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When Women's Rights are *Not* Human Rights – the Non- Performativity of the Human Rights of Victims of Domestic Abuse within English Family Law

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A large proportion of child contact cases in England take place within a context of domestic abuse and significant risks to victims and their childrenq associated with post separation contact. The legal response has largely been inadequate and the potential impact of human rights law by the family courts has yet to be fully explored. This paper analyses an exploratory empirical research project undertaken in 2017/2018 with Women's Aid England and 72 victims of domestic abuse regarding their experiences of human rights law in the family courts. The results, theorised through the lens of performativity and against the context of international human rights law, reveal a high level of *non-* performativity with respect to the human rights of the participants. The paper concludes with recommendations and the implications the analysis holds for feminist organisations if they are to fully realise the human rights of the victims of domestic abuse.

INTRODUCTION

There are a number of definitions of domestic abuse in use across a variety of legal and policy contexts. Before embarking on any analysis concerning domestic abuse it is therefore important to set out which definition is to be employed. In England and Wales, there is currently no statutory definition of domestic violence,[1] however, there is a non-statutory cross-government definition. It is:

> any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can

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1 Although the Government has said that it will include one in the forthcoming Domestic Violence and Abuse Bill to be introduced in the 2017-2019 session. See HM Government, *Transforming the Response to Domestic Abuse*, *Government Consultation* at https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation-sign-version/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf (unless otherwise stated, all URLs were last accessed 4 January 2019). Unlike the existing definition it would cover the concept of 'economic abuse' (including access to basic resources like food and clothing) rather than simply financial abuse.

encompass but is not limited to the following types of abuse: psychological; physical; sexual; financial; emotional.[2]

Controlling behaviour is further defined as 'a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.' Whereas coercive behaviour is 'an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.'

It is this definition that will be utilised throughout this paper as it can be treated as broadly synonymous with the abuse explored in the research. Although it is difficult to obtain reliable prevalence data on domestic abuse[3] in 2018, official statistics recorded that 26 per cent of women had experienced some form of domestic abuse since the age of 16[4] and on average two women are killed by their partner or ex-partner every week in England and Wales.[5] In addition, research has also demonstrated that a large proportion (at least 50 per cent)[6] of child contact cases[7] in England and Wales take place within a context of allegations of domestic abuse. When placed against evidence of the significant risks to victims and their children associated with post separation contact, including an alarming number of homicides,[8] the need for the legal system to make the safest decision when considering such applications becomes

2 The definition was extended by the Home Office in March 2013 to include young people aged 16 to 17 and coercive or controlling behavior. See Home Office, *Cross-Government definition of domestic violence: a consultation – summary of responses*, September 2012, 19 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/157800/domestic-violence-definition.pdf.

3 For example, ONS adjusts crime data to reduce the risk of a small number of cases involving multiple attacks skewing overall crime trends, so the number of times that any person can be counted as a victim of crime is capped at five. Professor Sylvia Walby, Lancaster University, conducted research which indicated that, when the cap is removed, violence against women by intimate partners rises by 70% and violence against women by acquaintances by 100%. See https://theconversation.com/official-statistics-mask-extent-of-domestic-violence-in-the-uk-43087.

4 Office for National Statistics, *Domestic abuse: findings from the Crime Survey for England and Wales: year ending March 2017* (2018).

5 Office for National Statistics, *Homicide in England and Wales: year ending March 2017* (2018).

6 See, for example, Cafcass & Women's Aid, *Allegations of domestic abuse in child contact cases* (2017) at https://www.cafcass.gov.uk/2017/07/25/cafcass-womens-aid-collaborate-domestic-abuse-research/?highlight=womens%20aid; M. Harding and A. Newnham, *How do County Courts share the care of children between parents? Full report* Nuffield Foundation, 2015 at http://www.nuffieldfoundation.org/sites/default/files/files/Full%20report.pdf.

7 Termed 'child arrangements cases' in England and Wales and defined as orders 'regulating arrangements relating to . . . with whom [and when] a child is to live, spend time or otherwise have contact . . . with any person' (Children Act 1989, s 8). The Children Act 1989, s 1 provides that, when a court is considering making an order, the child's welfare must be the paramount consideration. Courts should also apply, in contested applications, the 'welfare checklist' set out in the Children Act 1989, s 1(3) which requires courts to 'have regard in particular' to a range of factors including the child's wishes and feelings, their characteristics and needs, the capability of the parents in meeting those needs, and any harm which the child has suffered or is at risk of suffering.

8 See H. Saunders, *Twenty-nine Child Homicides: Lessons still to be learnt on domestic violence and child protection* (Bristol: Women's Aid Federation of England, 2004); Women's Aid, *Nineteen Child*

apparent. Unfortunately, as the first section of this paper will demonstrate, the legal response to this issue has largely been inadequate. Furthermore, viewing the issue from the perspective of human rights has much to offer but it is clear that the impact of the Human Rights Act 1998 (HRA) for victims in the family courts has yet to be fully explored within the reported case law. This is surprising, given the significant developments in human rights law and practice at the regional and international level with regard to victims of domestic abuse. In order to understand why, this paper will, in the second section, analyse the results of an exploratory empirical research project undertaken in conjunction with Women's Aid England with victims of domestic abuse regarding their experiences and perceptions of the use of human rights in the family courts and provides a rare opportunity, absent to date from the literature, to hear their voices, as intended recipients of a number of developments in international human rights law on violence against women (VAW). The methodology employed in the research project will be fully outlined before moving on to analyse the findings of the project through the lens of performativity; a concept which enables us to consider the political and social discursive forces that construct and normalise legal practice and to consider the lived experiences of the use of human rights of the women victims in the family courts. Performativity can thus provide an illuminating and useful method to assess the extent to which the regional and international recognition of the human rights of victims within this context have been translated from paper to reality. The final section will conclude with recommendations for future research and reform.

THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS: WOMEN VICTIMS' EXPERIENCES IN APPLICATIONS FOR CONTACT IN THE FAMILY COURTS IN ENGLAND AND WALES

The long term effects of domestic abuse on victims and their children are significant and well documented.[9] As outlined above, a large proportion (at least

Homicides: What must change so children are put first in child contact arrangements and the family courts (Bristol: Women's Aid, 2016) and Women's Aid, *Child First: a call to action one year on* (Bristol: Women's Aid, 2017). In 2016 Women's Aid also launched its Child First campaign 'to stop avoidable child deaths as a result of unsafe child contact with dangerous perpetrators of domestic violence.' These concerns were investigated by the All Party Parliamentary Group on Domestic Violence after which they made further recommendations for reform. All-Party Parliamentary Group on Domestic Violence, *Domestic Abuse, Child Contact and the Family Courts* (2016) at https://www.womensaid.org.uk/appg-reports/.

9 A series of meta-analyses of research studies examining the effects of children's experience of domestic violence have indicated that exposure is related to a range of subsequent emotional, behavioural and social problems. See, amongst others, J. Devaney, 'Research Review: The Impact of Domestic Violence on Children' 12 (2015) *Irish Probation Journal* 79. In adult victims there is an increased risk of depression and suicide, see, amongst others: K.M. Devries and others, 'Intimate Partner Violence and Incident Depressive Symptoms and Suicide Attempts: A Systematic Review of Longitudinal Studies' (2013) *PLOS Medicine* and K. Alejo, 'Long-Term Physical and Mental Health Effects of Domestic Violence' (2014) 2 *Themis: Research Journal of Justice Studies and Forensic Science* 1, Article 5.

50 per cent) of child contact cases[10] in England and Wales take place within a context of allegations of domestic abuse.[11] When placed against evidence of the significant risks to victims and their children associated with post separation contact, including an alarming number of homicides,[12] the need for the legal system to make the safest decision when considering such applications from perpetrators becomes apparent. Unfortunately, the legal response to this issue has largely been inadequate; and has recently been termed 'a cycle of failure.'[13] Following research in the mid 1990's[14] which demonstrated a worrying focus on maintaining contact with the non-resident parent at the expense of the minimisation of domestic violence and the safety of victims within the family courts, 'good practice' guidelines for the judiciary were published in 2001.[15] Guidance was also issued in that year by the Court of Appeal,[16] which included the requirement to hold a fact-finding hearing on disputed allegations of domestic violence to ensure an adequate risk assessment for the safety of the child and resident parent before, during and after contact. Unfortunately, subsequent research indicated that this guidance was either largely ignored or inconsistently applied largely due to courts and professionals continuing to prioritise contact over children's and resident parents' safety. Moreover, even in cases of proven domestic violence, applications for direct contact were very rarely refused; the most common final outcomes were for direct, unsupervised contact.[17]

10 n 7 above.
11 *ibid*.
12 n 9 above.
13 See A. Barnett, F. Kaganas and R. Hunter, 'Introduction, Contact and Domestic Abuse' (2018) 40 *Special Issue of the Journal of Social Welfare and Family Law* 401.
14 M. Hester and R. Radford, *Domestic violence and child contact arrangements in England and Denmark* (Bristol: The Policy Press, 1996). See also, L. Anderson, *Contact between Children and Violent Fathers* (London: Rights of Women, 1997); A. Barnett, 'Contact and domestic violence: the ideological divide' in J. Bridgeman and D. Monk (eds), *Feminist perspectives on family law* (London: Cavendish, 2000) 129 and F. Kaganas and C. Piper, 'Divorce and domestic violence' in S. Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Aldershot: Ashgate, 1999) 183.
15 Lord Chancellor's Advisory Board on Family Law, Children Act Sub-Committee, *Guidelines for good practice on parental contact in cases where there is domestic violence*, (London: TSO, 2001).
16 In the combined appeals of *Re L, V, M, H (Contact: Domestic Violence*) [2000] 4 All ER 609 the court drew on a report by expert child psychologists, Drs Sturge and Glaser, and acknowledged that domestic violence involves a 'significant failure in parenting.' The guidelines issued for courts and professionals in contact cases where domestic violence was alleged were based on those developed by the Lord Chancellor's Advisory Board on Family Law, Children Act Sub-Committee *ibid*.
17 See R. Aris and C. Harrison, *Domestic violence and the supplemental information form* (London: Ministry of Justice; DCA & DfES, 2004); *The Government's response to the Children Act Sub-Committee ('CASC') Report: 'Making contact work'* (London, DCA & DfES, 2004); HM Inspectorate of Court Administration, *Domestic violence, safety and family proceedings: Thematic review of the handling of domestic violence issues by the Children and Family Court Advisory and Support Service (CAFCASS) and the administration of family courts in Her Majesty's Courts Service (HMCS)* (London, HMICA, 2005); C. Humphreys and C. Harrison, 'Squaring the circle – contact and domestic violence' (2003) 33 *Family Law* 419; J. Hunt and A. Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (London: Ministry of Justice, 2008); A. Perry and B. Rainey, 'Supervised, supported and indirect contact orders: Research findings' (2007) 21 *International Journal of Law, Policy and the Family* 21; L. Trinder, J. Connolly, J. Kellet and C. Thoday, 'Families in contact disputes: A profile' (2004) 34 *Family Law* 877; L. Trinder, A. Firth and C. Jenks, *Opening closed doors: A micro analytic investigation of dispute resolution in child contact cases*. ESRC End of Award Report, RES-000-22-2646 (Swindon: ESRC, 2009).

