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How Ante-Nuptial Agreements Perpetuate Male Dominance: A Critical Feminist Analysis of *Radmacher v Granatino* [2010] UKSC 42

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Abstract

The Supreme Court's decision in *Radmacher v Granatino* dealt with the enforceability of ante-nuptial agreements in the United Kingdom. In doing so, it was held that such agreements were to be given weight if they were freely entered into by each party, with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. In wake of this decision, this article presents a critical feminist analysis detailing the ways in which the newfound enforceability of ante-nuptial agreements can be viewed as a tool permitting heterosexual men to legally reinforce dominance over their female spouses. Ante-nuptial agreements by their very nature deprive non-moneyed spouses from the financial entitlements that they would otherwise be owed upon divorce. Therefore, by only benefitting the wealthier spouse, ante-nuptial agreements disproportionately harm women because of society's unequal distribution of resources along gender lines. Indeed, this fact serves to undermine the *Radmacher* enforceability criteria, as such women are faced with a 'dilemma of choice' in which they do not have the true capacity to 'freely enter' into an agreement that harms them. Similarly, ante-nuptial agreements are inherently unfair, which therefore undermines the Supreme Court's caveat of 'fairness' when giving weight to these

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agreements. Upon further inspection, even where the courts do intervene with the administration of ancillary relief, the non-financial contributions that many women make within their marriage are difficult, if not impossible, to quantify. When viewing such agreements through the lens of heterosexual relationships, it becomes clear that the women who adhere closely to heteronormative ideals are more likely to be perceived as being more deserving of ancillary relief. Therefore, it can be witnessed that ante-nuptial agreements perpetuate the dominant position that men hold over women sociologically, by allowing them to retain their wealth. This thus renders their non-moneyed wives financially submissive and vulnerable to poverty should they wish to divorce.

Keywords: ante-nuptial agreements, family law, critical feminism, ancillary relief, marriage

I. Introduction

Radmacher v Granatino[1] is a landmark case which introduced the presumption that, following prescribed considerations, ante-nuptial agreements are to be given effect in court. In making such a decision, the Supreme Court placed a strong focus on upholding individual autonomy on the caveat that it must be fair to hold the parties to their agreement.[2] In critically analysing this decision, this article argues that the conception of both autonomy and fairness in this context have a disproportionate and detrimental effect on women. In presenting this argument, this article takes place in four main parts. Part II will provide a brief explanation of the facts of the case, whilst contextualising this by laying out the legal landscape of ancillary relief. Part III will explain that the *de jure* equality that Liberal Feminism purports to have achieved regarding women's earning capacities has not resulted in *de facto* equality. As a result, this part argues that women are more likely to be the non-moneyed spouse in heterosexual relationships, meaning that they are the most likely to suffer as a result of ante-nuptial agreements. Part IV of this article will discuss the concept of autonomy. In doing so, this article will utilise Radical Feminist perspectives to argue that men can exercise autonomy more freely than women because of the power dynamics associated with gender, and that autonomy is a 'Masculinist' concept. Finally, Part V will argue that despite the court holding that only fair ante-nuptial agreements will be given weight, the way in which the court conceives fairness does not adequately protect women. This claim is supported by Marxist Feminist discussions about the unpaid work that women do in the home,

1 [2010] UKSC 42.
2 ibid.

alongside questioning whether the court's conceptions of fairness are shaped by heteronormative ideals.

II. Background Information

A. The legal landscape of ancillary relief

The Matrimonial Causes Act 1973 provides judges with discretion over how financial relief is to be afforded to divorcing parties. Additionally, *White* introduced the "yardstick of equality", in which the courts were encouraged to make financial allocations based on needs, compensation, and sharing.[3] This change therefore constituted a great improvement for those fulfilling the 'homemaker' role within a marriage, as this case introduced the presumption that this work is to be compensated. However, in response to the greater financial divisions that primarily women received under such presumptions, the prevalence of nuptial agreements began to rise. This is reflective of Smart's critique when women resort to the law to improve their situation; the law is counter-used to re-establish traditional rights.[4] This is highlighted by the contrast between the pre-*White* case of *Cocksedge*, in which nuptial agreements were found to be void,[5] and the post-*White* case of *Crossley*, in which they were described as "a factor of magnetic importance".[6] In amongst the increasing prevalence of ante-nuptial agreements, the court in *Radmacher* conclusively held that nuptial agreements, both ante and post, were capable of decisive weight.[7] This Supreme Court decision therefore facilitates the use of ante-nuptial agreements as a mean through which the ancillary equality established in *White* can be side-stepped.

