

Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice, by Sharon Thompson, Oxford, Hart, 2015, 219 pp., £50, ISBN 9781849465984

In the wake of the Supreme Court decision in *Radmacher v Granatino* [2010] UKSC 42, much ink has been spilled over the enforceability of prenuptial agreements when courts are making Financial Orders upon divorce. Questions ranged from the interpretation of fairness, or rather *unfairness*, in this context to the level of procedural compliance required by the parties before such agreements could influence the court's exercise of discretion. Thus, at first glance, it could be questioned whether Thompson's monograph, *Prenuptial Agreements and the Presumption of Free Choice*, would provide a new dimension or could offer a different perspective on this well-travelled area of law. Refreshingly, this book does so effectively by acknowledging from the outset that 'the enforceability of prenuptial agreements is not the focus' and instead 'it is the relationships underpinning them' (preface).

Encouraged by the seemingly overlooked dissent by Lady Hale in *Radmacher*, Thompson's objective is to interrogate and expose power inequalities or 'expressions' of power within this context (p. 4). This is a welcome enquiry that thankfully shifts the debate away from celebrating respect for autonomy to one that questions the darker nature of what Cotterrell (1987) terms 'private power' and the unique context in which it is exercised. After all, prenuptial agreements not only operate in a sphere far removed from the world of commerce but also can be further differentiated from commercial deals as the long-term consequences of signing a prenuptial agreement are very much unknown at the time of formation.

In order to better understand this context, Thompson draws upon traditional contract theory, in particular the viewing of contracts as manifestations of autonomy, and identifies numerous limitations of this approach. Crucially, the main limitation is that exercises of power in the signing of the prenuptial agreement often fall short of duress or undue influence, which, in turn, are facts largely ignored by contract law. As Thompson notes: 'in many cases, the court is desensitised to more subtle power imbalances' (p. 197). Using feminist theory as a counter-perspective to contract law, Thompson isolates and articulates overlooked gendered inequalities that so often get marginalised when courts prioritise what they deem to be solemn bargains, carefully struck by informed adults.

The book is comprised of six substantive chapters. Chapter One commences with a detailed exposition of *Radmacher* and challenges the problematic reasoning of the Supreme Court. In particular, it questions what Thompson sees as support for the 'liberal view of choice' (p. 36) that presupposes a neutral bargaining process unaffected by context when parties are signing a prenuptial agreement. Drawing upon a close analysis of post-*Radmacher* case law, Thompson challenges the seemingly false dichotomy between judicial paternalism (viewed

negatively and seen as a thing of the past) versus respect for autonomy (seen as modern and progressive). These findings are then mapped onto the developing landscape of financial provision in Chapter Two. Here a feminist and historical analysis of early property ownership in marriage is adopted, which then shifts to the modern position with Thompson reiterating that any 'enforceability' of prenuptial agreements derives from the discretion of the court and not the agreement itself. Two minor remarks can be made on this Chapter. Firstly, it may seem a little unusual to analyse the default regime for division of assets in Chapter Two, after the exceptions to that regime had already been explored in Chapter One. Secondly, the interesting discussion of non-matrimonial property on page 67 could have been developed as an internal countervailing force to the 'sharing exercise' that, in some ways, echoes prenuptial agreements as parties are again seeking to ring-fence assets (albeit here at the date of judgment).

Chapter Three moves to New York and analyses the practical application of prenuptial agreements in that jurisdiction. Although Thompson accepts that the problems may not be the same in the UK and New York, she posits several valuable insights through the use of excerpts from practitioner interviews. Thompson's use of practitioner perspectives throughout the book offers helpful vignettes that develop the theme of power and in many ways operate as warning signs for the future development of prenuptial agreements in this jurisdiction. Unlike the position in England and Wales, the fact that prenuptial agreements in New York are 'contracts, through and through' (p. 103) sets up the analysis of contractual principles in Chapter Four. This chapter interrogates traditional vitiating factors such as duress and undue influence alongside unconscionability and reveals that they are ill-equipped to deal with 'frequent and subtle imbalances of power' (p. 12). Indeed, their high threshold for application means that routinely 'equal power is often presumed in practice' (p. 129).

The final two chapters are undoubtedly the most interesting and ambitious. Thompson begins Chapter Five by rejecting traditional contract theory and instead replaces it with relational contract law married with feminist theory. Here the aim is explicit; namely, 'to make *visible* the gender dimension of prenups obscured by orthodox contract law' (p. 130). What is particularly welcome is Thompson confronting the perceived limitations of relational contract theory but then noting that implementation of her proposal does not necessarily require an overhaul of existing contract law as 'pre-existing relational elements' in contract law could be built upon (p. 163). In her final Chapter, Thompson concludes by translating this endeavour from theory into practice. By revisiting *Radmacher*, she again exposes the judicial tendency of assuming autonomy and notes the problematic trend of evaluating the fairness of an agreement separately to any analysis of autonomy. Interestingly, it is questioned whether under a different imagining of autonomy, the courts may state that 'respect for autonomy is reason *not* to give effect to a prenup, because the parties' intentions are not represented in the terms of the agreement' (p. 194). These insights are particularly illuminating as they start the process of generating alternative accounts of autonomy and underline Herring's observation that independence and freedom may be currently *de rigueur* but, in family law, they are perhaps 'false gods' (p. 36) (Herring 2014).

Prenuptial Agreements and the Presumption of Free Choice is not merely a doctrinal analysis of the modern approach to prenuptial agreements in England and Wales. Instead, and by situating the focus within general contract law scholarship and feminist theory, Thompson makes important analytical and empirically-informed connections that have hitherto been underdeveloped. In addition, Thompson offers a timely reminder of the dangers of autonomy and the risks created by the majority's ringing endorsement of that concept in *Radmacher*.

In light of England and Wales entering an era of even more contractualisation and private ordering, courts may have fewer opportunities to police expressions of private power. Similarly, when cases are litigated, the well-documented limitations of relational contract theory, let alone feminist relational contract theory, may prove too academic to revolutionise practice. Yet those practical factors should not be seen as diminishing the value of Thompson's analytical, thought-provoking and well-researched monograph. Ultimately, Thompson's core message that there is always inequality of bargaining power in prenuptial agreements is an important one. Building upon comparative law insights, it is very much hoped that Thompson's detailed contribution will prompt a re-conceptualisation of autonomy in this specific context and that the use of judicial discretion may exhibit a greater sensitivity to exercises of gendered power.

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References

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