

DESCRIPTION FOR THE GENERAL PUBLIC

„Critical approach to the concept of marriage: the anti-essentialist perspective”

Traditionally marriage is an object of scrutiny of a broad range of research fields, such as sociology, law, philosophy, and ethics. Classical philosophical inquiries concentrate on societal or institutional function of marriage (Plato, Aristotle, St. Thomas) sexuality within marriage (St. Augustin), the contractual character of the institution (Kant), and spousal as "unity" (Hegel). All those theoretical studies were included in „philosophical systems” and had an ethical dimension (philosophers rarely provided a detailed descriptive account of marriage). J.S. Mill was one of the first feminizing philosophers who argued against the subordination of women and the immoral character of the current legislation (Coverture).

In everyday life, we assumed the existing reality and take for granted the way it is commonly described. The critical approach means deeply scrutinizing the way we deliberate about given phenomena and underline our presupposition about it. The project is „critical” in twofold senses; on the one hand, it reconstructs from the institutional discourse the meanings of scrutinized concepts, on the other hand in the broad, pragmatic sense, it criticized given institutions and concepts as unfitted to the developing reality. Our societies changes and the goal of the project is to analytically describe what it is nowadays assumed by the concept of „marriage” in the institutional discourse.

To study the modern concept of marriage in the project will be using the tool of the artifactual conception of law. It means that social institutions, like marriage, exist because people bring them to life by acting and judging collectively. It is assumed that legal institutions are mind-independent - they exist independently of the beliefs of individuals, but their existence depends on the collective beliefs concerning their content, structure and way of functioning. One of the major tasks of the project is to determine, if marriage, as an institutional object - artefact, has or has not an essence. There is multiply approaches to the essentialism of artefacts - (A) essentialism concerning language (a concept of an institution); (B) ontological and legal-functional essence - whether there is an essential function or goal that the institution should fulfil; (C) moral essence - ethical aspects of a given institution. So far there are no studies that will implement the tools of the artifactual conception of law to scrutiny particular legal institution (such as marriage) or draw substantial legal consequences. The project would be a peculiar „test” for this approach and may reveal the practical dimension of the theory of law as an artefact.

Another problem is (D) a problem of how to derive from a certain view on marriage (A-C) a right to marry. The project offers a new approach. It critically evaluates a debate concerning justification of the right to marry based on the European Convention on Human Rights; in the project it will be examined two main arguments against the general right to marry: (1) the originalist interpretations of the concept of marriage (it seems that European Court of Human Rights sustains essentialist approach to the concept of marriage) and, (2) the argument from lack of European consensus (there is „no European consensus regarding same-sex marriage” (Schalk vs Austria 2010 §58) and as a result „[a]rticle 12 does not impose an obligation on the Contracting States to grant same-sex couples access to marriage” (Schalk vs Austria 2010 §101)).

The structured proceeding from the philosophy and theory (studying the ontological character of marriage as a legal artefact from the anti-essentialist point of view) to the legal consequences (developing the general right to marry in the given legal order) has a pioneer character. Undermining the importance of calling for a „history”, „an essence” or „a function” of the meaning of the marriage may support, along with a coherent reading of principles of justice, equal treatment, equal opportunity and neutrality, a construction of the revisited right to marry within the actual text of European Convention on Human Rights. What is more, although the project can't be located within the feminist jurisprudence, it concerns some dimensions - position of women, right of minorities - that should be analyzed also from this perspective. In this light, it is a novum on the Polish ground.