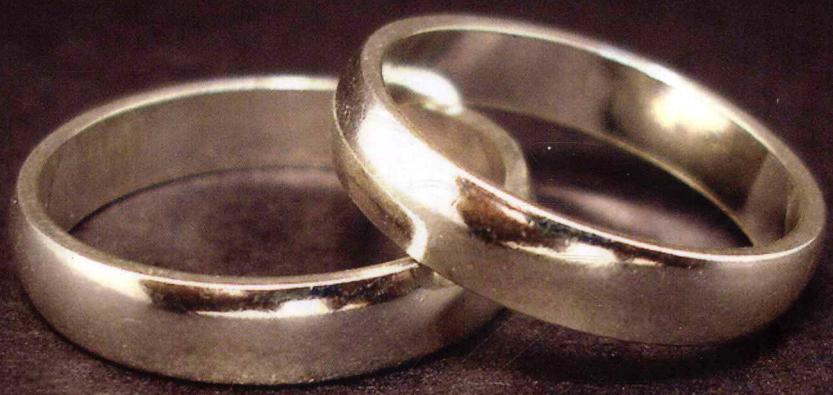
# Marital Agreements and Private Autonomy

## in Comparative Perspective



Edited by Jens M Scherpe

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In memory of

Tony Weir

who probably would not have approved

# *Foreword*

The Rt Hon Lord Wilson of Culworth
Justice of the Supreme Court of the United Kingdom

One of my worst moments as a young English advocate was in 1969 when a judge refused to grant my client a divorce in the light of her 'collusion' with her husband: for they had reached an agreement which not only resolved their financial issues but provided that he would not oppose the divorce. Unlike the type of agreements which are the main subject of this book, theirs was simply an agreement reached following their separation and a mutual disclosure of their resources and as a prelude to immediate proceedings. It is hard to believe, but English law was then hostile to any agreement between separated spouses, particularly if it identified a non-contentious route to their divorce.

Slowly—too slowly—English law has turned almost 180 degrees. Agreements of the type which, in my inexperienced forensic hands, absurdly resulted in my client's continued marriage to her husband, are now encouraged at every turn. But what about pre-nuptial and post-nuptial agreements, ie agreements reached significantly *in advance* not only of the divorce but also often of the separation and not infrequently of the marriage itself?

Here, English law has much to learn from other jurisdictions ahead of it in this area. And it will best learn it from this book. Indeed, in that reform of this subject is currently under active discussion, led (as in her chapter Professor Cooke explains) by the English Law Commission, the timing of its publication could not be better.

The book demonstrates that a marital agreement which—as in a civil law country—replaces one defined outcome with another defined outcome is very different from one which—as in a common law country—replaces an undefined outcome, dependent on the future exercise of a court's discretion, with a defined outcome. In the latter case, however, the defined outcome for which the agreement provides is illusory unless the law clearly provides that the agreement will be upheld. More important than whether it moves as far as I personally would wish is that future English law on this subject should be clear.

But let me not remain parochial. It is clear that other jurisdictions also consider that, in relation to marital agreements, they have yet to achieve the optimum fine balance between two of the central goals of any democratic society—to promote autonomy and to protect the vulnerable. So this is a book not only of international comparisons but also—so I forecast—of international interest.

I have had high hopes of this book ever since I attended the conference in Cambridge to which in his preface Jens Scherpe refers. The quality of the contributions by all the speakers from across the world was arrestingly high. But what I did not realise is how well the contributions would convert to the written page. I find many presentations of foreign law impenetrable even when written in English.

But the clarity of each chapter of this book—and I have read each page of it out of interest rather than out of duty—confers upon it a vastly increased value.

I applaud the vision and perseverance of Jens Scherpe in having conceived this book and, with so much distinguished help, in now bringing it to birth. I will be using it for many years, and I warmly invite my fellow family lawyers across the world to do likewise.

