

Entry No 13**Part I – At the Crossroads of Contract and Family Law**

A prenuptial agreement is an agreement made by a husband and wife before marriage to regulate their financial matters upon separation.¹ The debate on the enforceability of prenuptial agreement is essentially a dispute on the nature of marriage.² Should marriage be regarded as a contract, and therefore the mere result of a bargain by fully autonomous beings? Or is marriage more than a contract, but an immutable status, a status entailing an “irreducible minimum”³, a sacred duty which cannot be contracted away by agreements? As Suffolk in Shakespeare’s Henry VI puts it: “Marriage is a matter of more worth // Than to be dealt in by attorneyship”.

A. Marriage as Status

A search for the meaning of marriage – though pretty unromantic – starts from statutes. Section 40 of the Marriage Ordinance provides that “marriage” refers to a “Christian marriage” or its civil equivalence. The notion of Christian marriage is based upon the common law definition by Lord Penzance in *Mordaunt v Mordaunt*⁴:-

"Marriage is an institution. It confers a status on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilised society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it."

That forms the theoretical foundation of family law. Family law (or to be more precise, the law of ancillary relief), can be viewed as a default system, or a “standard-form contract”, which reflects the state’s perception towards the role of marriage.

¹ Halsbury’s Laws of England (5th ed., 2009)

² See Jens-uwe Franck, “‘So Hedge Therefore, Who Join Forever’: Understanding the Interrelation of No-fault Divorce and Premarital Contracts” (2009) 23 Int’l J.L. Pol’y & Fam. 235 at 237.

³ *Radmacher v Granatino* [2010] UKSC 42 at [132].

⁴ (1870) LR 2 P & D 109 at 126.

Indeed, the state has long viewed prenuptial agreements with deep suspicion. Even though the old common law duty of husband and wife to live together has gone, the public policy disfavors contractual arrangements that encourage divorce.⁵ The court remains the ultimate guardian of family welfare, and the long established common law still rules the day: prenuptial agreements cannot oust the jurisdiction of the court in granting orders in cases of null marriage, divorce or judicial separation; neither can they prevent a spouse from applying an ancillary relief to court.⁶

That said, the concept of marriage in Hong Kong, as in other developed regions, is ever changing. According to a survey conducted by Women's Commission,⁷ nearly half of the interviewee accepted cohabitation relationship; and where a married couple could not live together harmoniously, 56.1% women and 47.3% men supported divorce as a solution. This finding is further supported by Hong Kong census conducted in 2013, indicating a substantial increase in number of divorces from 2062 in 1981 to 21, 125 in 2012.⁸ This trend resonates with the remark by legal historian Sir Henry Maine: "We may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."⁹

B. Marriage as Contract

Hong Kong courts are becoming more receptive to prenuptial agreement. In *LKW v DD*, Ribeiro PJ, albeit in *obiter*, was of the view that, when exercising its jurisdiction in making an ancillary relief order under section 4 of the Matrimonial Proceedings and Property Ordinance, the court should consider prenuptial agreements as a factor under the "all circumstances" limb.

This reasoning is in line with the English position. Thorpe LJ in his decision in *Crossley v Crossley* described prenuptial agreement "as a factor of magnetic importance".¹⁰ Yet it is far from clear whether prenuptial agreements are

⁵ [2010] UKSC 42 at [159]. ("Even if the old rationale for public policy rule 1 has gone, I still believe that it is the public policy of this country to support marriage and to encourage married people to stay married rather than to encourage them to get divorced.")

⁶ *Hyman v Hyman* [1929] AC 601

⁷ Women's Commission, "*What do Women and Men in Hong Kong Think about the Status of Women at Home, Work and in Social Environments?*" available at

http://www.women.gov.hk/colour/en/research_statistics/research_status_of_women.htm

⁸ Census and Statistics Department, Hong Kong Special Administrative Region, "*Women and Men in Hong Kong Key Statistics – 2013 Edition*" para 2.9 at 31.

⁹ Sir Henry Sumner Maine, *Ancient Law* 186 (Dorset Press 1986) (1861).

¹⁰ [2007] EWCA Civ 1491, [2008] 1 FLR 1467, 1472 at para 15.

contractually enforceable in court. In *Radmacher v Granatino*, the majority was coming close to suggest that prenuptial agreements are contractually binding, but Lady Hale’s powerful dissent renders this position uncertain. All we can say is that, in England, prenuptial agreement *may* be binding but, at the same time, they are not binding “in a contractual sense”.

