
Introduction

I represented a woman who was marrying a doctor. And the doctor was giving her nothing in the prenup ... I said to ... the doctor ... 'What's she getting under this agreement?' ... And he looks at me and says, 'Marrying a doctor!' ... That happens frequently, and many people will take less ... because they love the person and they don't think the agreement will ever come into effect.¹

For many wealthy individuals, marriage is inconceivable without a prenuptial agreement (prenup), because they need to be satisfied that divorce will not cost them half of their wealth. For many others, signing an agreement that waives the entitlement they would otherwise have to their partner's assets on divorce is a powerful statement that they are not marrying for money. Yet as the above example demonstrates, this dynamic can mean that one party financially benefits much more under the prenup than the other. Put another way, one party may get 'nothing in the prenup'—apart from marrying a doctor of course.

The demand for prenups is increasing,² because entering into a contract that states what both spouses get on divorce is often perceived to be a favourable alternative to the uncertainty and expense of leaving financial provision to be decided by a judge. From the perspective of Baroness Deech, a prenup can prevent the moneyed spouse from being deprived of all he or she has worked for, as without an agreement:

The wife who is least likely ever to have put her hand in cold water during the marriage is the one most likely to walk off with millions, regardless of her contributions or conduct. Hence we find that ... the phrases 'gold digger' or 'alimony drone' have been coined.³

This vision of the wife who contributes little but takes almost everything has led to calls for reform to make prenups binding. On the contrary, this book demonstrates that the stereotype of the covetous spouse is inconsistent with the reality for most couples getting married and entering into prenups. Rather than focusing on the perceived dangers of 'gold diggers', this book is concerned with the problematic aspects of such agreements, in particular issues of power. It aims to

¹ Practitioner 20, interviewed by the author in New York City, September 2010.

² See research findings in E Hitchings, *Law Commission Report: A study of the views and approaches of family practitioners concerning marital property agreements* (2011), which indicate that practitioners have seen an increase in work concerned with prenups. See also A Barlow and J Smithson, 'Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England and Wales' (2012) 24(3) *Child and Family Law Quarterly* 304, which found that the public is generally in favour of couples being able to make binding prenups.

³ HL Deb 27 June 2014, vol 754, col 1491.

expose these issues by presenting an empirically-based study of the occurrences and consequences of power inequalities between parties to prenups.

Background

Prenuptial agreements are not binding in English law. On divorce, the Matrimonial Causes Act (MCA) 1973⁴ provides the court with discretion to make financial provision orders (also known as ancillary relief) in respect of spousal property. For example, the court can make orders that adjust the ownership of spousal property,⁵ or it can divide the parties' pensions,⁶ or order one spouse to pay the other either a lump sum or money in instalments (known as periodical payments).⁷ When exercising its discretion, the only statutory guide is section 25 of the 1973 Act, which provides a list of factors for the court to take into account when making a financial order. However, it is for the judiciary to decide how these factors should be applied, and so its power to award financial provision is broad and virtually unlimited by statute. It is also this discretionary power⁸ that has prevented the court from giving effect to prenups, because it is against public policy for the court to enable such an agreement, rather than the judiciary's assessment of the case, to govern the financial consequences of divorce. This public policy objection is the reason prenups are still not binding,⁹ and the only way these agreements can oust the jurisdiction of the court is if Parliament introduces legislation to that effect.

In the 1990s and early 2000s, if a spouse sought to rely on a prenup during financial relief proceedings, it would have little, if any, effect on the court's decision. But gradually prenups became more influential as regards the financial outcome on divorce, as the court considered that nuptial agreements could be included within the scope of factors for consideration under section 25 of the MCA 1973.¹⁰ From being a factor to consider, the position of prenups has developed case by case, to the point where the court can now decide to attribute decisive weight to an agreement. In fact, as a result of precedent set by the Supreme Court in *Radmacher v Granatino*, the judiciary *must* now attribute decisive weight to a prenup if it is not unfair.¹¹ In short, the court can no longer ignore an agreement in the way it would have

⁴ In Northern Ireland, the corresponding statute is the Matrimonial Causes Order 1978.

⁵ MCA 1973, s 21(2).