Women's Aid's subsequent report on the homicides of 29 children in England and Wales between 1994 and 2004 as a result of contact arrangements[18] galvanised further calls for a change in culture on contact in the family courts.[19] In response, Practice Direction PD12J was issued by the President of the Family Division in May 2008 which established the framework to be followed by courts and professionals in child arrangements cases where allegations of domestic abuse are raised. However, subsequent research[20] indicated that it too was not being implemented as intended; women's accounts of domestic abuse were treated with suspicion, the risk and welfare assessment provisions of PD12J were not applied properly or at all which resulted in direct contact being invariably ordered and refusals of contact orders continuing to decline.[21] The change in culture that had been called for, to focus on the safety of the resident parent and child, had thus not been achieved. As a result, the practice direction was further revised in 2009[22] in 2014[23] and following the publication in 2016 of an updated report from Women's Aid, on child homicides resulting from contact[24] along with a sustained campaign for change, a further revised[25] and current version of PD12J was issued which reinforces the mandatory nature of many of its provisions, clarifies its broad concern with all forms of domestic abuse, and requires courts to record in their orders certain information demonstrating that its provisions have been followed.

It remains to be seen if this new version of PD12J bucks the trend and improves the situation. However, it is clear from the research to date that there is a

18 Saunders, n 8 above.

19 The Family Justice Council (FJC) issued a report which called for a 'cultural change ... with a move away from 'contact is always the appropriate way forward' to 'contact that is safe and positive for the child is always the appropriate way forward', at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Reportoncontact.pdf. The FJC recommended that a Practice Direction should be issued embodying the CASC and *Re L* guidelines and its own recommendations. See J. Craig, 'Everybody's business: applications for contact orders by consent' (2007) 37 *Family Law* 26.

20 See Barnett, n 14 above; A. Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) 26 *Child and Family Law Quarterly* 439; M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking up the pieces: Domestic violence and child contact* Rights of Women, 2012 at http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking_Up_the_Pieces_Report-2012l.pdf; R. Hunter and A. Barnett, *Fact-finding hearings and the implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* Family Justice Council, 2013, see Kent Academic Repository at https://kar.kent.ac.uk/35678/1/FFH%20report%20January%202013.pdf.

21 *ibid*.

22 Subsequently incorporated into the Family Procedure Rules 2010 as Practice Direction 12J (PD12J).

23 PD12J was revised in April 2014 to bring its provisions and terminology into line with other amendments to child arrangements proceedings that came into effect at that time. The amendments included inserting a new, broader definition of 'domestic violence' focusing on coercive control, implementing some of Hunter and Barnett's recommendations (see n 20 above) in order to improve protection for children and victim parents and attempting to make the process more user-friendly for litigants in person (LIPs).

24 n 9 above.

25 In November 2016, Mr Justice Cobb, having reviewed PD12J at the request of the President of the Family Division, produced a report with proposed revisions to PD12J, at https://www.judiciary.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf.

clear and persistent pattern of domestic abuse being minimised by family courts and professionals dealing with post-separation arrangements for children, leading to the exposure of victims and their children to unsafe and potentially life endangering contact arrangements. This is largely due to a 'contact at all costs' culture where the welfare principle[26] has been interpreted to mean a strong presumption towards contact with both parents and a perception that contact should not be given up on unless there are particularly compelling reasons.[27] This cultural shift towards contact at all costs is without doubt due in some part to the success of the father's rights movement in the UK[28] and internationally,[29] which claims that fathers are disadvantaged by a family law system that favours mothers in child contact disputes and that, either in not awarding fathers sufficient contact or in failing to enforce contact orders, courts fail to operate in the best interests of the child[30] and therefore contribute to societal breakdown.[31] What is particularly striking is the employment of human rights/rights narratives in doing so. Although some father's rights groups employ a child centred approach, recognising that children have a right to a relationship with both parents[32] others are clear on their focus; the Fathers4Justice webpage, for example, leads with the statement, 'having a father is a human right.' The subtitle to this header does go on to refer to the human rights of children 'to a father' but does not discuss the human rights of children more broadly to have a safe and healthy relationship with both parents. In any case, however, as the term itself suggests the *father's rights* movement has undoubtedly been successful in harnessing the language of rights to ensure that their claims are heard and to a certain extent are aided in this by considerable support from powerful sections of the media.[33] This is in direct contrast to the women's movement in England,

26 Found in the Children Act 1989, s 1: When a court is dealing with proceedings relating to a child's upbringing or the administration of the child's property (or the application of any income arising from it for the child's welfare), the Children Act 1989 dictates that the court's paramount consideration shall lie with the welfare of the child.

27 See H. Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267 and *Re S (Contact: Promoting Relationship with Absent Parent* [2004] EWCA Civ 18, [2004] 1 FLR 1279; *Re M (Children)* [2009] EWCA Civ 1216, [2010] 1 FLR 1089; *Re J-M (A Child)* [2014] EWCA Civ 434, *Re J-M (Contact Proceedings: Balance of Harm)* [2015] 1 FLR 838; *Re T (A Child: Suspension of Contact: Section 91(14) CA 1989)* [2015] EWCA Civ 71.

28 The advent of Fathers 4 Justice in 2003 brought the cause into the mainstream media for the first time and new legislation was brought in the United Kingdom as a result in 2005. Another leading group Families Need Fathers is recognised as a source of help by The Department of Constitutional Affairs and regularly provides evidence to parliamentary sub-committees.

29 On the international development of such movements, see R. Collier and S. Sheldon, 'Fathers' Rights, Fatherhood and Law Reform International Perspective' in R. Collier and S. Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart, 2006) 1.

30 M. O'Connor, G. Burch and M. Cox, *A Blueprint for Family Law in the 21st Century* Fathers 4 Justice Ltd, 2005 at http://www.fathers-4-justice.org.