B. The facts of *Radmacher*

The parties in *Radmacher* had been married for eight years and had two children. Ms Radmacher proposed that Mr Granatino signed an ante-nuptial agreement to prove that he was marrying her for her love, and to protect her inherited wealth. The agreement was written in German, a language not spoken by Mr Granatino, and had the effect of preventing either party from making a claim on the other in the event of divorce. Ms Radmacher failed to officially disclose the exact value of her assets to her fiancé, nor was Mr Granatino provided with a

3 *White v White* [2000] UKHL 54.
4 Carol Smart, *Feminism and the Power of Law* (1st edn, Routledge 1989) 138.
5 *Cocksedge v Cocksedge* [1844] 14 Sim 244.
6 *Crossley v Crossley* [2007] EWCA Civ 1491 para 15.
7 *Radmacher* (n 1).

verbatim English translation of the agreement. Although he was provided with the opportunity to do so, he did not receive independent legal advice.

In 1998, the Home Office laid out proposed safeguards to assess when a nuptial agreement is to be set aside.[8] Though such safeguards were never implemented, at first instance Baron J noted that the agreement in *Radmacher* did not comply with these safeguards because the parties had children, Mr Granatino did not receive independent legal advice, and there was no full disclosure of assets. Because of this, she concluded that the agreement was "manifestly unfair", and instead based her decision of ancillary distribution upon the yardstick of equality. Following Ms Radmacher's appeal, the Court of Appeal overturned this decision and instead the award that they provided to Mr Granatino was only enough to "provide for his role as a father rather than a former husband".[9] Upon a further appeal, this decision was upheld by the Supreme Court, where Lord Phillips held that nuptial agreements are given effect by the courts where they are "freely entered into by each party with full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".[10]

Thompson has noted that this decision subsequently denotes how the court had "a new respect for autonomy"[11] when giving weight to ante-nuptial agreements. However, this article argues that this decision failed to adequately assess the detrimental impact that this will disproportionately have on women, and how the court's conception of 'fairness' as a protective safeguard does not remedy this.

III. Why Women Are Disproportionately Affected by Ante-Nuptial Agreements

This article acknowledges the inherent heteronormativity in focussing a critique of ante-nuptial agreements on heterosexual married couples who conform to the stereotypically gendered roles of the 'breadwinner' and 'homemaker'. Furthermore, it must be acknowledged that in this case the parties did not conform to such roles, with Ms Radmacher being the moneyed spouse. In defending a focus upon women who fulfil this stereotypical role, this article notes that these women are the most vulnerable to the harms that ante-nuptial agreements present. This was a consideration adopted by Lady Hale in *Radmacher*, where in her dissent, she stated

8 Home Office, *Supporting Families: A Consultation Document* (Stationery Office 1998).

9 *Radmacher v Granatino* [2009] EWCA Civ 649 para 50.

10 *Radmacher* (n 1) para 129.

11 Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Bloomsbury 2015) 13.

that "the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision which she – it is usually although by no means invariably she – would otherwise be entitled".[12] This argument is supported by Brod, who notes that in protecting the wealth and earnings of a prospective spouse from being distributed to the other, ante-nuptial agreements generally disadvantage women.[13] It follows that as a class, women earn less than men; a disparity which can be seen even in the wages of the most highly paid women.[14] Therefore, such agreements magnify society's unequal distribution of resources along gender lines.

