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Marital agreements and private autonomy in comparative perspective [Book review]

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Marital Agreements and Private Autonomy in Comparative Perspective
Edited by Jens M. Scherpe (Oxford and Portland, Oregon: Hart Publishing, 2012)
[532 pp. Hardcover:£75]

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As appears to be customary for many comparative books these days, this book is essentially a collection of papers (or more precisely, "national reports") written by legal experts located in different jurisdictions around the world; specifically, it is the result of a research project and conference on the subject of the financial relations of spouses, with England and Wales as the anchor jurisdiction. The regulation of marriage, in many jurisdictions it seems, attempts to strike a balance between two diametrically opposed characterisations: on the one hand, a marriage is largely akin to just another contract (indeed, a marriage can comprise various contracts regulating different aspects of, and different points during, the relationship) between two consenting parties; on the other hand, a marriage (which often leads to the formation of families) is something that is sacrosanct and has a special moral status that transcends the contract's purely legal attributes and contingent consequences. This dichotomy features prominently in how spouses conduct their financial relations (both before and after marriage), which in turn introduces another dichotomy: should a marriage purely be a matter of private ordering, or should the State (and the courts) be allowed to intervene for certain arrangements made pursuant to marriage?

In this connection, Jens M. Scherpe (the editor of the book) states in the Introduction that how spouses conduct their financial relations is an issue of near-universal concern, and justifies the comparative study undertaken in the book by postulating an underlying structure that is common to how marriage is governed in many jurisdictions: "Private autonomy…is a very highly valued good in most societies…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…typically mandatory rules cover situations where there frequently is an imbalance in power between the parties…[however] such rules are in place to *protect autonomy*…in other areas…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…to support families". Indeed, Lord Wilson of Culworth, who penned the Foreword, explains at the outset the value of casting the net beyond England and Wales for this project: "in relation to martial agreements, [many jurisdictions] 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…international interest."

Scherpe, however, is aware of the immediate challenges that accompany a comparative approach to the topic: "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…the answer…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." Nonetheless, Scherpe maintains that great care was taken in the selection of the 14 jurisdictions surveyed as well as in the crafting of the questionnaire that was presented to each jurisdiction (this, again, is also customary for comparative books).

As regards choice of jurisdictions, Scherpe offers some brief but fairly convincing reasons for how the 14 jurisdictions (England and Wales, Australia, Austria, Belgium, France, Germany, Ireland, the Netherlands, New Zealand, Scotland, Singapore, Spain, Sweden, and the USA) were chosen by identifying a series of common legal, cultural, and historical threads, though one wonders if certain parts of the world could have been better represented, and also if some (so-called) developing countries could have been included (since the idea of protecting vulnerable and disadvantaged family members is conceivably even more relevant in such jurisdictions, and would have provided suitable comparisons).

As regards the crafting of the questionnaire, "national reporters [were allowed] to explain their national system in its full legal, social and cultural context without feeling constrained by the questionnaires…Nevertheless, each national report was to be written in a way that it could be read and understood without reference to the introduction [and] and the questionnaire." The beneficial result of this customised information control is that almost every national report is quite strictly divided into and written according to the same broad parts: the financial consequences of divorce (in the main, ancillary relief); pre-nuptial and post-nuptial agreements (whether contract law is superseded by special family law rules *vis-à-vis* enforceability); separation agreements (a more specific study of post-nuptial agreements); conflict of laws (how a foreign marital agreement will be treated); and the conclusion.

National reports range from 17 to 40 pages each, and as purported can be read independently from each other and the questionnaire. The writing style throughout the book is generally clear, though editorial harmonisation for succinctness would have been ideal. At any rate, all of the States – including those that have relatively more complex federal and state/province systems – submitted reports that each contain a manageable amount of detail to give the reader a good flavour of the general legal and political issues that are affecting the state of the law on spousal financial relations. For instance, one learns that: in Austria,