18 August 2011
Nicholas Wilson

# *Preface and Acknowledgements*

This book is based on (and indeed part of) a research project entitled 'Marital agreements and private autonomy in a comparative perspective', the idea for which was first conceived in 2007. It was apparent that the legal position on marital agreements in England and Wales contrasted starkly with that of the continental European jurisdictions, which seemed to merit a comparative study. I am very grateful to Stuart Bridge that he supported the project (and even paid for the coffee) when I first presented it to him. Shortly afterwards the decision in *NG v KR (Pre-nuptial contract)*[1] was handed down, and it became apparent that further academic and particularly comparative study of marital agreements not only had merit but was needed. This case was not only in part the original motivation for the project, but was also to become its biggest motor—and, in some ways, obstacle. The Law Commission of England and Wales then made marital property agreements part of its 10th Programme for Law Reform, which provided further stimulus. Walter Pintens, Josep Ferrer-Riba, Joanna Miles and Elizabeth Cooke were of invaluable help when drafting and discussing the questionnaire for the national reports.

With the generous financial assistance of Mills & Reeve LLP a conference was organised in Cambridge on 26–27 June 2009, where the drafts of the national reports and initial comparative findings were presented. In the afternoon of 27 June a workshop followed, where the reports and findings were discussed with the national reporters, Law Commissioner Prof Elizabeth Cooke and Matthew Jolley, also of the Law Commission, in a very productive session.

Lord Justice Wilson (as he then was) very kindly agreed to give concluding remarks at the conference—just days before the Court of Appeal decision in *Radmacher v Granatino*[2] was to be handed down, in which he together with Lord Justice Thorpe and Lord Justice Rix overturned the above-mentioned first instance decision. I had not realised when I invited him a long time before the conference that this would put him in the difficult position of not being able to talk about what we all would be talking about only a few days later! Needless to say, the impact of the Court of Appeal decision on the project was very significant.

When the case later was appealed to the Supreme Court, a decision had to be taken. While most of the national reports had been written already, the book was in great danger of being out of date by the time it was published, if this latest development was not taken into account. So it was decided to wait until the Supreme Court's decision[3] was handed down, which took somewhat longer than expected—namely until 20 October 2010. Then the Law Commission's Consultation Paper (on which see Law Commissioner Prof Cooke's chapter in this book) was about to be published. It was only in January 2011 that the comparative work could really

[1] *NG v KR (Pre-nuptial contract)* [2008] EWHC 1532 (Fam).
[2] *Radmacher v Granatino* [2009] EWCA Civ 649.
[3] *Radmacher v Granatino* [2010] UKSC 42.

be completed—and most chapters needed to be updated at this point. I am very grateful to the authors of the national reports for their patience and understanding. Likewise, Hart Publishing and particularly Rachel Turner, Melanie Hamill and Tom Adams were very supportive throughout the entire time.

There are quite a few people and organisations I would like to thank: first of all, Mills & Reeve, and particularly Roger Bamber and David Salter, for their financial support of the conference; the British Association for Comparative Law and the Centre for European Legal Studies of the University of Cambridge and the Faculty of Law generally (and Felicity Eves-Rey, Elizabeth Aitken and Rosie Šnajdr particularly) for their administrative support; Andrew Gerard and Steve Burdett who made sure that the computing side of things worked; Daniel Bates for his wonderful work on the various websites; Brian Sloan and Bevan Marten for their support during the workshop; my conference helpers, Sneha Ramakrishnan, Emily Rayner, Ella Westby and Heather Flemming for their support during very busy conference days; Roger Bamber (Mills & Reeve LLP), Stuart Bridge (University of Cambridge), Anne Barlow (University of Exeter) and Walter Pintens (University of Leuven) for chairing sessions at the conference; Lord Wilson (as he now is) for his concluding remarks at the conference and for writing the foreword of this book.

The research project and this book would not have been possible without the support of a Small Research Grant from the British Academy. The editing of the book was supported by a Newton Trust Small Research Grant and undertaken with tremendous skill and energy by Claire Nielsen (currently a PhD candidate at the University of Cambridge)—thank you very much for doing such great work.