Brod's claims are situated within a critique of the Liberal Feminist aims of equality of the sexes. Liberal Feminists place emphasis on autonomy and egalitarianism, whilst arguing that gender equality is to be achieved by legal and political reform. In the context of the gender pay gap, they claim that Affirmative Action is to be used to aid women in achieving high paying roles and that doing so will, in turn, close the earning gap between men and women. It follows that this aim is achieved through the implementation of anti-discrimination laws. However, this has not resulted in substantive equality. Brod notes that the ratio in *Radmacher* was formed as a result of the "distorted or idealised perception by lawmakers that women have achieved de facto equality by men".[15]

In rebuttal to this, Brod presents a Radical Feminist argument by noting that instead of Liberalist ideals, the court should focus upon a woman's 'de jure equality', as she claims that women are still structurally discriminated against in the workplace.[16] This is evidenced by the fact that within most service sector organisations, women are at the bottom of the wage hierarchy.[17] Furthermore, Fineman notes that because of the expectations that women are to be caretakers for children,[18] they do not comply with the image of the 'ideal worker' who has no family demands other than earning a living.[19] Brod's work is reflective of Fineman's contentions that when laws are constructed in a gender neutral way, they do not recognise the individual vulnerabilities that women face, and they, therefore, have a harmful impact on women in the context of their socioeconomic status.[20]

In accordance with this, George has branded the decision in *Radmacher* to be "an explicit judicial endorsement of gender discrimination".[21] This claim is reflected

[12] *Radmacher* (n 1) para 137.

[13] Gail Frommer Brod, 'Premarital Agreements and Gender Justice' (1994) 6 Yale JLF 229-295.

[14] ibid.

[15] ibid 253.

[16] ibid.

[17] Joan Acker, 'Inequality Regimes. Gender, Class, and Race in Organisations' (2006) 20 Gender and Society 441-464.

[18] Martha A. Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies,* (Routledge 1995).

[19] Acker (n 17) 449.

[20] Martha A. Fineman, *The Illusion of Equality* (University of Chicago Press 1991).

[21] Rob George, *Ideas and Debates in Family Law* (Hart Publishing 2012) 102.

by the studies of ante-nuptial agreements in Australia which found that, because of the weaker economic position that women have to men, in thirty-three out of thirty-nine reported cases an economically subordinate wife was seeking to avoid her agreement.[22] Fineman has argued that where women fulfilling a caregiving role earn less money than their male partners, a "derivative dependency" arises in which women become economically dependent upon a wage-earning partner.[23] As a result, where women have succumbed to agreeing to ante-nuptial agreements, they may find themselves "preserving emotionally disastrous unions"[24] for fear of the weak economic position that they will find themselves in upon divorce. Therefore, ante-nuptial agreements can be seen as a patriarchal tool whereby the preclusion of the yardstick of equality provides the economically superior husband with legally enforceable financial domination. Furthermore, at a more conceptual level, Thomas notes that "protecting these assets by [ante-nuptial agreements] effectively protects the structural inequalities that lead to these gender differences", and that therefore it can be claimed that the decision made by the Supreme Court in this case is not only detrimental to the economically vulnerable women coerced into these agreements, but also to women as a whole.[25]

IV. Can Non-Moneyed Women 'Freely Enter' Into Ante-Nuptial Agreements?

In upholding the ante-nuptial agreement in *Radmacher*, Lord Phillips held that the court should show a "respect for individual autonomy", and that it would be "paternalistic and patronising to override their agreement simply on the basis that the court knows best".[26] This notion is a further reflection of the court's Libertarian values, a perspective that this article argues enables male dominance within this private sphere. This article argues that women are not free to exercise autonomy in the same way that men can, meaning that they cannot freely enter into ante-nuptial agreements.

A. Feminine experiences of automony

This article argues that a Liberal conception of autonomy is detrimental to women because of the structural issues which prevent them from freely exercising

[22] Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16 Intl JL, Policy and the Family 127-140.

[23] Fineman (n 20) 161-164.

[24] Candice A. Garcia-Rodrigo, 'An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage' (2009) 11 JL and Family Studies 121.

[25] Sharon Thompson, 'In Defence of the "Gold-Digger"' (2016) 6 Onati Socio-Legal Series 1231.

[26] *Radmacher* (n 1) para 78.

autonomy in the way that men can. In her dissent, Lady Hale questions whether ante-nuptial agreements should in fact be viewed as an agreement which "benefits the strong at the expense of the weak".[27] Thompson has noted that the division of power between the moneyed spouse, who is asking for the ante-nuptial agreement, and the non-moneyed spouse will always be unequal.[28] This is because ante-nuptial agreements commonly only reflect the autonomy of the moneyed spouse, who is intending on protecting their property, by avoiding the default system of ancillary relief upon divorce.[29] In furthering the notions of strong vs weak that occur within ante-nuptial agreements, MacKinnon has argued that gender is a hierarchy in which male is the privileged term and female is the oppressed term.[30] Therefore this suggests that the limits upon a female non-moneyed spouse's autonomy are twofold; as both her financial position and her gender place her in a weaker contractual position than her partner.