C. “[T]he law of marital agreements is in a mess”¹¹

The analysis returns to the conflict between contract law and family law: the latter is fiercely guarding against the intrusion of the former into marriage – a field where devotion and unselfishness, but not calculation of personal interest, is expected. The struggle has an unfortunate consequence. As Lord Justice Hoffman in *Pounds v Pounds*, a post-nuptial agreement case, expressed his grievance:-

“The result ... is that we have, as it seems to me, the worst of both worlds. The agreement may be held to be binding, but whether it will be can be determined only after litigation... In our attempt to achieve finely ground justice by attributing weight but not too much weight to the agreement of the parties, we have created uncertainty and, in this case and no doubt others, added to the cost and pain of litigation.”

The same holds true for prenuptial agreement.¹²

This author submits that the confusion in the law of prenuptial agreements largely stems from the indeterminability of the modern notion of marriage. Our task is to strike a balance between private autonomy and ensuring ‘fairness’ for (or expectation of) the economically vulnerable spouse upon divorce.¹³ Such an ideal is always easier said than done, though this author attempts to give a tentative proposal to this legal mess, with a sincere hope to contribute a bit to the development of family law in Hong Kong.

Pare II – Should prenuptial agreement be “binding and enforceable”?

The freedom of contract seems to suggest that husband and wife can, at will, tie their hands through making a mutual agreement with regard to their domestic life.

¹¹ [2010] UKSC 42 at [133].

¹² See Barbara A. Atwood, “*Marital Contracts and the Meaning of Marriage*” (2012) 54 Ariz. L. Rev. 11.

¹³ See Brian Bix, “*Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*” [hereinafter “*Bargaining in the Shadow of Love*”] (1998) 40 Wm. & Mary L. Rev. 145.

What is objected to is a commitment that the state would be bound to enforce – particularly when one of the parties later changes his or her mind about the value of adhering to the original contract. Should the state coerce the compliance? What public policy is being served by such an enforcement?¹⁴

A. Justification for Enforcing Prenuptial Agreements – Respecting Autonomy

“Autonomy” means self-governance. It is all about having a *choice* in leading our lives. As the argument goes: Modern marriage is to a large extent “a private matter between the people involved. Why should the two individuals not have the right to construct the factual, moral, and legal contours of their marriage relationships as they see fit?”¹⁵

Some argues that there are good reasons to encourage altruism in relationships. Whatever the merits of this argument, contracts can be a useful tool for a couple who want to make a greater commitment to each other, and who want to create greater incentives for altruistic behavior.¹⁶ It is argued that prenuptial agreement is not evil *per se*: it is not necessarily a tool to obtain an unfair advantage over the other. It may be that the purposes of such agreements is to ensure the retention of certain family wealth by children, isolated from possible matrimonial claims; or to ensure that the spouse would have adequate economic protection after the breakdown of marriage. It is this author’s contention that, by providing individuals a valid legal tool to choose their own life discourse, private autonomy can well be preserved.

But autonomy presupposes consent. Contractual provisions should be enforced if and only if the parties have *truly* assented to the provisions. Some opponents maintain that in the context of prenuptial agreement, couples may be unable to form a rational and informed consent, and this distortion of consent becomes “an argument against the state enforcement of private arrangement.”¹⁷ That said, it is this author’s submission that procedural safeguards can well ensure that the decisions are informed and conscious. This point would be further addressed in Part III.

¹⁴ Brian Bix, “*Private Ordering and Family Law*” (2010) 23 *Journal of the American Academy of Matrimonial Lawyers* 249 at 251 [hereinafter “*Private Ordering*”]

¹⁵ Brian Bix, “*Bargaining in the Shadow of Love*” at 167.

¹⁶ *Ibid.*

¹⁷ Brian Bix, “*Private Ordering*” at 252.

B. Justifications for NOT Enforcing Prenuptial Agreements

I. State's interest in Governing Marriage

The “efficiency” argument is essentially a consequentialist approach: one balances the benefits of state enforcement of prenuptial agreements against the cost incurred by rendering the agreements not binding. On the contrary, one may approach the issue in a deontological way: state has a special interest in upholding the institution of marriage and regulating financial relations of spouses. Private contracting should be discouraged as this idea is intrinsically at odd with state power and authority.