My final thanks go to Ann-Christin Maak (who as I write this is my fiancée and hopefully will be my wife when this book is published) who—apart from the authors—is probably the one who suffered most because of this project. May we never need to rely on a marital agreement!

Jens M Scherpe, July 2011

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# *Introduction*

JENS M SCHERPE

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## I. DEFAULT RULES AND AUTONOMY

This book is concerned with an area of family law which is subject to special legal provisions in all jurisdictions: the financial relations of spouses.[1] The policies underpinning those provisions unsurprisingly differ from jurisdiction to jurisdiction, but what they all have in common is the desire to support families and to protect the weaker spouse and the children in the event of separation and divorce.[2] Each jurisdiction therefore subjects the spouses to a specific set of rules that governs their financial relations. Such a set of rules in principle applies to every marriage concluded, even (and indeed particularly) if the couple give no thought to their financial relations. Hence these rules apply 'by default' and therefore the legal rules that then apply often are called the 'default system' or 'default rules'. If the couple want different rules to apply to their financial relations, they have to 'contract out' of the default rules by what this book calls a 'marital agreement' (see also the questionnaire following this introduction, on terminology). The interrelation of default system and 'contracting out' is

[1] It is important to point out at the outset that in many jurisdictions the rules explained and discussed here also apply to other formalised family regimes, such as civil/registered partnerships, and that of course in many jurisdictions 'spouses' can now refer not only to husband and wife but also to same-sex couples. Hence when the term 'spouse' is used in this book the term applies to all married individuals, irrespective of their gender or the gender of their partner. See also the section on 'Terminology and areas not covered' in the questionnaire below.

[2] See eg A Lüderitz and N Dethloff, *Familienrecht*, 28th edn (Munich, CH Beck, 2007) 1 ff; N Lowe and G Douglas, *Bromley's Family Law*, 10th edn (Oxford, OUP 2007) 1 ff; A Agell and M Brattström, *Äktenskap Samboende Partnerskap*, 4th edn (Uppsala, Iustus Förlag, 2008) 14 ff. In many jurisdictions, eg Germany (Art 6 of the Basic Law, the German Constitution), Spain (Art 32 of the Constitution), Ireland (Art 41 of the Constitution) and Slovenia (Art 53 of the Constitution), there even is a constitutional mandate to protect 'marriage' and/or 'the family'.

the focal point of this book, and the research agenda can be summarised in this question:

> If the spouses do not want the default rules to apply to their financial relations, should they be free to conclude an agreement to 'contract out' of the default system—and if so, to what extent?

The central question that this book addresses therefore is how much autonomy legal systems allow or should allow spouses to regulate their financial relations themselves. Private autonomy of course is a very highly valued good in most societies, a central feature of modern democracies, the backbone of our economies and often even protected by constitutions. Private autonomy is seen as the ultimate expression of the freedom of an individual, and legislatures and courts generally are very hesitant to interfere with it. But in all jurisdictions there are some areas governed by mandatory rules which cannot be derogated from by an agreement between the parties, and party autonomy on the face of it is therefore limited by law. Such limitations require strong and clear policy justifications, and typically mandatory rules cover situations where there frequently is an imbalance of power between the parties, leading to an unequal bargaining position: for example in labour law, insurance law, consumer law and, of course, family law. In these contexts, the mandatory rules are seen as a measure to ensure that both parties, to the furthest possible extent, actually are in a position to take an autonomous decision. Hence many of the mandatory rules which at first glance appear to limit the autonomy of the parties are actually in place *to protect autonomy*. But in other areas—not least family law, and the financial relations of the spouses in particular—the mandatory rules go beyond this aim: the law takes a paternalistic approach and the mandatory rules protect *from* autonomy, curtailing the freedom of the individual for his or her 'own good'. Here the rules are an expression of different policy objectives, which, in the context of the financial relations of the spouses and family law in general, are to support families and to protect the weaker spouse and the children in case of separation and divorce.[3]