This argument is supported by Pateman who claims that women are controlled by men through contracts, as these provide them with a means through which they can "transform their natural right over women into the security of civil patriarchal rights".[31] Furthermore, because of their subordination, women are incapable of consenting to any institution that is traditionally male dominated.[32] Subsequently, it can be claimed that women are thus incapable of consenting to marriage, as this is a patriarchal institution which reinforces male domination.[33] Historically, married women were seen as the property of their husband and this historical oppression is something that can still be witnessed in modern times.[34] It follows that ante-nuptial agreements can be perceived as a male-dominated, patriarchal institution which cultivates the financial subordination of women. Furthermore, if we are to accept that women cannot consent to patriarchal institutions, they therefore cannot 'freely enter' into an ante-nuptial agreement.

In discussing how women exercise autonomy, Hadfield presents "the dilemma of choice" in which she questions the true extent to which women are able to exercise their autonomy when faced with choices that are harmful to them.[35] In utilising the work of Trebilcock, Hadfield argues that consent and autonomy are

[27] ibid para 135.
[28] Thompson (n 11).
[29] ibid.
[30] Catharine MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7(3) Signs 515-544.
[31] Carole Pateman, *The Sexual Contract* (Polity Press 1988) 6.
[32] Brod (n 13).
[33] Garcia-Rodrigo (n 24).
[34] ibid.
[35] Gillian K. Hadfield, 'The Dilemma of Choice: A Feminist Perceptive on the Limits of Freedom of Contract' (1995) 33 (2) Osgoode Hall LJ 337, 351.

to be seen as two separate values and, unless she is presented with normatively acceptable options from which to choose, individuals are not able to truly express autonomy.[36] It can be claimed that in reconsidering Fineman's earlier contentions of the financial dependence that women can have on wage earners,[37] some women may find that marriage is a necessity for securing financial stability. Therefore, where an ante-nuptial agreement is a prerequisite to enter into a financially secure marriage, financially insecure women are in a position in which they do not have the capacity to make an autonomous decision.

B. Autonomy as a 'masculinist' concept

The final criticism of the Liberalist emphasis on autonomy is that autonomy is a 'Masculinist' concept, and therefore the emphasis that is placed upon it furthers the androcentric nature of ante-nuptial agreements.[38] In *Radmacher*, Lord Phillips opined that "we must assume that each party […] is able to look after him or herself".[39] This article argues that in doing so, Lord Phillips' position is incorporating the Liberal Feminist ideals that both men and women are individual and autonomous beings. Such a stance however comes with the caveat that women are only provided with this autonomy when they are similarly situated with men. Therefore, this Liberal Feminist perspective can be critiqued, in that rather than creating an equal legal system, it merely includes women within a male oriented legal system.[40] This article therefore argues that the principle of autonomy which is being upheld in *Radmacher* is reflective of masculine attributes, thus rendering it inaccessible to women.

In making such a claim, this article utilises the work of Naffine, who argues that the law in itself is 'Masculinist'.[41] In this 'Masculinist' system, supposed 'universal' legal reasoning is in fact reflective of the way in which men act and think, which Naffine has labelled as "the male culture of law".[42] As a consequence of this, men are put at an advantage within this system, and women are left to adapt and replicate values which are detached from themselves. This argument is echoed by MacKinnon, who similarly argues that male perspectives are accepted as the universal standard.[43] In labelling the principle of autonomy as 'universal', its masculine nature is therefore being masked, thus preventing the inequality that

36 ibid.
37 Fineman (n 20).
38 Thompson (n 11).
39 *Radmacher* (n 1) para 42.
40 Garcia-Rodrigo (n 24).
41 Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin 1992) 6.
42 ibid.
43 Catherine MacKinnon, *Feminism Unmodified Discourses on Life and Law* (HUP 1987).

it incorporates from being acknowledged. MacKinnon notes that autonomy, as it is currently perceived in the law, does not reflect feminine realities, which are traditionally rooted in connectedness and the nurturance of dependency.[44] Such claims are further supported by Gilligan, whose work argues that female ethics are more "relational" and based upon an "ethic of care".[45] These ethics are therefore in direct contrast with those of the "most perfectly autonomous man", who is "perfectly isolated".[46]