31 See, for example, the website of Fathers4Justice at https://www.fathers-4-justice.org/our-campaign/our-mission/.

32 See Families need Fathers at https://fnf.org.uk/about-us-2/aims-and-objectives.

33 See, as examples, articles from the Daily Mail at http://www.dailymail.co.uk/femail/article-2678528/The-vengeful-mothers-tear-fathers-childrens-lives-Britains-parenting-guru-one-unspoken-scandals-age.html and http://www.dailymail.co.uk/femail/article-3051155/The-fathers-children-computer-screen-heartbreaking-sign-times-divorced-dads-relying-video-calls-contact-children-miles-away.html.

which, unlike its relative success at the international level (detailed below), has struggled to employ not just human rights discourse in their public campaigning and lobbying but a rights narrative *in general* to advance the rights of women in this area;[34] there is no 'mother's rights movement' within the public discourse. The recent Women's Aid campaign on child contact and domestic abuse is a case in point, entitled 'Child First – safe child contact, saves lives.' Although the campaign has been very successful, the focus of the public campaign was, nonetheless, the safety of children; the separate and equally concerning need to ensure the safety of their mothers and the role of human rights in achieving these aims were ancillary and background concerns. This mirrored concerns expressed on the role of women's groups in the lead up to the Children and Adoption Act 2006, which introduced more powers to enforce and regulate contact orders,[35] that 'women's groups concentrated far more on the harm that domestic violence causes children than on the harm that domestic violence causes their mothers.'[36]

One particular focus of the father's rights movement has been the campaign for a 50/50 legal presumption of shared parenting, which although rejected by the UK government[37] has nonetheless resulted in an amendment to the Children Act 1989[38] in favour of a presumption as to the involvement of both parents where it serves the best interests of the child; 'involvement' remains undefined.[39] However, in contrast to claims made by some in the father's rights movement in support of the amendment, the reality is that in practice it is extremely rare that the courts will order no contact[40] and in stark contrast to

34 On women's groups' (non-) use of human rights discourse, see the Special issue of *Feminist Legal Studies* on 'Encountering Human Rights' (2008) 16 *Feminist Legal Studies* 1. There are of course exceptions, such as Rights of Women whose focus is strongly rights based but this organisation is concerned with general issues concerning women rather than the rights of mothers.

35 The Children and Adoption Act 2006 introduced two new provisions in the Children Act 1989 to allow the courts to enforce a child contact order: firstly, where a contact order is breached without a reasonable excuse, the court may make an enforcement order, ordering the person in breach to undertake unpaid work. Secondly, where financial loss is incurred as a result of a contact order being breached (for example, the cost of a holiday) the court may order financial compensation to be paid.

36 H. Reece, 'UK Women's Groups' Child Contact Campaign: So Long as It is Safe' (2006) 18 *Child and Family Law Quarterly* 538. However, her critique of the women's movement related to its focus on domestic violence and contact to the exclusion of autonomy based feminist critiques of child contact and did not consider the use of human rights.

37 The Family Justice Review in 2011 recommended against *any* presumption – see Family Justice Review, *Family Justice Review Final Report* (London: Ministry of Justice, Department for Education, Welsh Government, 2011) 23.

38 Contrary to this recommendation, in April 2014 the government amended the Children Act 1989, s 1 to include a presumption that 'unless the contrary is shown ... involvement of [a] parent in the life of the child concerned will further the child's welfare' so long as that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm.

39 T. Haux, S. McKay and R. Cain, 'Shared Care after Separation in the United Kingdom: Limited Data, Limited Practice?' (2017) 55 *Family Court Review* 572.

40 0.3 per cent of cases in 2011 – see Ministry of Justice, *Judicial and Court Statistics 2011* (London: Ministry of Justice, 2012). There does not appear to be any more publicly available data on this since then.

the prevalence of domestic abuse in such cases outlined above. Furthermore, mothers who oppose or seek to restrict contact on the basis of abuse are constructed as 'implacably hostile'[41] and/or it is claimed that their children are suffering from 'parental alienation' despite concerns raised by the scientific community as to its legitimacy as a scientific construct, a syndrome or as a mental disorder.[42]

Cuts to the availability of legal aid have also had a significant impact on victims and their ability to defend such applications.[43] The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) removed most private family law issues from publicly funded legal advice. Legal Aid is thus only available for private family law cases for those who can provide the necessary evidence that they have experienced or are at risk of experiencing domestic violence.[44] However, much of the available research reports that the evidence requirements have impaired access to legal aid, to varying degrees, for victims of domestic violence in private family proceedings.[45] As a result, not all domestic abuse victims are able to obtain legal aid for family law proceedings[46] and will either have to defend themselves as litigants in person or, if they are not confident enough to do so,[47] feel obliged to allow contact at the risk of their own safety and that of their children. Moreover, victims of domestic abuse can also be subjected to further trauma and abuse by the perpetrator of abuse if he/she exercises their right to cross examination as a litigant in person in family law

41 See J. Wallbank, 'Castigating mothers: The judicial response to "willful" women in disputes over paternal contact in English law' (1998) 20 *The Journal of Social Welfare & Family Law* 357; J. Wallbank, 'Getting tough on mothers: regulating contact and residence' (2007) 15 *Feminist Legal Studies* 189; C. Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence' (2008) 14 *Violence Against Women* 381; V. Elizabeth, N. Gave and J. Tolmie, 'The Gendered Dynamics of Power in Disputes Over the Post separation Care of Children' (2012) 18 *Violence Against Women* 459.

42 See W. O'Donohue, L.T. Benuto and N. Bennett, 'Examining the validity of parental alienation syndrome' (2016) 13 *Journal of Child Custody* 113.

43 See, amongst others, S. Choudhry and J. Herring, 'A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse' (2017) 39 *Journal of Social Welfare and Family Law* 152.

44 See Regulation 33 of LASPO, which lists the types of evidence that the Legal Aid Agency will accept to grant legal aid in these circumstances. The regulations changed on 8 January 2018. A broader list of acceptable types of evidence has been introduced with the intended purpose of widening access for victims. This happened as a result of a successful judicial review (on appeal) brought by Rights of Women in 2016 with the help of the Public Law Project, which argued that the previous regulations were too restrictive. See *The Queen (on the application of Rights of Women)* v *The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91.

45 See F. Syposz, 'Research Investigating the Domestic Violence Evidential Requirements for Legal Aid in in Private Family Disputes' Ministry of Justice, 2017 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domestic-violence-legal-aid-research-report.pdf.