⁶ For example, a judge can make a pension-sharing order pursuant to MCA 1973, s 21A, which permits a spouse to share his or her former partner's pension rights. Alternatively, pursuant to s 21B, the judge can award a pension compensation-sharing order, which permits a spouse to share in his or her former partner's Pension Protection Fund (PPF) compensation.

⁷ MCA 1973, s 21(1).

⁸ Conferred by Parliament under MCA 1973, s 23.

⁹ Other public policy objections have historically prevented the enforcement of prenups but, as ch 1 will explain, changing attitudes towards financial provision on divorce have rendered these other objections obsolete.

¹⁰ Specifically as part of s 25(1), which directs the court to consider 'all the circumstances of the case'.

¹¹ *Radmacher v Granatino* [2010] UKSC 42.

20 years ago.¹² As a result, if the judge decides that it is appropriate to give effect to a prenup on divorce, the parties' decision replaces the court's evaluation as to which financial orders to make in that case. This means that individuals who either have or are anticipating accruing significant wealth can agree with their partners before marriage how these assets will be divided in the event of divorce. Moneyed spouses can even decide to use an agreement to ring-fence their assets completely.

The effect of prenups is also to contract out of the default system of financial provision on divorce. A desire to contract out of this discretionary procedure in the United Kingdom (UK) has highlighted the problems couples face when resolving financial issues in court. On divorce, the valuation of parties' assets can be a lengthy and costly process, and as financial orders depend on the facts in individual cases, parties often have no way of knowing how their assets will be split, particularly when there is a surplus once their needs have been met. These issues have led Sir James Munby to say:

I should be very surprised if our law of ancillary relief does not undergo more or less radical reform over the coming years ... We need to reconsider practice and procedure so as to facilitate the use of out-of-court methods of resolving financial disputes ...¹³

These out-of-court methods include mediation for individuals who can no longer access legal representation, since legal aid has been cut for family law in England and Wales.¹⁴ But prenups are another a form of private ordering which can, in theory, circumvent many of the current uncertainties produced by the law applicable to financial orders on divorce. Before marriage, couples are able to determine their financial interests, discuss their expectations in the event of divorce, and can avoid complicated valuations and costly litigation on divorce having resolved these matters outside the courtroom.

Although there are potential benefits to entering into prenups, there are equally as many potential problems. The purpose of the court's discretion to make financial orders on divorce is to achieve a fair outcome which is tailor-made to that particular couple's circumstances.¹⁵ However, a prenup cannot account for a family's situation on relationship breakdown, as it is created before the marriage, at a time when the couple's circumstances might be very different. Furthermore, as prenups are scrutinised less and given more weight by the court, issues of power between the parties are potentially hidden or not addressed.

When exploring these issues further, the UK is not necessarily the best place on which to focus, because although prenups are arguably increasing in popularity,¹⁶ legally, weight has not been attached to such agreements for nearly as long as in other jurisdictions. For example, in New York prenups have been binding for

¹² *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45.

¹³ J Munby, 'The Family Justice Reforms' (29 April 2014), available at <<http://www.judiciary.gov.uk/wp-content/uploads/2014/05/family-justice-reforms-29042014.pdf>>.

¹⁴ Pursuant to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁵ *White v White* [2000] UKHL 54.

¹⁶ One indication of this is the increased number of reported judgments where there was a relevant prenup.

almost 35 years.¹⁷ The default system of financial provision in New York is equitable distribution, which provides the court with extensive discretion to make financial orders in a very similar way as applies in the UK.¹⁸ And so it is conceivable that information on the experiences of expert attorneys in this field would enable a detailed assessment as to how prenups operate in practice. In 2010 I interviewed 20 practitioners in Manhattan, New York City, on this subject, some of whom had over 30 years' experience of prenups. The clients of these attorneys were exceptionally wealthy, and included world-famous actors, businessmen and musicians. But when speaking to these attorneys, it did not seem to matter who they were representing, the response was the same—there is always inequality of bargaining power between parties entering prenups. As one attorney put it, 'I have always defined prenups as agreements by which one party, usually the party with the wealth, wants to cheat the other one.'¹⁹ The views of these individuals provide a very interesting insight into the practical issues with prenups, and so extracts from their interviews appear throughout this book.