Of course, not every man will employ these masculine values, which is why Naffine conceptualised "the ideal man of law".[47] Naffine argues that the ideal, hegemonic man of law is a white, middle class, freestanding autonomous creature who is "rationally self-interested and hard-headed".[48] It therefore follows that the law is constructed as a monopoly to benefit this man.[49] This argument can be supported by *Radmacher*, in which Lord Phillips held that the parties' autonomous decisions are to be upheld unless they were the result of "unconscionable conduct, such as undue pressure".[50] In making this statement, Lord Phillips clearly adopts a contractual understanding of autonomy, a concept which therefore inherently reflects the freely autonomous and rational 'man of law'. Lady Hale's dissenting judgement criticises this decision by noting that the choices made surrounding ante-nuptial agreements are not made in a vacuum, and therefore factors which influence these decisions may not necessarily render the agreement unconscionable in a contractual sense.[51] It follows that on the surface, there are many non-gendered factors which can impede upon a person's ability to freely enter into an ante-nuptial agreement. Furthermore, Thompson notes how when such agreements are made prior to marriage, the parties suffer from a cognitive limitation in which their autonomous decisions are unlikely to reflect their best interests, because of their optimistic ideals of the longevity of the relationship.[52] Therefore, in believing that the agreement will never take effect, the non-moneyed spouse may fail to adequately consider the consequences of their actions. Furthermore, as ante-nuptial agreements are often used as a test of a spouse's intentions, the non-moneyed spouse does not have equal bargaining power to their partner. This is exacerbated

[44] ibid.
[45] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (HUP 1982) 21.
[46] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale JLF 12.
[47] Naffine (n 41) 119.
[48] ibid 164.
[49] ibid.
[50] *Radmacher* (n 1) para 71.
[51] ibid.
[52] Thompson (n 11).

by the idea that negotiating the terms of the agreement may be perceived as proof that they are not marrying for love. This can be witnessed in *Radmacher* where Ms Radmacher claimed that the wedding would not go ahead had Mr Granatino not signed the ante-nuptial agreement.[53] In failing to consider this as a limitation on Mr Granatino's autonomy, it becomes clear that despite claiming to have a 'respect for individual autonomy', the threshold for what constitutes autonomy in this instance is low and therefore fails to compensate for the feminine realities which can impede upon an individual's ability to make autonomous decisions.[54]

V. Is the 'Fairness' in *Radmacher* Truly Fair?

Once it has been established that the ante-nuptial agreement has been freely entered into, Lord Phillips holds that it is to be given weight "unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".[55] In presenting the notion that only fair ante-nuptial agreements are to be given weight, it appears as though the court retains the ability to counteract the possible disadvantages that women experience from entering into these agreements. Ante-nuptial agreements however are inherently unfair, as their effect is to deprive the non-moneyed spouse of money that they would otherwise be owed. Therefore, because every ante-nuptial agreement will be unfair, the standard for fairness set in *Radmacher* is too low to sufficiently protect women. Furthermore, even when questions of fairness are considered by the court, women are not adequately compensated by such provisions.

A. Discussions of fairness in *Radmacher*

In his judgement, Lord Phillips notes that ante-nuptial agreements are capable of altering what is to be conceived as fair, and that the substantive equality approach adopted in *White* is something which should be weighed against the ante-nuptial agreement.[56] In doing so, Lord Phillips reconceptualises fairness and holds that even ante-nuptial agreements which preclude the financial compensation of the 'homemaker's' work can be held to be fair.[57] However, this caveat of fairness can occasionally be used to derogate from the ante-nuptial agreement in order to compensate a 'homemaker'. The explanation for when this can occur is limited, as Lord Phillips notes that "fairness will depend on the facts of the particular case,

[53] *Radmacher* (n 1).
[54] ibid para 78.
[55] ibid para 123.
[56] ibid.
[57] ibid.

and it would not be desirable to put down rules that would fetter the flexibility of the court".[58] In assessing what the court is to consider as an 'unfair agreement' in terms of compensation, the only guidance given by the court in *Radmacher* is "if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth", it will likely be "unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned".[59] Despite this statement appearing to provide a remedy for the issues posed by ante-nuptial agreements to fair compensation, it is difficult to assess how this will be done in practice. Even where spouses have not entered into an ante-nuptial agreement, the awards provided to non-moneyed spouses still do not uphold a 50/50 split, as the largest award to date of £300 million only reflected a 36% share.[60] It follows therefore that even when purporting to consider 'fairness', it is unlikely that this will be achieved through balancing an already dissatisfactory approach, with an agreement whose sole purpose is financial deprivation.