46 See the survey conducted by Rights of Women, 'Evidencing Domestic Violence, Nearly 3 years On' December 2015 and the three earlier surveys on the same issue conducted in 2012, 2013 and 2014 at http://rightsofwomen.org.uk/policy-and-research/research-and-reports/.

47 For a victim of domestic abuse, the prospect of defending oneself in court proceedings will of course be even more daunting and traumatic, particularly when having to face the former perpetrator who may well be defending himself for the same reasons.

proceedings.[48] This is despite an overwhelming consensus[49] that this position breaches the Article 6 and 8 HRA rights of the survivor and as a result is not permitted in criminal law proceedings.[50]

A further complicating factor in terms of monitoring the experiences of victims of domestic abuse and their children in the family courts is the general principle that all family proceedings are to be heard in private, save where specific rules otherwise dictate, or the court orders.[51] This applies particularly in the case of proceedings involving children, in which case it will be a contempt of court to breach that privacy.[52]A narrow range of non-parties, such as accredited press representatives and others whom the court permits can attend court,[53] but they must still recognise the anonymity and confidentiality rules that apply.[54] This has led to some tension between the principle of open justice on the one hand and the need to ensure the privacy of children and vulnerable family members. This tension has been further exacerbated by criticism in some sections of the media of 'secret' family courts and a perceived lack of their accountability, fuelled in part by the father's rights movement.[55] As a result, the President of the Family Division issued guidance in 2014,[56] on the issue of transparency, which made clear that certain types of judgments should normally be made publicly available,[57] including where a serious contested fact finding in public and private law has taken place. This would clearly include findings on domestic violence within Children Act proceedings. However, research following its implementation found not only a patchy understanding and adherence to the guidance across courts but also that the rate of publication was falling. Furthermore, that the demands of the publication process may make

48 A Women's Aid report (following a survey in 2015) found that 25% of victims of domestic abuse who had recently been through the Family Courts had been cross-examined by their former partner/abuser during family court proceedings. See https://www.womensaid.org.uk/research-and-publications/.

49 See All-Party Parliamentary Group on Domestic Violence report, n 8 above and also the Review of PD12J to the Family Division by Mr Justice Cobb, n 25 above.

50 The Youth Justice and Criminal Evidence Act 1999, sections 29, 34, 35, 36 and 38 and the Criminal Procedure Rules 2015, Part 23 provide for an alleged perpetrator to obtain representation at the expense of public funds to avoid this situation. In 2017 the Ministry of Justice included a provision in the Prison and Courts Bill to ban such cross-examination, however, the Bill fell due to the general election. It is now included in the upcoming Domestic Violence and Abuse Bill 2018.

51 See the Family Proceedings Rules 2010, rule 27.10.

52 By, for example, telling the press names of children or parties, see the Administration of Justice Act 1960, s 12(1). Social workers or expert witnesses can be named save where the court orders otherwise because it might, for example, enable the identification of a child. See for example *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142 *per* Munby J; *Re J (a minor)* [2016] EWHC 2595 *per* Hayden J).

53 Family Proceeding Rules 2010, rule 27.11(2)).

54 Under the Administration of Justice Act 1960, s 12(1).

55 For example, N. Watt, 'Family courts must open up to avoid outrageous injustices, warns UKIP' *The Guardian* 26 October 2015; C. Booker 'New family court guidelines won't improve a rotten system for children' *Sunday Telegraph* 27 July 2013.

56 Sir James Munby, *Transparency in the Family Courts: Publication of Judgments Practice Guidance* 16 January 2014, [2014] 1 WLR 230; [2014] 1 FLR 733, Fam D and at https://www.judiciary.gov.uk/publications/transparency-in-the-family-courts/.

57 Via the British and Irish Legal Information Institute on an anonymised basis.

it unsustainable in the current resource-starved environment.[58] Other research has demonstrated that the creation of unnecessary public intrusion into the private and family lives of children caused by greater public transparency may not be in the best interests of the children involved.[59] Achieving full public transparency in family proceedings may thus be unrealistic and/or undesirable; as a result the large majority of Children Act proceedings will continue to be conducted in a largely private arena.

Despite all the above, the research to date has largely ignored the relevance of the human rights framework to the specific issue of contact and domestic abuse.[60] This is surprising given that a number of the rights of victims under the European Convention on Human Rights (ECHR) will be engaged in such proceedings and the HRA enables victims to directly claim their rights within domestic private law proceedings. As public authorities, courts are required under Section 6 of the HRA to act in a manner that is compatible with ECHR rights and under Section 3 of the HRA, to interpret all legislation 'so far as is possible to do so' in a manner which is compatible with the ECHR.[61] These obligations will apply even when an action is a private one between two individuals.[62] As a result, judges must give effect to the Children Act 1989 - the key piece of legislation governing family law - in a way that is compatible with the rights contained in the HRA. This is particularly relevant when the court is faced with victims of domestic abuse and their children who may be at risk of further abuse as a result of contact and whose particularly vulnerable position demands, at the very least, the recognition and protection of their human rights under the ECHR.

The European Court of Human Rights (ECtHR) has firmly established that domestic abuse falls within the scope of a number of ECHR rights[63] and

58 See J. Doughty, A. Twaite and P. McGraith, '*Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people* Cardiff University, 2017 at http://orca.cf.ac.uk/99141/.

59 See J. Brophy and C. Roberts, 'Openness and transparency in family courts: – other jurisdictions and messages for reforms in England and Wales, Briefing Paper No 5' University of Oxford, Department of Social Policy and Social Work, 2009; J. Brophy, *Media access to family courts: views of children and young people* (London: Office of the Children's Commissioner for Children – England, 2010); J. Brophy, ' Media access to family courts – "Next Steps" – Views of Children and Young People' National Youth Advocacy Service and the Association of Lawyers for Children Report, 2014 at https://www.alc.org.uk/news_and_press/news_items/nyas_alc_report_media_access_to_family_courts_next_steps_views_of_children.