Although the research carried out in New York adds a comparative and empirical basis, this book presents an analysis of the position of prenups in the UK. There will be a focus on England, Wales and Northern Ireland, as the status of prenups in these countries is the same. In England and Wales, agreements are enforced as part of the process of financial redistribution on divorce under the MCA 1973. In Northern Ireland, this procedure is mirrored in the Matrimonial Causes (Northern Ireland) Order 1978, which contains the same provisions as the 1973 Act. In Scotland, however, the approach to family law is very different from the rest of the UK. Scotland is a mixed jurisdiction where prenups (referred to as 'marriage contracts') are enforced in the same way as other contracts.²⁰ As there is a distinct difference between Scots law and the law in England, Wales and Northern Ireland, Scotland is not considered in this book. Thus, hereafter, reference to the UK position includes England, Wales and Northern Ireland, but excludes Scotland.

Power

The theme of this book is power, specifically *expressions* of power between parties to prenups.²¹ Power is a crucial aspect of prenups, as the terms of these agreements

¹⁷ Pursuant to NY Domestic Relations Law § 236(B)(3) (McKinney 1986), which was introduced in 1980.

¹⁸ NY Domestic Relations Law, § 236(B) (McKinney 1986).

¹⁹ Practitioner 14.

²⁰ K Norrie, 'Marital Agreements and Private Autonomy in Scotland' in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012) 293.

²¹ The analysis of power in this book focuses on the relationships between engaged heterosexual couples and between husbands and wives. There is less information on prenups entered into by same sex couples, because at the time of writing, same sex couples have been only able to legally marry less than a year (pursuant to the Marriage (Same Sex Couples Act) 2013).

could ultimately benefit one party much more than the other, or the outcome of an agreement tainted by power disparity could be especially detrimental to one party in the light of changed circumstances. As Barlow and Smithson's research has found, issues of power related to prenups are a 'perceived problem' by members of the public.²² However, recognising power in practice is a familiar problem for the court when giving effect to prenups, as there is a tension, first, between promoting one person's power to control his or her property in the event of relationship breakdown and, secondly, protecting the other person who may be powerless within this arrangement. Since the Supreme Court decided that prenups are to have decisive weight, the court's approach has been to recognise the importance of giving effect to a couple's agreement out of respect for their autonomy. This has also meant limiting the court's evaluation of power imbalance in less extreme cases, because addressing issues of power could lead to a restriction of the original agreement's enforcement. But exposing power and the associative difficulties with it is important in the context of prenups, because if power is obscured by respect for autonomy it is likely to be overlooked completely. Of course we should have the ability to protect our property interests, but a blinkered view which focuses only on the individual property rights of spouses assimilates prenups with agreements made in the normal course of business. Yet a prenup is not the same as a standard insurance contract, and saying it is, is particularly problematic, as Cotterrell describes:

Through the use of the concept of property, it becomes possible to banish almost entirely from the discourse of private law recognition of one of the most dominant features of life in a society of material inequalities—that of *private power*.²³

Indeed, limiting our view of prenups to a discrete contract ignores the 'society of material inequalities' to which Cotterrell refers. If these inequalities are missing from the court's assessment of prenups, they become a private and accepted feature of the marriage and family.

In the context of prenups, one of the most prevalent manifestations of this is the gendered power dimension. As Lady Hale explains:

Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she—it is usually although by no means invariably she—would otherwise be entitled ... In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.²⁴

The force of Lady Hale's assertion indicates the importance of gender in the prenuptial context, but as this book will demonstrate, the law does not always recognise it. One

²² Barlow and Smithson, above n 2.

²³ R Cotterrell, 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' (1987) 14 *Journal of Law and Society* 77.