As illustrated in Part I, the concept of marriage is evolving, and it is the lawmaker's goal to construct a legal device which can meet the differing expectations of many others. This author is not saying that prenuptial agreement should be made *mandatory*, thereby uprooting the default family law system; what this author suggests is that, in today's multi-dimensional and vocal society, the good old days when the state actually monopolizes the meaning and construction of marriage is gone; an alternative path should well be embraced. Couples with life-long devotion to marriage can happily choose not to conclude a prenuptial agreement. At the point of marital breakdown, the state's idea of fairness is used. But if parties would like to contract around the default system, they can feel free to do so, and with certainty and confidence as to the legal consequence of such arrangement.

II. Problem of Rationality

“Autonomy” assumes that couples are acting in rationality when concluding prenuptial agreements, as if they are concluding commercial contracts, although some argues that we properly underestimate the power of love:-

“Persons planning to marry usually assume that they share with their intended spouse a mutual and deep concern for one another's welfare... persons planning to marry usually have about one another can disarm their

capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating commercial agreements.”¹⁸

As Scherpe succinctly puts it, “while there may be nominal autonomy in such situations, the social realities the parties find themselves in mean that there is no actual autonomy to make a free and informed choice.”¹⁹

It is conceded that emotional fog may exist in the signing of prenuptial agreement; yet it ought not be an absolute bar against the enforcement of prenuptial agreements. Various safeguards, including independent legal advice, may partly solve this problem. Lawyers may put frankly to an overly-optimistic spouse-to-be to think about the unthinkable in a marriage contract and therefore giving the parties a much-needed alert.

To be sure, even the best legal advice cannot guarantee a fair or just agreement since advice might be ignored. Yet this problem is not confined to prenuptial agreements but probably in whenever there are long term agreements. The problem of rationality does not of itself defy the merits of prenuptial agreements. A proper attitude is to ask what protective rules should be in place in order to guard against the problems pertained to prenuptial agreements, but not to bury our heads into the sand, sidestepping the issue of enforceability of such agreements.

To conclude, while acknowledging its potential shortcomings, it is contended that prenuptial agreement should be made binding and enforceable. A more urgent issue to be answered is how these agreements should be enforced. That brings us back from the jurisprudential playground to the practical reality of policy implementation.

¹⁸ American Law Institute, *Principles of the Law of Family Dissolution – Analysis and Recommendations* (St. Paul MN, American Law Institute Publishers, 2002), comment c on section 7.02, 1063

¹⁹ Jens M Scherpe, “Marital Agreements and Private Autonomy in Comparative Perspective” in Jens M Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Portland, Oregon : Hart, 2012) [hereinafter “*Marital Agreements*”] at 491.

Part III – Enforcement of Prenuptial Agreements

A. Practical Effect of Legally Binding Prenuptial Agreements

Making prenuptial agreements enforceable means that parties can resolve the financial consequences following their divorce privately without going through the process of ancillary relief.²⁰ In other words, such agreements:-

- (1) could be enforced as contracts; and
- (2) would provide a defence to an application for ancillary relief.

There is no need for court's approval or any form of registration in order to give effect to the prenuptial agreement.

Logic and principle of autonomy dictate that, so long as the contract is valid and consent is genuine (procedural safeguards would be in place so as to ensure its genuineness. This point would be further discussed in Part III(C)), the court should give full effect to all the clauses contained within agreements – the so called “cast-iron agreement” ousting the jurisdiction of court in granting ancillary relief. That said, the Law Commission of England and Wales gave us a reminder:-

“It may be that this ‘cast-iron’ model is the one demanded by the logic of autonomy. But it is almost certainly unacceptable as a matter of public policy, and alien to the culture of our family law”²¹

Hong Kong, which adopts the English common law, has a similar concern.

Society demands, in addition to procedural formality, specific safeguard in the conscionability of outcome. If the contracts turn out to be substantially unfair, it seems to be the case that the court will resume its jurisdiction and regain its power of granting ancillary relief.

This author feels uncomfortable with this idea: fairness is inherently vague – it only re-grants the court its wide discretionary power in the law of ancillary relief, thereby defeating the whole purpose of law reform. At the end of the day, even if the prenuptial contract is valid, the court may refuse to give effect to the agreement, on the basis that the content is *unfair* and re-open the possibility of ancillary relief.

