake off the patriarchal context of marriage. It is an interesting proposition, and the LCC make a convincing case for it, but unfortunately it has not been implemented.

Other proposals to move away from conjugality propose de-centring either sex or marriage, or both, to provide a new framework. In 2006, the Beyond Marriage movement in the United States advocated a ‘marriage plus’ system, seeking both an expanded definition of marriage to include same-sex couples and recognition of a broader range of relationships that are currently excluded, including: senior citizens who live together as partners, carers or constructed family members; extended families; queer couples/individuals who are jointly raising children, perhaps across two households; and close friends and siblings who live together.⁵⁰⁶ Polikoff, one of the contributors to Beyond Marriage, published her own proposal along similar lines. She suggests a multi-tiered system, consisting firstly of marriage, which is renamed civil partnership to distance it from marriage’s historical context and religious connotations,⁵⁰⁷ and secondly of a system of registration for “designated family relationships”. This would allow someone who does not have a spouse or partner to identify someone as ‘designated family’ to be treated as a spouse.⁵⁰⁸ Where there is no civil partner or designated family, Polikoff proposes that the law should consider someone to be a family member “based on the circumstances of

505 Ibid.: 29-30.
506 Beyond Marriage 2006.
507 Polikoff 2008: 132.
508 Ibid.: 134.

the relationship”, including friends, if they can show that they had a close relationship with the person and were the most likely to know their wishes.⁵⁰⁹ The legal consequences of relationship recognition would not be a universal list but be dependent on the particular relationship’s function rather than legal status. In other words, where a law is designed to facilitate child-rearing, for example, any childless civil partnerships would not have access to it but any household raising children, whether or not they were in a civil partnership or designated family relationship, would be included.⁵¹⁰ In this way, civil partnership becomes a genuine choice because it is “neither necessary nor sufficient to access particular laws”.⁵¹¹

Finally, drawing on Fineman’s work (discussed in Part 2) on inevitable and derivative dependency, Herring argues that marriage should not be abolished or replaced but rather fundamentally changed so that it becomes “less sexy” and centres around caretaking relationships:

“Care is enormously valuable in our society. The meeting of the needs of others in a caring relationship should be a central goal of any society. A sexual relationship between two parties may be fun for the parties involved, but is not itself producing any great social benefit. Care does.... There is a particularly good reason for regarding care as the hallmark of marriage for lawyers. If we look at the role of the law in marriage, it is primarily involved in ensuring that if a relationship breaks down there is a fair sharing of the family property, to ensure that one party does not unduly benefit or lose out from the relationship.... I have argued that it is care work which is the primary source of economic disadvantage caused in a caring relationship. The primary justification for financial orders on divorce lies not so much in the marriage itself but in the care work performed in the context of an intimate relationship.”⁵¹²

There is something to be said for recognizing the care work performed within the family and more broadly, and indeed I suggested in Part 2 that societal recognition of this work is necessary, but to do so within the (redefined) institution of marriage raises potential concerns about further entrenching gender inequality, rather than alleviating it, especially if our concern is for the economic vulnerability of the carer and cared-for. In particular, the arguments about the privatization of care outlined above would be relevant here. As I have argued elsewhere,

“[It] is well established that proposals for the recognition of care and dependency through family law can be made in a very conservative way to *demand* that care and dependency be taken care of within the private family, only providing recognition for it from the resources of the family itself rather than providing additional state resources.... Recognising [caring] relationships holds clear appeal to those of us who seek to move beyond the much-critiqued and legally-privileged sexual family but I suggest that recognition could increase, rather than decrease, the economic vulnerability of carer, cared for and those who are interdependent, as care and dependency are increasingly privatized within a newly expanded family unit.”⁵¹³

For this reason, I would suggest that rather than seeking to recognize care through the lens of marriage or a similar framework, an approach such as that of the Law Commission of Canada—which focuses on the defining purpose of each legal entitlement rather than an institutional framework that can be applied to categories of relationships—has more potential for promoting gender equality.

509 Ibid.: 136.

510 Ibid.: 133.

511 Ibid.: 133.

512 Herring 2015.

513 Barker 2013.

4.6

Conclusion

The final stage in the evolution of marriage in the twenty-first century western world that was considered in this paper is one that takes marriage back to its religious roots. Both religious alternative dispute resolution and arguments for the recognition of polygamy have been resisted by some in the West on gender equality grounds. That these concerns have not been expressed in relation to Christian and Jewish alternative dispute resolution—and nor have they been prominent in relation to the introduction of covenant marriage in some US states—suggests that there may be other factors underlying the objections. All of these developments may pose challenges for gender equality in different ways. Religious arbitration may (re)impose patriarchal religious approaches to divorce but, as I have set out above, there are ways that this can be mitigated through maintaining state oversight or ensuring that all parties receive legal advice on their civil law remedies before agreeing to religious arbitration. Failing to recognize it at all, particularly in a context where parties are encouraged to come to their own settlements, potentially increases the vulnerability of religious women. As such, the implications of religious arbitration for gender equality can depend not only on the rules of the particular religious authority but also on the state's response to religious arbitration. To the extent that covenant marriage cements gendered power relations and makes divorce less accessible, it is problematic for gender equality and could be particularly dangerous for women in abusive marriages. Finally, though there are arguments that polygamy has a negative impact on gender equality, it is unclear that it is polygamy that causes or exacerbates these inequalities, as opposed to the fundamentalist religious contexts in which it is practiced in North America. Patriarchy and male domination are not exclusive to polygamous communities: As demonstrated in Part 1, they form the basis of monogamous marriage too.

This part of the paper also considers alternatives to marriage, beginning with the registered/civil partnership provisions that were introduced as a compromise instead of same-sex marriage. While many countries

that introduced these have subsequently also introduced same-sex marriage, it is less common for these provisions to be opened up to different-sex relationships. Although there are generally few, if any, substantial differences between them and marriage, some different-sex couples have sought access to them as an alternative to marriage, citing gender equality as the key reason for this. However, while marriage is steeped in a patriarchal history, it is difficult to see how the new 'badge' overcomes this. It is a secular institution with a different name and it eliminates some of the more obvious remnants of patriarchy in the ceremony, for example, but the structures of marriage have also been replicated in civil partnerships, albeit in gender-neutral language. As such, other alternatives that move further away from marriage may be preferable from a gender equality point of view. The French PaCS and the Australian *de facto* provisions both, in different ways, move away from marriage to some extent, but more radical proposals have been made to centre care rather than sex as the basis for legal recognition. This, its proponents suggest, would address the problem that care work is the primary source of economic disadvantage, though it risks enabling the further privatization of care and dependency. I would suggest that it is the proposals made by the Law Commission of Canada that have the most potential to move beyond the problematic aspects of marriage. They focus not on the relationship but on each legal entitlement usually associated with marriage, and ask whether these entitlements are still legitimate, whether they could be assigned to individuals or whether individuals could designate a person to assign them to. This would be a significant step towards dismantling the marriage model that has proven so persistently problematic for gender equality.

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