²⁴ Radmacher above n 11, [137].

possible explanation for this, which this book will develop further, is that the contractual view of autonomy often followed by the court is associated with the perception that prenups are entered into by two independent, gender-neutral individuals, both seeking to safeguard their property and finances. But adding a gender dimension to this context demands a different view of these agreements. For example, in the UK the moneyed spouse with the wealth to protect through a prenup is statistically more likely to be the husband.²⁵ Furthermore, even if men and women enter into prenups as financially independent individuals, dependency can develop during marriage which changes their positions. These dependencies are often gendered, as the division of labour within the family means that most non-financial contributions are made by women.²⁶ At the same time, this analysis also applies to a smaller number of husbands taking on these gendered roles, and so recognising a gendered power dimension does not, as Mr Justice Holman insinuated, lead to gender bias, or to a ‘stereo-typical view that a wife may be dependent upon her husband but not vice versa’.²⁷

In any case, even if couples enter a prenup with a clear vision of their intended future in their minds, this vision is susceptible to change, not least from an economic point of view. This long-term view of prenups is one of the most powerful illustrations of how a contractual relationship between spouses is *different*, as Regan puts it:

While it is plausible to say that members of an economic partnership may regard themselves as strangers in the market after the partnership ends, it is far less reasonable to characterize ex-spouses solely in this way. Ex-spouses are not simply individuals who revert to the status of detached individuals. They have shared an experience that has affected them deeply, so much that in a sense they are not the same persons they were when they entered the marriage.²⁸

Put simply, prenups are not only different in nature from agreements made in business, but they are also particularly problematic in their nature and effect compared with other types of intimate agreements. Separation agreements, which couples use to divide their assets on divorce, are made at a time when both parties know how the marriage has changed them. But for couples entering into prenups (which, as their name implies, are entered into before marriage), these circumstances are not known.²⁹ All of this makes it very difficult to create a prenup that will adequately reflect the intentions of spouses on divorce. From this perspective,

²⁵ Office of National Statistics, ‘Women in the labour market’ (2013), available at <http://www.ons.gov.uk/ons/dcp171776_328352.pdf> states not only that more men than women tend to work in professional occupations that are associated with higher levels of pay, but also that men outnumber women in the top 10% of earners.

²⁶ See *ibid.* This is highlighted by statistics, which show rising employment for women in general, but also that women with children are less likely to work than those without, whilst the opposite is true for men. See also S Duncan *et al.*, ‘Motherhood, paid work and partnering: values and theories’ (2003) 17(2) *Work, Employment and Society* 309.

²⁷ *Luckwell v Limata* [2014] EWHC 502 (Fam) [132].

²⁸ M Regan, *Alone Together: Law and the Meanings of Marriage* (OUP 1999) 189–90.

²⁹ See *Radmacher*, above n 11 [175] (Lady Hale).

the notion of contractual autonomy is even more flawed, because the spouse with less bargaining power and who is on the short end of the agreement, cannot predict what the effect of contracting out of his or her entitlement on divorce will be.

As a result, this book provides a critique of prenups, both in the way in which they are given effect in *Radmacher v Granatino* and in general (that is, for jurisdictions that do not have matrimonial legislation that reserves discretion to the court to decide the financial outcome of divorce). By examining how the court's concept of autonomy is affected by power, and how both contract law and the law applicable to prenups does not address these issues of power, this book seeks to find a different way of viewing the context in which prenups are made. Addressing these issues is particularly important at a time when the status of such agreements is under review by the Government, since the Law Commission published its recommendations for legislative reform of nuptial agreements at the beginning of 2014.³⁰

Theoretical Perspectives Employed in this Book

Contract Theory

Contract theory is an important tool when exploring the nature of prenups because these agreements must have contractual validity to be enforced.³¹ However, it is emphasised that the use of contractual perspectives does not mean that prenups are viewed as ordinary business contracts in this book, though later chapters consider whether this is the case in practice.³² Rather, the idea that such agreements should be freely entered (without duress) emerges from contract law, thus it is inextricably linked to the enforcement of prenups.

When evaluating how power and autonomy are conceptualised in relation to prenups, contract theory is extremely useful, particularly due to its influence on the creation and enforcement of these agreements. Moreover, autonomy is fundamental to the enforcement of contracts, as von Mehren explains:

Contract ... implies autonomous ordering. The ordering should, therefore, be done by parties who act with a degree of awareness, independence and responsibility. Where these qualities are not present in requisite measure, the requirements of procedural justice immanent in the concept of contract are not met.³³

³⁰ Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014).

³¹ See *Radmacher* above n 11, [71] (Lord Phillips). Note, however, that in *Radmacher* the relevance of contract law to the weight to be attributed to prenups is distinguished from the question of whether or not prenups have binding contractual status ([62]).

³² In particular ch 3, which examines empirical evidence of prenups in practice.