²⁰ Law Commission of England and Wales, Marital Property Agreements (Law Commission Consultation Paper No. 198, London 2011) para 5.10 at 71.

²¹ *Ibid.* para 7.27 at 119.

Outcomes, again, are subject to the “lottery of the different judges”²². Lord Justice Hoffman’s reminder in *Pounds v Pounds* should not be taken lightly.

There is no doubt that every contract – prenuptial agreement is of no exception – is subject to the scrutiny of court. This author suggests to treat prenuptial agreement as courts treat restrictive trade covenants: Courts are allowed to evaluate the substance of the contract with reference to a yardstick of fairness, and may “blue-pencil” unreasonable clauses out from the agreement.²³ Put it in another way, prenuptial agreements are *severable*.

Despite the inclusion of “unfair terms”, the contract does not lose its status as a “cast-iron” agreement. In other words, courts are still forbid to grant ancillary relief, provided that the prenuptial agreements (1) fulfill the procedural requirement in ousting court’s jurisdiction in ancillary relief; (2) fall within the applicable scope delineated by legislation (discussed in Part III (B) below) and (3) are contractually valid under the purview of general contract law, i.e. in the absence of any vitiating factors like mistake, duress, or misrepresentation. The guiding role should be played by *contract* law, but not *family* law, at least in the context where contracts are in perfect harmony with the formality requirements. The notion of substantive fairness would be further addressed in Part III (D).

B. Applicability of Prenuptial Agreements

Whichever view one takes towards marriage, this author endorses with the view taken by the Law Commission of England and Wales that two considerations transcend the autonomy of the parties to the agreement: (1) financial responsibilities owed by parents toward their children and (2) the principle that no one can ask the state to shoulder one’s financial responsibilities for one’s partner.²⁴ As Lord Philips said in *Radmacher v Granatino*:

“A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.”²⁵

²² Resolution, “*Family Agreements: Seeking Certainty to Reduce Disputes – The Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales*”, available at http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf, para 1.5 at 8.

²³ *Francotyp-Postalia Limited v Whitehead* [2011] EWHC 367 (Ch)

²⁴ *Supra* note 20, para 7.10 at 114.

²⁵ [2010] UKSC 42 at [77].

These limitations are consistent with the theory of private autonomy: “being autonomous implies a measure of self-worth in that we must be in a position to trust our decision-making capacities to put ourselves in a position of responsibility.”²⁶ Dereliction of one’s responsibility or simply shifting the burden to third parties are antonyms of self-autonomy.

In effect, the court may interfere and set aside or vary the provisions in a prenuptial agreement if:-

- (1) the agreement made insufficient provision for the children of the family; and/or
- (2) the agreement left, or would in the foreseeable future leave, one or both parties dependent upon the government in circumstances where that could be avoided by the making of an order in ancillary relief.²⁷

By delineating the applicability of prenuptial agreements, the law ensures a basic safety net for parties. The possible return of public control serves as an incentive for negotiating parties to protect the children and provide adequate financial protection for their spouses, in an attempt to avoid ancillary relief proceedings.

C. Procedural Fairness

On the eve of marriage, it is difficult, if not impossible, for couples to exercise their rational faculty when concluding prenuptial agreement. Nonetheless, English contract law recognizes no general principle in controlling unfairness in contracting. Contracts may only be vitiated by doctrines which focus on (1) the reprehensible conduct of the enforcing party, e.g. duress and misrepresentation or (2) defective consent of the weaker party, e.g. mistake and undue influence.²⁸ In the special context of marriage, this author agrees that, in addition to general rules of contract law, extra safeguards are warranted. All these formalities lower the threshold for court intervention and offer greater protection to weaker parties. The over-arching objective is to protect private autonomy.

²⁶ Paul Benson, “*Autonomy and Self-Worth*”, *Journal of Philosophy*, 91 (12): 650 – 668, quoted from “*Autonomy in Moral and Political Philosophy*”, *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/autonomy-moral/#AutPat>

²⁷ *Supra* note 20 para 7.16 at 117.

²⁸ Mindy Chen-Wishart, *Contract Law* (Oxford University Press Inc: New York, 2010) at 364.

A pattern can be identified among different common law jurisdictions: they usually require (1) independent legal advice; (2) financial disclosure and (3) time factors. It is convenient for Hong Kong lawmakers to follow the same practice; though it is submitted that these safeguards ought not to be viewed as hard-and-fast rules, failing any one of them renders the entire contract procedurally flawed and automatically unenforceable; rather the court should adopt a holistic approach in assessing the overall picture of the individual case at hand. It is the cumulative effect that matters. Once again, the bottom line is to ensure that the parties' decisions are formulated in an informed and meaningful sense.