spousal maintenance during marriage cannot be waived, and that the legal grounds for divorce cannot be excluded by agreement; in Ireland, the State has historically seen itself as having an overriding supervisory role in the resolution of all familial disputes, particularly with regard to vulnerable family members; in New Zealand, marital agreements have long enjoyed statutory protection, and recent amendments have made it harder for spouses to get out of pre-nuptial and post-nuptial agreements, resulting in marital agreements being more likely to be upheld in court; in Singapore, a practicable stance is taken, in that no marital agreement can ever supplant the statutory powers of the court to order the just and equitable division of matrimonial assets and the provision of reasonable maintenance; in Spain, courts are slow to interfere with marital agreements only if they do not deviate excessively from the default rules; and in the USA, there was a clear dominant trend toward fewer limitations on the enforceability of marital agreements, but that trend has since halted and in some States reversed, in part because of the reconceptualisation of the unconscionability rule.

Crucially, Scherpe devotes an entire (and substantive) chapter at the end of the book to helpfully put all the national reports into comparative perspective – this is something that is not done often enough in comparative books such as this. Without a chapter to pull all the information together (and indeed, analyse the information comparatively), comparative books of this nature are perhaps no more than a scattering compilation of national primers, no matter how consistently the research agenda is applied in each surveyed jurisdiction. Hence in the final chapter, Scherpe identifies from the 14 jurisdictions surveyed the broad commonalties and broad points of departure, and further groups them into different structural divisions for analysis.

Indeed, Scherpe's final analysis of the jurisdictions surveyed is well thought-out, and confirms his original postulations: first, there are two irreducible approaches to the "default" matrimonial property regime, in that either some form of community of property of marriage is formed through marriage, or during marriage there is a separation of property; second, division of and "participation" in the property is achieved either through the rules of a matrimonial property regime (which may nevertheless be subject to the court's discretion) or through the court's discretion (which may nevertheless be guided by rules); third, the overarching aim of jurisdictions that prefer rules is certainty, while the overarching aim of jurisdictions that provide for more discretion is fairness; and fourth, in community of property jurisdictions, pre-nuptial and post-nuptial agreements are not for spouses to secure a financial advantage over the other in the event of divorce, but to give an advantage.

Scherpe also observes in his conclusion that ultimately: "In all jurisdictions examined…the circumstances under which the marital agreements was entered into are subject to scrutiny…where the pressure goes beyond what is

seen as acceptable…safeguards come into play…Generally the legal systems at this stage want to protect…the 'voluntariness' and 'procedural fairness' of the agreement…The way issues of unconscionability of dealings are addressed vary…but often include specific formal requirements, legal advice and duties to disclose assets…[however] many jurisdictions also set relatively low thresholds for the procedural and formal requirements". He then opines that once the stage of "unconscionability of dealings" is passed, "the analysis in all jurisdictions then focuses on the substance of the agreement – whether the outcome is unconscionable or unfair…the idea of having 'cast-iron' pre-nuptial and post-nuptial agreements…seems to defy the policies underlying family law in general and the law or marriage in particular." This set of conclusions raises the question of whether the current conceptualisation of how marital agreements should be regulated is here to stay, or is gravitating towards yet another paradigm.

In this regard Scherpe rightly notes that the issue of how spouses conduct their financial relations has been the focus of recent law reform in many jurisdictions. Given the breadth of the jurisdictions surveyed in this book, and given the defensible methodology in which the jurisdictions were surveyed, this book is a recommended read for all involved in reforming the law in this area. Indeed, law reform is often guided by the best practices and developments of different jurisdictions, even from jurisdictions that may seem remote and unconnected, as exemplified by the experiences of some of the jurisdictions surveyed in this book. Furthermore, the growing trend of spouses drawing up agreements to regulate their financial relations is but part of a wider trend of the ever-changing definition of what constitutes a marriage and a family, especially since: divorce rates are up; more people prefer to cohabit rather than marry; there is more property to protect than ever; (financial) issues that cannot be disentangled from having children are more prevalent; people are becoming more mobile and inter-marry; and some States are beginning to treat same-sex couples differently from the past. Some of the jurisdictions surveyed in this book capture this wider state of flux as well, thus making the book even more comprehensive in scope and greater in utility.