³³ A von Mehren, 'A General View of Contracts' in *International Encyclopedia of Comparative Law* vol 7 (Tübingen 1982), 64.

This emphasis on contractual autonomy goes to the heart of why prenups are enforced. From a contractual perspective, the point of prenups is to enable people to be autonomous without state intervention. A number of commentators claim that ‘autonomy is good for you’, because people can avoid the imposition of what some believe to be oppressive paternalistic values.³⁴ Within the boundaries of reasonableness and conscience, couples can tailor their own financial consequences to divorce.³⁵ This perspective undoubtedly influenced the majority in *Radmacher v Granatino*,³⁶ but whilst it is of course important for parties to control what happens to their own property, there are still significant concerns, expressed by commentators like Bix, that unequal bargaining power could affect the operation of autonomy:

[F]or every person who makes choices ... fully aware of what he or she is giving up and freely choosing to do so for whatever benefits may seem to come from the choice, there will be many others who act in ways that are less free, knowing, or autonomous.³⁷

On a broader theoretical level, McLean suggests that an ‘individualistic model of autonomy is largely unconcerned with what the decision is; rather, it is interested in the right to make it’.³⁸ This could explain why autonomy in the prenuptial context is presumed, as the judiciary in the UK appears to focus on parties’ right to enter into prenups, and on whether this right is repressed by public policy issues.

Contract theory is used here in two ways. First, it is a lens through which power and autonomy are considered in the context of prenups. To understand this perspective, the law of contract relevant to prenups is examined, in particular the effect of vitiating factors on the enforcement of these agreements.

Secondly, alternative contractual perspectives are used to conceptualise autonomy in a way different from the judiciary’s approach to autonomy in cases such as *Radmacher v Granatino*, which is examined in chapter one. A particularly helpful perspective when exploring the variety of pressures affecting autonomy in practice is the relational contract school of thought. Relational contract theory was established primarily by Ian Macneil, and posits that contracts should not be confined to the point at which an agreement is signed: the focus should instead be directed to the wider context in which contracts operate.³⁹ This is one layer of analysis which will be employed in later chapters to re-evaluate how issues of power can be made more visible in the case of prenups.

³⁴ M Ertman, ‘Commercializing Marriage: A Proposal for Valuing Women’s Work through Premarital Security Agreements’ (1998) 77 *Texas Law Review* 17.

³⁵ See S Cretney, ‘The Family and the Law—Status or Contract?’ (2003) 15 *Child and Family Law Quarterly* 403.

³⁶ See *Radmacher*, above n 11, [78] (Lord Phillips).

³⁷ B Bix, ‘Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage’ (1998) 40 *William and Mary Law Review* 145, 171.

³⁸ S McLean, *Autonomy, Consent and the Law* (Routledge 2010) 20.

³⁹ I Macneil, *Contract: Exchange Transactions and Relations* (2nd edn, Foundation Press 1978).

Feminist Critiques of Contract

Another way of recognising issues of power in a way that is different from current practice is to employ feminist theory to criticise contract law. A feminist perspective is useful because it does not aim to present men as *necessarily* having an oppressive role in a prenup, but it recognises that there *is* a power dimension between men and women when prenups are being entered into. As Brod puts it, the gendered power dimension of prenups is severe because it means that '[p]remarital agreements adversely affect the economic and social wellbeing of many women, they contribute to the financial vulnerability of women as a class, and they magnify society's unequal distribution of resources along gender lines.'⁴⁰ This, she says, can be explained by the fact that prenups are used to protect the wealth and income of the prospective spouse, who is commonly male. It is this connection rather than any 'intent to disadvantage or discriminate against women as a group'⁴¹ which creates a gendered power dimension.

Atwood corroborates this view on prenups with evidence that the wife challenges the agreement in 85 per cent of cases.⁴² Identifying the same gender dimension as Brod, she asserts that '[s]ince men generally occupy a position of economic superiority, strict enforcement of premarital agreements may work to the ultimate economic disadvantage of women'.⁴³ Lady Hale's view in *Radmacher v Granatino* supports this argument. In the sole dissent to the all-male majority judgment in this case, Lady Hale employs a feminist perspective to expose the complexities of prenups:

Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing no limit on the claims that might be made against her, and then limited her claim to a pre-determined sum for each year of marriage regardless of the circumstances, as if her wifely services were being bought by the year? ... [T]hat is what these precedents do.⁴⁴

Thus, as Lady Hale suggests, prenups are not only gendered in the way they are negotiated, but are also gendered in their effect. For example, it is not uncommon for the female spouse to undertake unpaid labour in the home, such as childcare. But a prenup can potentially contract out of the economic entitlement generated by this non-financial contribution, or, as Lady Hale puts it, could buy these services by the year.

