Marital Agreements and Private Autonomy in Comparative Perspective BY JENS M. SCHERPE, ed. [Oxford: Hart Publishing, 2012. xiii + 518 pp. Hardcover: £75.00]

Marital Agreements and Private Autonomy in Comparative Perspective is based on a research project of the same title. In its Preface, the Editor Jens Sherpe writes: "[I]t 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". Indeed, in recent years, the legal status of marital agreements in England and Wales has been criticised and debated on. The courts in the U.K. have a wide discretion over the determination of the financial consequences of a divorce, and marital agreements made between spouses over such matters are not enforceable in themselves. In contrast, many of the continental European jurisdictions have more definite default matrimonial property regimes and also permit marital agreements to be enforced. The topic was made part of the Law Commission of England and Wales' Tenth Programme of Law Reform.

The interest in the area is also mirrored in Singapore. I began working on the topic of 'spousal agreements' in 2006, publishing my first article that year in this area, which was gaining much interest. In 2009, the Court of Appeal in Singapore delivered a landmark decision expounding the law on pre-nuptial agreements. In 2010, the U.K. Supreme Court decided U.K.'s landmark decision on pre-nuptial agreements in *Radmacher v. Granatino* [2010] 3 W.L.R. 1367 [*Radmacher*]. The U.K. Law Commission published a consultation paper on 'Marital Property Agreements' the following year (U.K., Law Commission, "Marital Property Agreements: A Consultation Paper", Cmnd. 198 (London: Her Majesty's Stationery Office, 2011), online: <http://www.justice.gov.uk/lawcommission/docs/cp198_Marital_Property_Agreements_Consultation.pdf>) and a full report is expected to follow soon. *Marital Agreements and Private Autonomy in Comparative Perspective* comes as a milestone in comparative literature that captures the essential legal positions in fourteen jurisdictions in the area. The book project was an ambitious one, requiring the commitment of legal writers from a significant number of jurisdictions who could deliver the respective reports with high quality and accuracy as well as keep to a common map of areas covered. A Conference was organized and held in Cambridge in June 2009 where the draft reports and comparative findings from the various jurisdictions were presented.

The aim of this book is to present a comparative survey of the matrimonial regimes across selected jurisdictions and the extent to which the law permits spouses autonomy to regulate their financial relationships. The approach taken was to employ a questionnaire whereby reporters from the selected jurisdictions answer the same set of questions. These answers are presented in the "national reports" contributed by each jurisdiction's reporter. The questions map key issues, which must be included in each report, and allow each national reporter the space to present the local position in the most effective manner. The focus of the questionnaire was to seek out the "default system" regulating the financial relationship of spouses and the extent to which the law permits spouses to derogate from the default system by way of 'marital agreements'. Each national report also includes a section on the 'conflict of laws' rules governing marital agreements.

The law on marital agreements and private autonomy from fourteen jurisdictions is presented in this work. Each jurisdiction contributes a national report constituting one chapter in the book. However, there are three chapters devoted to the English happenings. The national report on the position in England and Wales is written by Joanna Miles. This is complemented by a chapter on "An English Practitioner's View on Pre-nuptial, Post-nuptial and Separation Agreements" by Mark Harper and Brett Frankle. A chapter on "The Law Commission's Consultation on Marital Property Agreements" is contributed by Professor Elizabeth Cooke, who shares her journey on the Law Commission's recent study. The report by Miles sets out the regime governing financial reliefs on divorce, with discussion on *White v. White* [2001] 1 A.C. 596 (H.L.), *Miller; McFarlane* [2006] UKHL 24 and *Charman v. Charman* [2007] EWCA Civ. 503. It discusses the enforceability of pre-nuptial and post-nuptial agreements, including the latest position in *Radmacher*. Note is also made of statutory requirements regulating separation agreements and the binding effect of such agreements. The chapter by Harper and Frankle is not a national report but focuses on the effect of *Radmacher* on the English practitioner assisting parties with marital agreements. It discusses practical aspects a practitioner ought to pay careful attention to, such as the matters of independent advice, financial disclosures, possibility of duress and provisions to be included in the agreement. The chapter by Professor Cooke gives insight to the breadth and depth of considerations demanded of the Law Commission in its work on the consultation paper.

The Australian national report is written by Owen Jessep who first gives background details on the Australian legal system and the historical context on the law on marital agreements. Australia has a rather long and complicated legislative history on the regulation of spousal financial agreements. The report discusses the various pieces of legislation that shaped the law on financial agreements in Australia today and analyses the reactions to and implications of the legislation. The report from Austria is written by Susan Ferrari. It sets out how the law treats contracts made by spouses on issues such as divorce maintenance and matrimonial property. The French and Belgian report is written by Walter Pintens. It presents the mandatory regimes on the rights and duties of spouses and the default matrimonial regime. France and Belgium give extensive autonomy for spouses to make pre-nuptial and post-nuptial agreements. The legal regimes supporting such agreements are discussed in this report. The German report, written by Anatol Dutta, notes that marital agreements in Germany are uncommon, despite private autonomy in matrimonial matters being one of the "cornerstones" of German family law. It summarises German law on the "pillars" on which financial relations of spouses rest: matrimonial property, adjustment of pension rights, post-divorce maintenance, allocation of the matrimonial home and chattels, followed by the legal requirements and treatment of marital agreements with respect to each of these "pillars", including the limits on autonomy more recently imposed by judicial review. The national report from Ireland, written by Louise Crowley, sets out the historical context of divorce and its consequences in Ireland. Divorce was only introduced in 1996 in Ireland and so issues on marital agreements are relatively recent in its history. The recommendations in the report of the Irish Department of Justice and Equality's Study Group on Pre-nuptial Agreements, published in 2007, are usefully set out in summary in this report. The report from the Netherlands, a jurisdiction well known for binding