## II. THE APPROACH TAKEN IN THIS BOOK AND TERMINOLOGY

Obviously the answer to the question about how much autonomy the spouses should have to regulate their financial relations to a large degree depends on the nature and content of the default rules that would otherwise apply. But the answer in each jurisdiction also depends on the policy approach to marriage in general, the financial relations of the spouses in particular, and on the specific societal, cultural and economic context. This includes issues such as labour market accessibility for women and men, social welfare provisions in general, state support for or provision of child care etc. Therefore a comparative study of the autonomy of the spouses to determine their financial relations faces considerable difficulties because of the breadth of the issues involved. Thus even when the comparison is undertaken in full awareness of the broader nature of the issues at hand, it will never be able to give a

[3] See above n 2.

truly 'full picture', and the comparison therefore inevitably is incomplete and limited. However, this does not mean that such a comparative study is therefore futile. On the contrary, provided one is aware of the limitations of such comparisons, it can nevertheless inform and stimulate academic discussion on the topic, which is the aim of this book.

The approach taken in this book is common for comparative projects: a questionnaire by which the same set of questions is answered by expert lawyers from the several jurisdictions and a comparative analysis is then undertaken based on their answers. The questionnaire following this introduction was drafted very carefully[4] but is not as detailed as questionnaires for other comparative projects.[5] The aim was, on the one hand, to allow the national reporters to explain their national system in its full legal, social and cultural context without feeling constrained and limited by the questionnaire. On the other hand, it was important for the purposes of the comparison that all national reports address roughly the same issues, even if (and perhaps especially if) a particular issue is not relevant in all jurisdictions. Nevertheless, each national report was to be written in a way that it could be read and understood without reference to the introduction, the questionnaire or any of the other chapters in the book.

As explained above, all jurisdictions have some form of 'default system' for the financial relations of the spouses, and the extent to which the parties are allowed to derogate from this system by agreement naturally depends greatly on the nature and content of the default rules. Therefore each national reporter was asked briefly to explain the default rules in the first part of his or her report. The comparison of these default systems alone merits a greater and more extensive comparative study, such as the one undertaken by the Commission on European Family Law.[6] But a comparison of the default systems was necessary for this project too, and this comparison is found in the final chapter of this book.

Having reported on the default system, national reporters were asked next to describe the rules on agreements wishing to derogate from the default system. The terminological approach here was difficult, because such agreements are not necessarily (or with certainty) considered to be 'contracts' in all jurisdictions.[7] The neutral term 'marital agreements' was therefore used. As stated in the questionnaire, for the purpose of this comparative project 'marital agreements' were taken to include pre-nuptial agreements (sometimes also referred to as ante-nuptial agreements) and post-nuptial agreements, ie agreements concluded before and after the wedding, respectively. But the term 'separation agreements' was to be used for a

[4] I would like to thank Walter Pintens, Josep Ferrer-Riba, Joanna Miles and Elizabeth Cooke for their invaluable help in the drafting of the questionnaire.

[5] See for examples the questionnaires used by the Commission on European Family Law for their projects on divorce and maintenance between former spouses, parental responsibilities and property relations between spouses, all available at www.ceflonline.net/.

[6] K Boele-Woelki, B Braat and I Sumner (eds), *European Family Law in Action II: Maintenance Between Former Spouses* (Antwerp, Intersentia, 2003); K Boele-Woelki, W Pintens, F Ferrand, C Gonzalez-Beilfuss, M Jänterä-Jareborg, N Lowe and D Martiny, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Antwerp, Intersentia, 2004); K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action IV: Property Relations between Spouses* (Antwerp, Intersentia, 2009).

[7] See eg the discussion in *Radmacher v Granatino* [2010] UKSC 42, especially [62 ff].

special kind of post-nuptial agreement, namely agreements concluded shortly before or during divorce proceedings, ie at a point in time where the spouses have already decided that they will separate/divorce and are merely regulating the division of assets, maintenance etc.[8] Such separation agreements differ from the other marital agreements because they are made at a point in time when the parties know (or at least are in a position to know) exactly what they are agreeing to, whereas the pre-nuptial and post-nuptial agreements otherwise are agreements that are to apply in a more or less uncertain future. For this reason, the national reporters were asked to deal with separation agreements in a distinct part of their report if/where this was appropriate.