B. A Marxist interpretation of fairness

It follows that, in accordance with Marxist Feminist arguments, even in instances where the court was to exercise its discretion to derogate from the ante-nuptial agreement, the likely concession afforded to the 'homemaker' is likely to be insufficient. Marxist Feminists place an emphasis upon the unpaid labour that women undertake in the home. In particular, theorists such as Benson have noted that this work ultimately results in benefitting capitalism, as by caring for children and cooking meals, wives are supporting their wage-earning husbands to perform as ideal workers within the workforce.[61] In turn, Marxist Feminism calls for women to be financially compensated for this work, and further for the definition of 'work' to be expanded to include the unpaid efforts of women within the home.[62] This is a perspective which is somewhat reflected in Lord Phillips' comment on how fairness is to be perceived. However, Marxist Feminists call for structural reform in which women are paid a wage for this work, rather than mere compensation upon divorce.[63] In absence of this structural reform, the courts are unable to sufficiently compensate women for this work because of the difficulty which comes alongside

[58] ibid para 76.
[59] ibid para 81.
[60] *Cooper-Hohn v Hohn* [2014] EWHC 4122.
[61] Margret Benson, 'The Political Economy of Women's Liberation' (1969) 21(4) Monthly Review 13-27.
[62] Angela P. Harris, 'Theorising Class, Gender, and the Law: Three Approaches' (2009) 72 LC Problems 37.
[63] Nancy Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22 Political Theory 591-618.

quantifying the monetary value which is to be attributed to this work. As a result of this, the court has an "unprincipled and chaotic approach" [64] to compensation.

This is an issue which has been discussed within the work of Starnes, who notes how "mother's myths" lead people to believe that mothering "just happens" and therefore the amount of work that goes into this role is not adequately recognised.[65] When discussing the dangers that such myths pose, Starnes notes that they distort primarily male judicial assessments of compensation.[66] In doing so, she cautions how the myth that "mothering is free" leads to judges undervaluing the true cost of this role, and as a result many mothers are left in need upon divorce.[67] Additionally, it must be noted that remaining unemployed for the duration of a marriage causes a depreciation in a wife's earning capacity.[68] This is a factor which neither Lord Phillips in his vague discussion of fairness, nor Marxist Feminist theory provides a sufficient remedy to. Even if Lord Phillips were to explicitly state that this is a factor to be considered, Starnes notes the impossibility of determining this depreciation, as there is rarely a comparative baseline against which to measure a woman's best alternative opportunity had she not become a mother.[69] This article claims that the egalitarian visions of equality that Liberal Feminism has promoted has exacerbated this issue. Starnes warns of how judges are "seduced by egalitarian visions of housewives retraining and entering the job market" upon divorce, envisioning them as being "freed" of household duties to now begin new lives.[70] In reality however, these "new lives" are ones accompanied with limited property and little support.[71] Therefore, this article holds that in purporting to consider the 'fairness' of ante-nuptial agreements, the harms that women suffer from these agreements fail to be remedied because of a lack of judicial understanding of the lived realities of these women.

The Liberal Feminist ideal of equality of status presents the idea that both parents share dual responsibilities for child-care, work full-time, and both share equal leisure time.[72] Liberal Feminism calls for gender-based assumptions of parenthood to be eliminated and instead for both men and women to participate

64 Charlotte Bendall, 'Some More 'Equal' than Others: Heteronormativity in the Post-White Era of Financial Remedies' (2014) 36 J of Social Welfare and Family L 260.

65 Cynthia Lee Starnes, 'Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership' (2006) 13 Wm. & Mary J. Women & L 203.

66 ibid.

67 ibid 215.

68 ibid.

69 ibid.

70 ibid 220.

71 ibid.