60 Exceptions include S. Choudhry, 'Contact, Domestic Violence and the ECHR' in M. Freeman (ed), *Law and Childhood Studies*, *Current Legal Issues* vol 14 (Oxford: OUP, 2012) ch 20 and S. Choudhry and J. Herring, *European Family Law and Human Rights*, (Oxford: Hart Publishing, 2010).

61 If it is not possible to do so then a declaration of incompatibility may be issued under the HRA, s 4.

62 The so-called horizontal effect of the HRA.

63 Article 2 (the right to life), Article 3 (the right to freedom from torture, inhuman and degrading treatment), Article 8 (the right to private and family life) and Article 14 (the right to freedom from discrimination). For a full analysis of the relevant case law and its applicability to English law see: Choudhry and Herring, n 60 above, ch 3 and Choudhry, n 60 above.

developed a number of key principles within the context of domestic abuse. As part of its positive obligations under the ECHR, the state has a responsibility to ensure that the ECHR rights of victims of domestic abuse are protected within both criminal and civil proceedings. This includes the need for state authorities to undertake effective investigations and risk assessments in order to protect victims from domestic abuse and to strive to protect children's dignity, which, in practice, requires an adequate legal framework to protect children against domestic violence.[64] A failure on the part of the state to do so may constitute a breach of the Article 3 rights of a victim of abuse and, in cases involving the loss of life, their Article 2 rights.[65] Moreover, with respect to the absolute rights (such as Article 2 and 3), there are no circumstances in which it is permissible for the state to infringe those rights. In other words, the state cannot justify its failure to protect a survivor and her child's Article 2 or 3 rights in a contact case by referring to the perpetrator's right to respect for family life. Furthermore, due to the fact that domestic abuse disproportionately affects women, a state's failure, even if unintentional, to protect women against domestic violence will breach women's rights to equal protection of the law under Article 14, in conjunction with claims made under Article 2 and 3.[66] Of particular note is the observation that general and discriminatory judicial passivity on the issue is also capable of creating a climate that is conducive to domestic abuse.[67]

Viewing the issue from the perspective of human rights therefore has much to offer but it is clear that the impact of the HRA for victims is yet to be fully explored both within the literature and in practice. Although claims have been made to the right to family life under Article 8 in applications for contact, Articles 2, 3 and 14 are yet to be raised in the reported case law within the particular context of applications for child contact where domestic abuse is a factor, suggesting that human rights are yet to be 'brought home'[68] within this context. To explore this further a small-scale empirical research project was undertaken in conjunction with Women's Aid England during 2017 and 2018. The aim of the project was to provide an analysis of whether and how a human rights framework (the HRA) is being employed in relation to women victims of domestic abuse's experiences of the English family courts in relation to applications for child contact by perpetrators of domestic abuse.

64 *DMD* v *Romania* (2017) ECHR 815.

65 See *ES And Others* v *SLOVAKIA* App no 8227/04 15 September 2009 and *Eremia and Others* v *the Republic of Moldova* App no 3564/11 28 May 2013.

66 *Opuz* v *Turkey* [2009] ECHR 33401/02 at [198]. See also *Eremia and Others* v *the Republic of Moldova ibid*; *Halime Kılıç* v *Turkey* App no 63034/11 28 June 2016 and *Bălşan* v *Romania* App no 49645/09 23 May 2017.

67 *Opuz* v *Turkey ibid* at [198].

68 This phrase emanated from the title of the then Labour Government's White Paper on the policy behind the Human Rights Act 1998: *Rights Brought Home: The Human Rights Bill* CM 3782 (1997), presented to Parliament by the Secretary of State for the Home Department.

THE RESEARCH PROJECT – DESCRIPTION, METHODOLOGY AND OUTCOMES

Methodology

The research collected empirical evidence of victims' experiences of the family courts in the context of contact cases using quantitative and qualitative methods. Quantitative methods included firstly, an online survey, disseminated though Women's Aid's Victims' Forum and network of member domestic abuse services. The survey had twenty questions, and was analysed using the online Survey Monkey analysis options. The survey was sent out to 180 Women's Aid member services who were asked to forward it on to victims they were working with who had had experience of the family courts.[69] 63 women participated in the survey. Secondly, a short follow up online survey, focusing on human rights, was sent to those respondents from the first survey who had indicated that human rights were raised in their child contact cases; 14 women completed this survey. Qualitative methods included firstly, two focus group discussions with victims, in which emerging findings from the survey data were discussed in greater depth; nine women participated in the focus groups. Secondly, individual telephone interviews with victims, in which emerging findings from the survey data were discussed in greater depth were undertaken; nine women participated in the interviews. In total, 72 women living in England were involved in the research. Some of these women took part in both the surveys and a focus group discussion or interview, and some only took part in one activity. In order to take part, participants needed to be women victims of domestic abuse who had experiences of the family courts in the last five years, and whose cases were complete. Only women participants were invited in recognition of the fact that women are more affected by domestic abuse; both in terms of its occurrence and its severity.[70]

The limitations of the research project are also acknowledged; data and evidence collected as part of this research comes from a self-selecting group of women and have not been corroborated. Research findings therefore relate to the experiences of these women only; it is not claimed that they represent the experiences of all victims of domestic abuse in the family courts. In addition, the geographical spread of participants could not be guaranteed as the survey was disseminated via the Women's Aid Survivor Forum and Women's Aid member domestic abuse services. As a result, there could be differences between judges or local court cultures that we were not able to capture. It should also be acknowledged that there have been a number of changes to the family justice

69 Due to the number of members it was not possible to record how many victims received the survey, only the number that responded.