After the description of the rules on marital agreements, the national reporters were asked to describe the private international law/conflict of laws rules concerning such agreements. While, because of the complexity of this issue, no comparison of it is undertaken in the final chapter study, it was nevertheless felt that the exposition of these rules was necessary to inform an interested reader.

Finally, readers will note that the reports, while written in English, do not quite read as typical academic texts published in an anglophone country; this is intentional. For the purpose of this comparative project it was felt that the language should only be edited where this was essential for the understanding of the text; otherwise the aim of the editing was to stick closely to the original text.[9] Hence there is no full consistency in the usage of certain words or terms (eg gift/donation; maintenance/alimony), and each chapter needs to be considered by itself. As is appropriate for comparative projects, the citations largely follow national customs, so that an interested reader can more easily identify and find the sources in the respective jurisdictions.

## III. THE JURISDICTIONS CHOSEN AND STRUCTURE OF THE BOOK

The jurisdictions for this comparative project were chosen very deliberately. The idea for this project arose because of the somewhat bizarre state of the law on marital agreement in **England and Wales** at the time, and indeed long before the decisions of the Privy Council in *MacLeod v MacLeod*[10] and the Court of Appeal's decision (and later the Supreme Court's decision) in *Radmacher v Granatino*.[11] Unlike many jurisdictions, England and Wales does not have a matrimonial property regime as such, and so there is no clear distinction between property division and

[8] 'Separation agreements' for this project were also to include those agreements that are specifically concluded in order to be part of court proceedings or even to form the basis of a court's decision or to provide a substitute for a court order. It is to be noted that in some jurisdictions, for example Ireland, the term can have a different meaning, namely referring to agreements upon separation without the intent to actually divorce.

[9] I would once again like to thank Claire Nielsen for editing the chapters so competently and thoroughly, and the Newton Trust for its financial support in the form of a Newton Trust Small Research Grant.

[10] *MacLeod v MacLeod* [2008] UKPC 64.

[11] *Radmacher v Granatino* [2009] EWCA 649 and [2010] UKSC 42. The Supreme Court since 1 October 2009 has replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom.

maintenance. Instead, the courts are given a wide discretion as to how to determine the financial consequences of a divorce. While this allows for a great degree of flexibility and thus—at least theoretically—for a fair outcome in each particular case, it creates significant uncertainty for the spouses, despite (or maybe even because of) the recent House of Lords decisions in *White v White*[12] and *Miller v Miller; McFarlane v McFarlane*.[13] One obvious way of achieving greater certainty for spouses in their financial affairs would be to allow parties to make binding marital agreements in which the couple regulate their property and other consequences in case of divorce. Therefore it seemed quite surprising that, despite the lack of legal certainty under the default rules in England and Wales, such marital agreements were not (and indeed still are not) binding or enforceable in this jurisdiction, and that the private autonomy of the parties in this regard appears not to be respected. Contrariwise, in many other jurisdictions, including those with rigid matrimonial property regimes which provide for a high degree of legal certainty (at the expense of flexibility), marital agreements can be binding and enforceable in principle, but nevertheless to a certain extent remain subject to review by the courts. The legal status of such agreements in England and Wales at the time when the project was conceived was therefore the subject of much criticism and debate amongst academics and practitioners, and 'Marital Property Agreements' were made part of the Law Commission of England and Wales's Tenth Programme of Law Reform.[14] The research project and conference were inter alia set up to provide a comparative background for the Law Commission's work. The subsequent decisions in *MacLeod* and *Radmacher v Granatino*[15] to a certain extent changed or at least clarified the law, and the Law Commission published its consultation paper on the matter in January 2011.[16] Because of the special circumstances, to complement the English national report in this volume and to stimulate the reform discussion in England and Wales, a report on the Law Commission's consultation paper and 'a practitioner's view' are also included here.