72 ibid.

equally in child-care.[73] These ideals are in fact detrimental to women. This has been highlighted by Starnes, who notes that when assessing fair ancillary relief, judges "confuse equality of status with identity of contribution".[74] Therefore, in doing so, it is unlikely that compensation is to be afforded for the disproportionate amount of housework that the wife has endured. The disproportionate contributions that women make within the home have been discussed by Fineman, who notes that women still bear disproportionate responsibility for child-care.[75] This claim can be supported by findings that adult women in households with children under six years old spent at least 2.7 hours a day on primary child-care, as compared to the 1.2 hours that men undertake in similar households.[76] Similarly, David Demo and Alan Ackok found that even women who work full-time still assume 70-80% of all housework.[77] As a result, the disproportionate work undertaken by women in the home leads to what Fraser has called "time poverty".[78] This results in women having less leisure time than men to pursue other interests or to earn money, and this in turn further limits their earning capacity in comparison to men.[79]

Lord Phillips further holds that an ante-nuptial agreement could be set aside if one party will be left in a "predicament of real need".[80] As a result of the financial dependencies that 'homemaking' women form on their husbands however, many women are likely to be left in a 'needy' position upon divorce. This can be reinforced by studies which showed that over "40% of divorcing households headed by women saw their incomes immediately cut by more than one half".[81] Furthermore, women who participate in the workforce are even less likely to have their contributions within the home recognised by a court. This issue has been discussed by Marxist Feminists, who claim that women often endure a 'double workday' in which they return home to complete household chores. In attributing compensation for housework, the High Court, in *Cooper-Hohn v Hohn*, highlighted how this second shift is unlikely to be remedied, by holding that this was not a 'special' contribution worthy of sufficient compensation.[82] It follows that this is a stance which is similarly reflected by Lord Phillips in *Radmacher,* as his statement of what constitutes as "fair" paints a picture of a "devoted" housewife, thus implying

[73] Susan Boyd, *Motherhood and Law: Constructing and Challenging Normativity* (Aldershot 2013) 267-283.
[74] Starnes (n 65) 231.
[75] Fineman (n 20).
[76] Starnes (n 65) 209.
[77] ibid 210.
[78] Fraser (n 63) 599.
[79] ibid.
[80] *Radmacher* (n 1) para 81.
[81] Brod (n 13) 229.
[82] *Cooper-Hohn* (n 60).

that those who do not conform to this image of devotion are not afforded with compensation for their work.[83]

Indeed, the court's considerations of fairness in this instance are constructed too narrowly and will therefore preclude the allocation of compensation for the non-financial contributions which many women make during a marriage. It was held in *Radmacher* that there was no compensation factor to be considered, as it was decided that Mr Granatino's career change was not "motivated by the demands of his family".[84] This reinforces how, unless a party can show that they performed an exclusively 'homemaking' role within the marriage, the question of fairness and compensation is unlikely to be considered. This narrow construction has been further critiqued by Bendall, who argues that this is a reflection of the Supreme Court's heteronormative values, as she notes that the court cannot perceive Mr Granatino as anything other than the male 'breadwinner'.[85]

C. Are conceptions of fairness shaped by adherence to heteronormative values?

Bendall argues that perhaps one of the reasons why the court in *Radmacher* disregarded a full analysis of the fairness of the agreement was because they could not perceive Mr Granatino as being vulnerable due to heteronormativity.[86] Berland and Warner define heteronormativity as the way in which "institutions, structures of understanding, and practical orientations make heterosexuality seem not only coherent […] but also privileged".[87] In privileging heterosexuality, it follows that men and women are expected to behave in accordance with masculine and feminine values. Therefore, there is a heteronormative assumption that within marriage the husband will be a 'breadwinner' whilst the wife acts as a "homemaker"; an assumption which is not complied with in *Radmacher*. It must be noted that this article has framed its critique in accordance with these assumptions because of the way in which these roles harm women through gendered power dynamics and financial arrangements. Furthermore, this article argues that ante-nuptial agreements exacerbate these harms. Non-compliance with these gendered roles however can be similarly detrimental to the non-moneyed spouse.

