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BOOK REVIEW

RECONSTRUCTING
MARRIAGE: THE LEGAL
STATUS OF RELATIONSHIPS IN
A CHANGING SOCIETY

Caroline Sörgjerd

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Caroline Sörgjerd, *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society*

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In the wake of the defeat of Bills in the Federal Parliament to amend the *Marriage Act* 1961 (Cth), to extend marriage to Australians irrespective of their sexual orientation or gender identity, and the defeat in the Legislative Council of Tasmania of a Bill to permit 'same-sex marriage' under the law of that State, this book helps us to get our bearings. It allows Australians to gain a broader perspective. Its purpose is to explore "the essence of marriage" as seen by the author, an academic in Sweden.

Originally written as a doctoral thesis at Uppsala University, the book basically focuses on the way in which the definition of "marriage" came to be enlarged in Sweden, other Nordic countries, The Netherlands and Spain. By choosing these different jurisdictions, with their distinctive histories and social and legal traditions, the author extracts what she sees as the truly essential elements to an interpersonal legal relationship properly described as "marriage".

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Perhaps surprising for an Australian audience, which tends to look upon Sweden as extremely *avant-garde*, is the description of the initial opposition of the Lutheran Church in that country to extending marriage eligibility to homosexuals. The Church of Sweden, a reformed Protestant, Lutheran denomination, was until recently established by law and enjoyed special national privileges. This status was only terminated in 2000. But, even then, the Church remained influential. Traditionally, it had taught that all sexual acts, to be moral, had to take place within marriage and for the purpose of procreation.

Exceptionally for Continental Europe, Swedish law, until relatively recently, criminalised extra-marital sexual behaviour. As a result, homosexuals, who could not marry had no right whatsoever to engage in any sexual relations at all. In this sense, the Swedish situation partly mimicked that of Britain before 1969 and Australia before 1974. As well, Sweden departed from the Napoleonic civil code that generally prevails in Western Europe. That code for 200 years has drawn a distinction between *marriage* (a civil status performed by state officials) and *weddings* (a religious rite). In Sweden, the national church had the legal power (as in countries deriving their laws from England) to officiate in marriages. These constitute more than 40% of all such ceremonies, slightly more than the 33% of Australian marriages now conducted in places of worship.

The author explains how all this started to unravel 20 years ago. Only 2% of the members of the Church of Sweden regularly attend worship. Only 23% of the Swedish population now state that they believe in God. In this context, the

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enactment of a form of civil partnership for homosexual couples in 1987 and its morphing into a Registered Partnership Act in 1994 was widely accepted, although pioneering in its time. It was therefore unsurprising when, in 2009, Sweden adopted a gender-neutral concept of marriage. When it did so, the Church of Sweden debated it and decided, that it would permit (but not require) its clergy to officiate in same-sex marriages. This put that church out of line with most other Christian denominations in Sweden. Still, according to the author, equality has won overwhelming acceptance in the Swedish population. And the new law has followed, rather than led, changes in community beliefs and opinions.

The central portion of this book is the story of how a country with a highly influential, conservative, interventionist State church changed itself into one in which the church, at least officially, is comfortable with same-sex marriages and often now performs them. An important section of the book describes the questioning of earlier biblical perspectives on homosexuality and the focus of the religious “on the message of love as a superior value and all-encompassing purpose... in line with the principle of equality”, said to be at the heart of Christian beliefs.

The book shows how The Netherlands became the first country to move beyond registered civil partnerships to “open up” marriage to homosexuals. Unlike Sweden, there was no church participation in marriage as such. Accordingly, it was simpler for the State to enlarge the availability of that civil status, whilst leaving it to religious bodies to make their own decisions concerning their involvement in same sex marriages. Successive

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parliamentary committees concluded that equal treatment of citizens to enter into civil partnerships required a change. The enactment of the change did not give rise to heated debate either in parliament or in society in general. The author attributes this to the high levels of tolerance of diversity in the Dutch population.

Spain was a harder nut to crack. In some regions, after 1994, registration offices began to perform registrations of same-sex couple relationships, but without any legal implications. Catalonia in 1996, introduced an Act recognising cohabiting couples, undifferentiated by their sex. Significantly, the *Spanish Civil Code* did not define marriage as a union between a man and a woman but simply stated that “Man and woman have a right to contract a marriage”. As the author points out, this was to be an important verbal tool for the change of the law propounded by the socialist government under Prime Minister Zapatero.

The enactment of the new law by the Cortes, only the third such law in the world, is explained in the book as another response to the lingering hostility to the repression and church influence during the Franco dictatorship. The statute was immediately challenged in the Constitutional Court, amidst denunciations by the church hierarchy and the visiting Pontiff. Astonishingly for an Australian lawyer, the decision has been pending in that court since 2005 and was not resolved by the time this book was published. Just imagine sitting on a decision in Australia for seven years!

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The government of Spain has changed, with the return of a conservative coalition. However, their attention is currently focused on the economy. Meantime, thousands of same-sex couples are being married, making repeal increasingly difficult with every passing year.

What lessons for Australia? First, we seem to be well behind other Western countries in marriage equality. The position will get worse if, as expected; law reform is accepted in 2013 in the UK, France and New Zealand. Secondly, the process of change appears to bear out Arthur Schopenhauer's famous dictum that 'all truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third it is accepted as being self-evident'. Finally, the importance of political leadership is demonstrated. It was evident in the reform in Sweden, The Netherlands and most especially Spain. Australia, by way of contrast, appears to be travelling on a different planet, a worrying sign of declining secularism that presents a larger challenge for us.

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