England and Wales of course is a common law jurisdiction, and therefore it seemed logical to look at the way the issue was dealt with in other common law jurisdictions. **Australia** was chosen because it has a rather complicated (and some say, unfortunate) history of legislating on the topic, and it was hoped that much could be learned from that. **New Zealand** also legislated on marital agreements, but some time after Australia did so, and could therefore benefit from the 'Australian experience'; moreover, the default system in New Zealand is quite different (and since the 2001 and 2004 amendments, includes de facto relationships and civil unions of

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

[13] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

[14] Law Commission for England and Wales, *Tenth Programme of Law Reform* (Law Com No 311, 2008), available at www.official-documents.gov.uk/document/hc0708/hc06/0605/0605.pdf.

[15] The conference accompanying this project was actually held one day before the Court of Appeal decision was handed down. This decision, and the following appeal to the Supreme Court, caused considerable delay to this project as they of course led to a partial reassessment of the comparison and required a rewriting of some of the chapters, and I would once more like to thank the national reporters and the publisher for their patience and understanding.

[16] The Law Commission, *Marital Property Agreements—A Consultation Paper* (Consultation Paper No 198, 2011), available at www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

the same or opposite sex) and therefore a comparison promised to be interesting. **Singapore** often is said to be the 'purest' of the common law jurisdictions, but while there is, of course, the heritage of the English common law, the societal and cultural background is a very different one which, it was assumed, could potentially lead to a very different view on marital agreements. The **United States** were chosen because of the sheer number of jurisdictions comprised, which promised a wealth of comparative material, but also because of the publication of the *Principles of the Law of Family Dissolution* by the American Law Institute in 2002, which contain specific provisions for marital agreements, and the Uniform Premarital Agreement Act of 1983, drafted by the National Conference of Commissioners on Uniform Sate Laws. **Ireland** was also of specific interest because Irish family law is one of the most rapidly developing in Europe; only in 1996 was divorce introduced, and before that the issue of marital agreements (with the exception of agreements regulating factual separation) did not really arise. The financial consequences of divorce are subject to very tight policy guidelines in Ireland and thus the scope for derogation by agreement appeared particularly limited. Nevertheless, in 2006 the Minister for Justice, Equality and Law Reform set up the Study Group on Pre-Nuptial Agreements, whose report was published in 2007.

Like Ireland, **Scotland** is often overlooked in comparative studies. But as a mixed jurisdiction whose approach to marriage and family law in general is quite different from the English one, it was expected that it could contribute much to the discussion.

The continental European civil law jurisdictions were chosen because their approaches to matrimonial property and financial relief on divorce are fundamentally different from that in England and Wales. **Germany** in recent years had seen a number of decisions on marital agreements which significantly changed the law, and it represents the jurisdictions operating with a community of accrued gains as the default matrimonial property system. Some features of the default system in **Austria** appear to be rather similar, but in many areas this jurisdiction takes a refreshingly different view on financial relief, particularly by (in principle) giving the courts discretion to divide the property under the default matrimonial property regime, thereby bringing Austria much closer to the approach taken in the common law world. Likewise, in **Sweden**, which in this project represents the Nordic countries and their matrimonial property system of a deferred community of property, the courts are afforded a considerable degree of discretion with regard to the division of assets, including where there is a marital agreement.

**Belgium** and **France** were chosen as representatives of the Romanic legal family with its community of acquest, which is also the predominant matrimonial property system in Eastern Europe. The community of acquests creates a community of property for some assets from the day of the marriage, and the high prevalence of marital agreements in these jurisdictions seems to suggest that a significant number of couples wish to regulate their financial relations differently, which merited closer study. It will be evident already that the function of marital agreements regarding property is a very different one here because they are to apply not only in the event of divorce but also during the marriage. While **Spain** belongs to the same legal family, many of the autonomous regions of Spain have their own jurisdiction in family law, leading to very diverse approaches.