70 Office for National Statistics, *Statistical bulletin - Domestic abuse in England and Wales: year ending March 2017* (2017); A. Myhill, 'Measuring coercive control: what can we learn from national population surveys?' (2015) 21 *Violence Against Women* 355; M. Hester, 'Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records' (2013) 10 *European Journal of Criminology* 623-; R.P. Dobash and R.E Dobash, 'Women's violence to men in intimate relationships. Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324.

system over the last five years such as the relaxation/broadening of the eligibility criteria for legal aid, and the change to practice directions on domestic abuse and contact, such as PD12J in 2017 (detailed above) that our participants' experience may not reflect and which may not represent current practice. The primary aim of the research, however, was to find out more about women domestic abuse victims' experiences of the family courts and to look at these experiences through the lens of human rights. As such, we were interested to hear not only about negative experiences and examples where human rights had not been recognised, but also about cases where domestic abuse allegations were addressed well by the family courts, and the human rights of domestic abuse victims and their children were protected and upheld. Unfortunately, the research did not uncover many examples of good practice. This may be because the women in the sample elected to take part because their experiences of child contact proceedings were poor, and they wanted to help improve the situation for others in similar positions. Finally, the exploratory nature of our study and its small sample size is acknowledged and as a result the findings emerging from our study prompt further research and investigation on a wider scale.

Experiences of abuse

All respondents to the online survey, and all participants in focus groups and interviews were women victims of domestic abuse. In the vast majority, the other party in the proceedings was the child's father and the alleged perpetrator of domestic abuse. 90 per cent of survey respondents said that the perpetrator in their case was a male former intimate partner. Three per cent of survey respondents said that the perpetrator in their case was a female former intimate partner. All focus group and interview participants said that the perpetrator in their case was a male former intimate partner. In terms of the type of abuse experienced, 67 per cent had experienced physical abuse, 57 per cent sexual abuse, 95 per cent emotional abuse, 83 per cent financial abuse and 89 per cent had experienced coercive and controlling behaviour.

Raising the abuse and fact-finding hearings

There was a high level of reporting to public authorities, with 82 per cent of survey respondents having reported the abuse to the police. 71 per cent of survey respondents[71] raised domestic abuse as part of their family court case, 20 per cent did not.[72] However, open-ended responses revealed that the reasons why they did not raise the abuse were because they had been advised by their legal representatives not to mention it, or they had reported the abuse but

71 55 answered this question and eight skipped it.
72 The remainder of survey participants were not sure if the abuse had been formally raised during the case.

Cafcass[73] did not include it in their reports. Women also chose this option if they had tried to raise the abuse but had been told by the court it was irrelevant.

Of those survey respondents where domestic abuse *was* raised as part of their case, 71 per cent said they had raised it themselves, 59 per cent said their legal representative raised the abuse, and 37 per cent said the Cafcass[74] Family Court Adviser had raised it.[75] Fact finding hearings should take place in circumstances where domestic abuse is alleged and is relevant to the question of which orders to make or it is disputed by one of the parties,[76] however, the research, echoing previous studies,[77] indicated that this does not always happen. In the online survey domestic abuse was *not* formally raised in 17 per cent of our survey respondents' cases. Only 29 per cent of survey respondents said a fact-finding hearing had been held as part of their case. A much larger proportion of our sample – 48 per cent of survey respondents – said that no fact finding had been ordered in their case, and 11 per cent of respondents were not sure. This indicates that fact finding hearings were not ordered in a significant number of cases involving domestic abuse allegations which, given the requirements of the practice direction, is surprising and demonstrates the patchy implementation of PDJ12. The reasons for not doing so were seldom explained; one interview participant told us:

> That's what I don't get, why didn't I have a fact-finding hearing? I asked my solicitor – why aren't they doing fact finding? [He answered] 'Oh well they don't always do it''. And I said 'but we need to prove what he's doing to me and I've got the proof, I can prove it' (focus group participant).

73 Cafcass represents children in family court cases in England and is a non-departmental public body accountable to the Ministry of Justice. It is funded through the Ministry but is independent of the courts, social services, education and health authorities and all similar agencies. Its Family Court Advisers may be asked by the court to work with families and then advise the court on what they consider to be the best interests of the children involved in the cases. Cafcass officers are the sole source of independent advice to the courts and their reports are highly influential on the court. If a judge wants to disagree with the recommendations of a Cafcass officer, he or she has to give reasons why. In some cases, where the court feels the child needs more of a voice in the court process to ensure that his or her interests are fully looked after, a Cafcass officer may be appointed to act as the child's Guardian within the legal proceedings, or may advise on the appointment of someone else to do so. Family Court Advisers also prepare section 7 reports if ordered to do so by a judge when a court feels a report about what is in the best interests of the child or the children's wishes and feelings is necessary.

74 14% said the section 7 report had not been ordered and 12% were not sure.

75 Survey participants could choose more than one answer to this question. In many cases, domestic abuse had been raised by more than one source: for 26%, it had been raised by both the survey respondent and their legal representative; for 12% it had been raised by the survey respondent, her legal representative and Cafcass; for a further 12% it had been raised by the survey respondent and Cafcass.

76 The 2014 version of PD12J will have been in operation during the cases of research participants as the newly revised Practice Direction 12J was issued in late 2017. However, as with the latter version, it contained detailed guidance on the considerations to be taken before ordering a fact-finding hearing. It also states that if no hearing is ordered, the court must provide written reasons to explain its decision. It can be viewed at http://flba.co.uk/downloads/ms_6483.pdf.

77 Hunter and Barnett, n 20 above.

Other women were advised not to request a fact-finding hearing at all, echoing previous research,[78] which demonstrated the substantial pressure placed upon victims to settle in family law proceedings rather than making an issue of the abuse:

> I was told that the idea was that you tried to negotiate, and if you couldn't, come to, his words were if you couldn't come to an adequate solution in negotiation, you went to a fact finding. That's how it was sold to me. It was almost like 'if you fail, you'll have to go to this fact finding, and if you don't, if you achieve, then you won't have to go' (focus group participant).

Some women reported that even where fact finding hearings had taken place and findings were made in their favour, they were still not taken into account with regard to contact:

> All professional witnesses supported me but despite overwhelming evidence, the judge said I didn't fit the profile of domestic violence victims as I wasn't scared enough. Also, I was too educated and knowledgeable to allow DV to happen to me (survey respondent).