Bendall argues that vulnerability is a typically feminine attribute and because of this, the courts were unable to perceive Mr Granatino as vulnerable, despite his

[83] *Radmacher* (n 1) para 81.
[84] ibid para 121.
[85] Bendall (n 64) 247.
[86] ibid.
[87] Lauren Berlant and Warner Michael, 'Sex in Public' (1998) 24 Crit Inq 548.

lack of legal advice and inability to read the ante-nuptial agreement.[88] In supporting this claim, Bendall asserts that when emphasising Mr Granatino's earning capacity, Lord Phillips describes him as "extremely able", and subsequently punishes him for failing to comply with the masculine role of the 'breadwinner' by pursuing a career in academia.[89] It must be noted that Lady Hale attempts to present a counter narrative of this subject in her dissent by claiming that this may have been a decision which benefitted his family.[90] Furthermore she notes that "happy parents make for happy children" and that even if not directly motivated by family needs, Mr Granatino's career change is likely to have had indirect benefits.[91] In accordance with this counter-narrative, Bendall similarly poses the question of how such a career decision would be interpreted if it were made by Ms Radmacher because of the association between women and child-care.[92] Therefore, Bendall concludes that even in this instance where the courts are presented with a relationship model which does not 'fit' within the heterosexual matrix, the court still applies the heteronormative ideas of the gendered division of labour to this marriage.[93] This therefore reinforces the idea that the way in which fairness is conceived in this case suggests that ante-nuptial agreements are only likely to be considered 'unfair' when both parties conform to these heteronormative assumptions.

This persuasive argument can be coupled with Lord Phillips' use of the word "devoted" when giving an example of a housewife being deserving of compensation.[94] In doing so, Lord Phillips frames his assessment of deservingness upon a wife's compliance with the heteronormative ideal of the feminine homemaker. Of course, by failing to give further explanation of how fairness is to be understood, we can only go so far in inferring what he meant by using this word. This interpretation, however, can be supported by Boyd, who argues that women are penalised for failing to conform to normative ideals of motherhood.[95] A "normative mother" is one which behaves "selflessly" for their children within the context of a heterosexual, nuclear family.[96] In accordance with this picture, this article contends that a similar image is conjured when describing a homemaker as "devout". Therefore, this article argues that just as how mothers are constructed as 'good' or 'bad' in accordance to how closely they conform to the notions of a

88 Bendall (n 64).
89 ibid referring to Lord Phillips in *Radmacher* (n 1) para 119.
90 *Radmacher* (n 1).
91 ibid para 194.
92 Bendall (n 64).
93 ibid.
94 *Radmacher* (n 1) para 81.
95 Boyd (n 73).
96 ibid 270.

'normative mother',[97] the construction of ante-nuptial agreements as being fair or unfair in *Radmacher* is similarly decided in accordance with conformity to this normative.

VI. Conclusion

In conclusion, ante-nuptial agreements can only ever be construed as a patriarchal tool in which male dominance is translated into financial dominance, whilst depriving women of the financial awards they are entitled to. It follows that regardless of the fictitious judicial considerations of 'fairness' in *Radmacher*,[98] the persistence of gendered inequalities both economically and domestically prevent any ante-nuptial agreement from ever being "fair". As this article has demonstrated throughout, the inherent unfairness associated with these agreements primarily harm non-moneyed women, though as discussed in part V, these problems can span wider than this category. This makes them a danger to all financially subordinate spouses who do not fulfil heteronormative pre-conceptions, thus reinforcing this article's cautions of the dangers that ante-nuptial agreements pose.

However, where thirty-nine per cent of marriages entered into today end in divorce,[99] it is rational for spouses to wish to agree upon a fair divorce arrangement prior to marriage. Additionally, the UK Government continually promotes the use of mediation by divorcing couples, which could undoubtedly be supported by the utilisation of ante-nuptial agreements in pre-determining their divorce settlement. It follows therefore that further discussion ought to be had to consider the possible avenues that couples can take to address their pre-marital desires to control their divorce outcomes, whilst preventing the further exploitation of the financial vulnerabilities of the non-moneyed spouse. However, it must be noted that this article's call for further discussion is accompanied by a caution voiced by Lady Hale in Radmacher that "it is difficult, if not impossible, to predict at the outset what the circumstances will be when a marriage ends".[100]

[97] Fineman (n 20).
[98] *Radmacher* (n 1).
[99] Office for National Statistics, *Divorces in England and Wales: 2018* (UK Government 2019).
[100] *Radmacher* (n 1) para 176.