pre-nuptial agreements, describes the community of property regime applicable to parties upon marriage and the extent of contractual freedom accorded to parties to contract out of the regime. The writers, Katharina Boele-Woelki and Bente Braat, note that about a quarter of all married couples in 2003 chose to depart from the default regime, a high percentage relative to that in other European countries. In the New Zealand report, the legislative history of the regulation of marital agreements is first presented. Margaret Briggs then discusses how the *Property (Relationships) Act 1976* (No. 166 of 1976, New Zealand), governs the spouses' freedom to make marital agreements. The national report from Scotland, written by Kenneth McK. Norrie, discusses the principles guiding the court in determining the financial consequences of divorce. The writer notes that although marriage contracts are enforceable in Scottish law, which allows autonomy to trump the default rules, marriage contracts today have decreased in popularity with changes in legislation providing for the separation of property. The report on Singapore law, written by the most respected Family Law scholar in Singapore, Wai Kum Leong, describes the matrimonial regime as a deferred community of property regime and discusses how the law treats pre-nuptial and post-nuptial agreements. She discusses the "latest consolidation" of the law on marital agreements, including a discussion of the landmark decision in *TQ v. TR* [2009] 2 S.L.R.(R.) 96 (C.A.). Academic suggestions are offered on how the law should develop. The report from Spain highlights the diversity of laws in its different territories. The community of property regime applies in some territories while the separation of property regime applies in others. Josep Ferrer-Riba had the difficult task of presenting such diverse laws in one chapter. It seems that private autonomy in family matters is "a recent development" in Spain, increasing in practice over the last 15 years; in 2011, the Supreme Court upheld the validity and enforceability of such agreements. The Swedish Report, written by Maarit Jänterä-Jareborg, presents the default regime as the deferred community of property regime and discusses how specific provisions in the *Swedish Marriage Code* (Swedish Code of Statutes 1987:230) regulate marital agreements. The report from the United States must have been a challenge to write given that there are laws in about fifty states to summarise. The writer, Ira Mark Ellman, presents generalisations within groups of states on the default matrimonial rules. He also discusses special rules "policing pre-marital agreements" in the U.S. and notes that American law treats spouses as having a confidential or fiduciary relationship such that there are heightened duties in their mutual dealings.

In the concluding chapter, Sherpe presents a comparative analysis, pulling together the common features by groups of jurisdiction, and making insightful comparative evaluations based on the national reports. He picks out rational themes and categories upon which comparisons and contrasts are appropriately made. For example, in analysing the default matrimonial regimes, Sherpe groups the jurisdictions into those with community of property regimes, those with separation of property during marriage coupled with rule-based regimes upon divorce and those with primarily discretionary financial relief upon divorce. He offers perceptive observations on the implications, strengths and weaknesses of the various systems. In his commentary on "Pre-nuptial and Post-nuptial Agreements", Sherpe presents how the various jurisdictions deal with the issue of how much autonomy spouses are given or should

be given to contract out of the default matrimonial systems. He considers the "safeguards" in place in the different models, and summarises how the jurisdictions seek to protect autonomy with procedural and substantive fairness. Reading this concluding chapter gives the reader an excellent appreciation of the comparative models on matrimonial regimes and spousal autonomy in marital agreements.

A reader from the common law jurisdiction may find the individual reports from the civil law jurisdictions a little more challenging to maneuver (and vice versa), but it is the aim of the book to stick closely to each writer's original text even if the resulting effect is to have less consistency between reports in the book. While each national report follows the same structure, it is intended to be self-contained and independent from the other reports.

This book is an excellent reference resource for international comparisons on the law on marital agreements, especially when foreign laws with legal materials in a foreign language are usually inaccessible. The book is a gem for readers seeking resources on the default matrimonial regimes of the jurisdictions represented, as well as a clear snapshot of the law on the effect and enforceability of marital agreements in these jurisdictions. It is a welcomed and timely contribution to an area that is attracting a huge amount of scholarly and practical interest and debate. There is much to learn from this book so rich in comparative models and the clear summaries in each national report can cause the law scholar to feel a little guilty for being somewhat "spoon-fed" with easily digestible presentations of a very high quality.

DEBBIE **ONG**
Associate Professor
Faculty of Law, National University of Singapore