Nevertheless, the purpose of feminist perspectives in this book is not *only* to expose prenups as being gendered. Rather, this particular lens allows autonomy

⁴⁰ G Brod, 'Premarital Agreements and Gender Justice' (1994) 6 *Yale Journal of Law and Feminism* 229.

⁴¹ *Ibid.*

⁴² B Atwood, 'Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act' (1993) 19 *Journal of Legislation* 127. See also Barlow and Smithson, above n 2, who, in an empirical study of views of members of the public, found that women perceive prenups differently from men.

⁴³ *Ibid.*, 129.

⁴⁴ See *Radmacher*, above n 11, [137].

and power issues to be viewed differently by criticising orthodox ideas of contract. Atwood, for example, believes that an emphasis on contractual autonomy overshadows the ‘empirical reality of unequal bargaining positions [, which] for most women will result in unequal bargains’.⁴⁵ With feminist theory, however, these inequalities can be recognised.

As a result, alternative perceptions of autonomy are explored, which have the potential to empower women to counteract power issues connected to prenups. By criticising and moving away from the traditional constraints of contract, feminist theory does not portray women as disadvantaged simply because they are women, but *does* recognise that power imbalances within prenups disadvantage women. By identifying these situations of power imbalance, a feminist critique of contract can ensure that the voices of both parties to a prenup are heard.

Chapter Outline

Chapter one of this book reveals how prenups are given effect in the UK by presenting a full exposition of *Radmacher v Granatino*⁴⁶ and the impact this case has had. *Radmacher* is significant because it was the first time the Supreme Court had the opportunity to decide the weight a prenup should have when financial provision orders are made. In this case, the justification of the majority of the Court for holding that the weight of a prenup should be decisive was that the autonomy of the parties should be respected. In the leading judgment, Lord Phillips said that respect for autonomy was important even if there are power imbalances between the parties, because adults can work these things out for themselves.⁴⁷ But leaving the couple to resolve issues of power could be difficult when one party is in a stronger bargaining position. The Court’s approach is also problematic because it avoids a detailed assessment of the context of the agreement, as the parties are assumed to have freely chosen the terms (even when one party is clearly on the short end of the agreement). Lady Hale adopted a different approach in *Radmacher*, and provided a dissenting judgment. She recognised the importance of context, and how the relationship of the parties is an important consideration when evaluating a prenup. However, the precedent created by the majority in this case is adopted in later cases, and autonomy is now the basis on which prenups are given effect, unless this would produce an unfair outcome. Chapter one concludes with an examination of why the *Radmacher* interpretation of autonomy is problematic.

Chapter two extends the analysis of prenups in chapter one by examining how financial provision on relationship breakdown has evolved. The development of

⁴⁵ See Atwood, above n 42, 130.

⁴⁶ See *Radmacher*, above n 11.

⁴⁷ Unless the circumstances explicitly show there has been unfair exploitation: *ibid*, [71].

judicial attitudes towards financial provision on divorce correlates with how attitudes towards prenups have changed, and tracing the history of financial provision on divorce also reveals the traditional structural inequalities between spouses which created a foundation of gendered power imbalance. These issues are now addressed by the courts, which have said that financial contributions should not be valued more than non-financial contributions, as both are vital to the marital partnership.⁴⁸ However, as chapter two explains, prenups can contract out of this ethos of sharing the fruits of the marriage,⁴⁹ and so the default system of financial provision on divorce is examined so that it is clear what this means. In addition, prenups are given effect as part of the court's discretion to make financial provision orders on divorce, and so it is important to examine the way in which this discretion is exercised.