I. Independent Legal Advice

Legal advice is a pre-requisite to the enforceability of prenuptial agreements in various common law jurisdictions. In Australia, section 90G of the Family Law Act 1986 requires parties to receive independent legal advice. The American Law Institute recommends parties to receive advice prior to the conclusion of prenuptial agreement, in order to invoke the rebuttable presumption that consent has been obtained without duress.²⁹

Australian jurisprudence deserves our particular concern. Under section 79 of the Family Law Act 1975 (Cth), it is possible for a binding financial agreement to supplant the default power of the court to make financial and property adjustment orders³⁰ – that is exactly the model that this author proposes. Australian law attaches particular importance to legal advice, and once strictly circumscribed the form and content of the advice to be given (section 90G).

The circumscription is too onerous that some lawyers refuse to act for potential clients and are generally reluctant to give financial advice. In 2009 the relevant provisions were amended such that lawyers would now only have to advise the the effects of the agreement on the right of that party; and the advantages and disadvantages, at the time the advice was provided, to the party of making the agreement.³¹

²⁹ See Principles of the Law of Family Dissolution: Analysis and Recommendations (2002) § 7.04(3)

³⁰ Leong Wai Kum, “*The Law in Singapore on Right and Responsibilities in Marital Agreements*” (December 6, 2010). Singapore Journal of Legal Studies, pp. 107-128, July 2010. Available at SSRN: <http://ssrn.com/abstract=1720824>

³¹ Section 9G(1)(b)

In 2010, the law was further relaxed. Even if the statutory requirements are not strictly satisfied, the court may nevertheless declare that the agreement is binding on the parties where it would be unjust and inequitable not to do so.

This relaxing of legal advice requirement is in line with the approach of the Supreme Court of the United Kingdom in *Radmacher v Granatino*, where only *material* lack of advice was held to be relevant.³² The majority was of the opinion that:-

“Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party’s assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars”.³³

To conclude, independent legal advice is never a complete guarantee; it is at most *a* safeguard, but not *the* safeguard against a party signing a severely disadvantageous agreement.

II. *Disclosure*

Disclosure is another common requirement among common law jurisdictions. As *Radmacher v Granatino* shows, only *material* lack of disclosure would lead to the agreement failing as a whole. Likewise, in Australia, section 90K(1)(a) of the Family Law Act 1975 (Cth) provides that non-disclosure of *material* matters are regarded as fraud and invalidates the agreement.

It is true that full and frank disclosure allows contracting parties to have a better estimate of the income and assets of the other party, and helps formulate a more informed and accurate decision, but unless in an extreme case where one spouse is very rich, in the ordinary course of events, “disclosure would not have changed the decision to sign the contract.”³⁴ Again, disclosure is one of the factors in

³² Jens M Scherpe, “*Marital Agreements*” at 494.

³³ [2010] UKSC 42, [69].

³⁴ Jens M Scherpe, “*Marital Agreements*” at 497.

ascertaining the informed consent of contracting parties, but it is not of itself a single most important, or sufficient, factor.

III. Time factor

Compared with legal advice and disclosure, time factor is even more an opaque idea. It assumes that, under a time constraint, prenuptial agreements may put pressure on the other party, and become “the price which one party may extract for his or her willingness to marry”.³⁵

It is dubious why a time limit may offer useful protection against the pressure. This author therefore agrees with the comment made by Scherpe: “if the concern that led to the proposal of a time limit is related to not being able to obtain legal advice, then the matter really should be dealt with under the requirements of legal advice rather than a time limit.”³⁶

To sum up, the objective of this list of factors is to assist the evaluation of whether the parties concerned were truly exercising their private autonomy. These factors are only guidance, and non-compliance with any one of them does not necessarily determine the failure of the agreement. The circumstances at the time of the conclusion of the agreement has to be viewed in a comprehensive manner. It would be unwise to restrict the ability of spouses to enter into agreements in the very first place.

D. Substantive Fairness

As explained in Part III (A), unconscionably of dealing, but not the outcome, is the basis of setting aside a contract. “Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.”³⁷ How to accommodate contract law, whose focus is exclusively on conduct, with paternalistic family law, which strives for a “fair” result under the circumstances, poses as the final and the most formidable challenge in the enforcement of prenuptial agreement.

³⁵ MacLeod v MacLeod [2008] UKPC 64, [36].

³⁶ Jens M Scherpe, “*Marital Agreements*” at 499.

³⁷ Hart v O’Connor (1985) at 1018.

The issue can be approached in this way: is court adjustment of prenuptial agreement justified? If so, how should the agreement be adjusted? A useful reference may be drawn to long-term commercial contract.

Imagine a manufacturer, contemplating long-term energy needs, enters a thirty-year oil supply contract. The contract price is initially satisfactory to both parties. Yet due to unexpected warfare in Iraq, oil price rockets. The supplier proposes a price adjustment. The manufacturer refuses the offer and the supplier repudiates the contract.

How can the courts response in these circumstances? They can (1) hold the supplier to the contract by granting the manufacturer specific performance; (2) propose out-of-court settlement and (3) adjust the contract by modifying the terms of the agreement. Traditional contract law frowns upon option (3) for various reasons: courts may threaten freedom of contract, produce uncertainty, and deter planning; or courts lack sufficient information and expertise to determine precisely when the adjustment.

Prenuptial agreement are certainly not commercial contracts, but they do share some similarities: both of them are regulating an unknown future. A change of circumstances, in case of energy supply – Iraqi war; in case of marriage – unexpected pregnancy, may render the operation of agreements unfair.

Indeed, Professor Hillman argues that there is an implicit “duty to adjust” in such long-term contracting.” The supplier reasonably expects the buyer to adjust in case of a serious disruption.³⁸ In other words, judicial adjustment is simply giving effect to parties’ reasonable expectation in order to maintain a harmonious relationship and avoid disputes and litigations.

But how should the court reshape the contract to reflect what the parties should have agreed to ex post or what they would have agreed to ex ante? Reminded that the justification for court adjustment, as this author argues, is to preserve the parties’ purposes. Reasonable expectation is the appropriate yardstick; and in the context of marriage, the expectation seems to be the protection of needs and compensation.

This begs the question again: if we ring-fence needs and compensation, then the court would have wide discretion in supplementing the agreement where it fell

³⁸ Robert A. Hillman, “*Court Adjustment of Long-term Contracts: An Analysis under Modern Contract Law*” (1987) 1 Duke Law Journal 1 at 3.

short of this requirement. “The model is therefore vulnerable to criticism that there would be too much potential for litigation and insufficient certainty.”³⁹ Duplicating this requirement would also render the applicability test in Part III (B) largely redundant.

Though intellectually inelegant, this author suggests a more down-to-earth solution: a mandatory sunset clause. This sunset provision can end the effectiveness of some or all of the agreement’s provisions once the marriage lasted a certain number of years, say, 5 years or once children were born.⁴⁰ By making the “duty to adjust” express and clear, the sunset clause represents a compromise between private contracting and public notion of fairness. As the agreement is constantly reviewed, it can adapt to a varying life course. The potential *unfairness*, due to changing circumstances, of holding a prenuptial agreement binding can be minimized; and even in extraordinary situation where the court is compelled to exercise its discretion of contract adjustment, the computation of needs and compensation is now restricted to a specific time interval. This confinement prevents the courts from creating a new contract for the parties. The tension between contract law and family law is, to a large extent, relieved.

Part IV – Conclusion

To sum up, this author makes the following submissions:-

- (1) Prenuptial agreement should be made legally binding and enforceable, provided that it fulfils additional procedural safeguards.
- (2) Those procedural safeguards include:
 - a. independent legal advice; and
 - b. financial disclosure,

though they are not absolute bars and non-compliance does not automatically void the contract.
- (3) The court may set aside or vary the provisions in a prenuptial agreement if:-

³⁹ *Supra* note 20, para 7.53.

⁴⁰ See Section 21J of New Zealand’s Property (Relationships) Act 1976.

- a. the agreement made insufficient provision for the children of the family; and/or
 - b. the agreement left one or the spouses dependent upon government.
- (4) A mandatory sunset clause is recommended. A prenuptial agreement would cease to take effect if:-
- a. a child is born; and/or
 - b. 5 years have been passed starting from the date of marriage.
- (5) The court may adjust the contract on the basis of protection of needs and compensation, but this discretionary power should be exercised with extra caution and used scarcely.