Chapter three shows that the power inequalities explored in chapters one and two have empirical basis in a study drawn on by this book. Using the accounts of practitioners specialising in the area of prenups in New York, chapter three outlines what independent and competent legal advice should entail, the consequences of prenups being difficult to challenge and the problems contingent on legislative regulation of prenups. Practitioners identified the ways in which power imbalances affect prenups and suggested various ways of addressing these issues, from 'sunset clauses', which place an expiry date on the agreement, to the integration of a 'wedding present', whereby the non-moneyed spouse receives a sum of money in exchange for giving up her right to court-awarded financial provision on divorce. In spite of this, the courts in New York still have limited scope to ameliorate power inequalities that have ultimately resulted in unfairness at the time of divorce. Furthermore, not everyone entering prenups has access to the expertise of the practitioners interviewed: non-expert legal advice could be particularly detrimental for the spouse with less power if it means that his or her lawyer is unaware of potential ways to counteract power inequalities. Chapter three concludes with a comparison of the empirical findings in New York with Emma Hitchings' study on practitioners' approaches to prenups in the UK.⁵⁰ Though it is not assumed that the context of prenups in the UK and in New York is the same, the experiences of the practitioners interviewed in New York provide valuable insight into the potential consequences of binding prenups in the UK.

Chapter four examines contract doctrines to see if they can address the problems with making prenups binding identified in earlier chapters. As prenups must have contractual validity in order to be valid, these doctrines are relevant to parties' ability to challenge an agreement on divorce. In particular, the doctrines of duress, undue influence and unconscionable bargaining will be even more important if the Law Commission's recommendations are introduced,⁵¹ because the courts' discretion to

⁴⁸ See *White*, above n 15.

⁴⁹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [141] (Baroness Hale of Richmond).

⁵⁰ See Hitchings, above n 2.

⁵¹ The Law Commission has recommended that prenups will be binding, provided a number of procedural requirements are met: see Law Commission, above n 30.

address power imbalance will be limited by legislation and so must be examined further in the context of prenups. However, examining the inadequacies of current legal doctrines highlights why issues of power between parties to prenups are often not addressed: it is because contract doctrines do not deal with the frequent and subtle imbalances of power existing within the prenuptial relationship.

Chapter five explores this further, by presenting a feminist and relational critique of contractual approaches to prenups. In particular, the orthodox contractual view of autonomy is criticised, as it influences how prenups are given effect by the court. First, relational contract theory challenges the orthodox view by highlighting the *relationship* between the parties, which in the context of prenups recognises that the parties are not always rational, unemotional or in many cases even bargaining for individual gain. Relational contract also criticises the established traditional approach for focusing on the time the agreement is made instead of the duration of the contractual relationship. By viewing autonomy as something which is exercised throughout the relationship, the intentions of the parties can be appreciated as they evolve during the marriage.

Secondly, classical perceptions of autonomy are challenged by feminist perspectives on contract law. A feminist approach is particularly useful when thinking about power because, as Conaghan has said, women-centred strategies typically rely on power, or lack of it.⁵² The ‘particular and contextual accounts’⁵³ proffered by feminist perspectives also makes the gender dimension of prenups visible, which Lady Hale noted was rendered invisible by the all-male majority in *Radmacher*.⁵⁴

In the penultimate section of chapter five, these theories are combined to produce a perspective named ‘feminist relational contract theory’, which provides a lens through which existing concepts of autonomy and power are criticised, whilst making it possible for alternative approaches to autonomy within the context of prenups to be discovered.

Chapter six outlines various ways in which legislative and judicial approaches to prenups could manage issues of power. By taking the context of the spouses’ relationship into account, power imbalances can be recognised, and so when the court has respect for party autonomy (as Lord Phillips said it should in *Radmacher*), this respect will be informed by the parties’ relational circumstances and expectations instead of compliance with prescribed contractual formalities. To show how this approach would work in practice, *Radmacher v Granatino* is revisited in light of feminist relational contract theory, which underlines the importance and significance of Lady Hale’s perspective in this case. However, Lady Hale’s contextual view is not held by many, as the debate surrounding prenups tends to focus on the right to make binding agreements rather than on underlying issues of power. This book aims to bring these underlying issues to the fore.

⁵² J Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27(3) *Journal of Law and Society* 351, 364.

⁵³ *Ibid.*

⁵⁴ See *Radmacher*, above n 11, [137].