> The fact-finding hearing was in my favour. With police documentation, hospital records, photographs of my injuries, you name it, we had it. Yet still they pushed for contact (interview participant).

The use of human rights

The online survey asked some initial questions about human rights. Answers to these questions gave us information about which types of human rights had been raised as part of the cases of the women in our sample. The most common right referred to as part of survey respondents' child contact cases was the right to family life (Article 8 of the ECHR), raised in 49 per cent of survey respondents' cases. The least common were the right to be free from inhuman and degrading treatment (nine per cent) and the right to life (seven per cent). 42 per cent of survey respondents, however, said that human rights had *not* been raised in their case despite the fact that the overwhelming majority of respondents had experienced domestic abuse and had reported it to the police. In line with the courts' duty under section 6 of the HRA, respondents were specifically asked if the court had raised human rights in their case. 65 per cent of respondents said that human rights were not raised by the court, compared to

78 See Hunter and Barnett, n 20 above. This is further evidenced by research from Women's Aid in conjunction with Cafcass which revealed that a substantial majority of the cases examined in which domestic abuse allegations were raised were settled by consent; where data was available the order was made by consent at the first hearing in 92% (97) of the cases: see 'Allegations of Domestic Abuse in Child Contact Cases' Joint Research by Cafcass and Women's Aid, July 2017 at file:///Users/Choudhry/Downloads/Allegations-of-domestic-abuse-in-child-contact-cases-2017.pdf.

only three per cent of cases where the court did raise human rights,[79] however, free text answers indicated that judges in these cases raised the human rights of the children and the father to have contact; the human rights of the mothers were not raised at all.

After the online survey data was analysed, we asked those respondents (22 women) who had answered that human rights were raised as part of their case to complete a follow up survey in order to elicit more detail. Data collected in this follow up exercise allowed us to see who had brought up and used human rights and the language of rights, and whose rights they were referring to. 14 women responded and in half of the cases the respondents raised human rights themselves, with only four legal representatives and four judges doing so.[80]It was also clear that the rights of victims were least likely to be discussed: ex partners rights were referred to in half of the cases, children's rights in 11 cases and the rights of victims in only five cases.

At first glance, these responses may suggest that some women were actively raising and advocating for their own human rights in the family court, and that children's rights were commonly being promoted. However, of the seven women who said they raised human rights themselves, five raised the human rights of their children in addition to their own, and two had raised only their children's human rights. Of the five women who said that either their ex-partner or their ex-partner's legal representative had raised human rights, all said that the rights referred to had been their ex-partner's. In the four cases where human rights had been brought up by the judge, the rights referred to were the abusive ex-partner's in two cases, and the child's in two cases. Thus, in our small sample, it appeared that women were more likely to focus on their children's rights, while men were more likely to advocate for their own rights. This demonstrated a notable gender difference in the use of human rights arguments in the sample and is consistent with other studies in this area.[81]

Focus groups and interviews with women victims developed these initial findings, reinforcing the suggestion of gender differences in how rights were perceived and advocated for. Some of the reasoning for these differences was provided by the women taking part in the interviews and focus groups; the main understanding of rights for the women taking part in interviews and focus groups was related to their children's rights, rather than their own. Although most of the women were able to view themselves as rights holders it was clear that they felt those rights had been rather 'lost':

> I don't know if we used the words human rights but we [the participant and her legal representatives] focused on the rights of the children. Their rights and their best interests. We were consistent throughout that. So it was always about what

79 Four respondents were not sure.

80 Survey respondents were able to choose more than one of the above options if appropriate. Of the seven women who had raised human rights themselves, four said that human rights had also been brought up by their legal representatives.

81 See C. Smart and B. Neale, *Family Fragments* (Cambridge: Polity Press, 1998) and A. Barlow and others, *Mapping Paths to Family Justice Resolving Family Disputes in Neoliberal Times* (London: Palgrave, 2017) 177-180. Both pieces of research found women to be child/welfare-centred while men focused on their own rights.

> was best for the children rather than what I wanted ... I focused on what was best for the children, about what I felt was best for them at the time (interview participant).

> I would say that when you say the words human rights, in theory that means civil liberties and having individual liberties and rights. But in practice in my experience, not only did I lose my rights by being in an abusive relationship, but that was perpetuated by the family courts afterwards (focus group participant).

When we asked the women if their own rights had been considered, promoted or protected during the family court process, the response was overwhelmingly negative:

> I don't believe I had any rights in court. I don't believe I had any equality, or any equal rights in court. It never came across like that. We were there to make contact happen between father and child, and that was it (interview participant).

> As far as I'm concerned, all the rights that I should have, the right to private life, the right to a fair trial, the right to live with my children and have a decent personal relationship with my children, every single human right that I personally should have, were completely disregarded by the family court (focus group participant).

> My human rights ... I just think they're broken and they're not even in the same picture, I don't think they're in the same building (interview/focus group participant?).

It was also clear that the women in the sample had not been advised about the applicability of the HRA/ECHR to their cases. In our sample, there was only one survivor who had been explicitly advised that her human rights had potentially been breached. Even in this case, the woman experienced considerable barriers in taking action to address the issue, as the account below shows:

> Through lengthy child proceedings in the family court, I lost any meaningful access to my child. And towards the end of those proceedings, when my child was not living with me, my barrister who'd been with me for some years through the proceedings ... she brought in, I think it was a legal magazine, and she said 'I saw this the other day' and she showed me a case where they took it to the human rights courts in Europe, under the right to family life. And she said 'I strongly believe this is an avenue you should explore, I think it's a similar case story' and she encouraged me to do that.

> At the time you're like a cork bobbing around in a stormy ocean at that point of the game when you've lost your child, so I wasn't well and I wasn't myself. It was only a couple of years later when I asked a friend who's a barrister 'what about this human rights stuff?' and he put me in touch with [a chambers] specialising in the Human Rights Act. But really ... no one was prepared to look at it without me putting my house on the line, and I had another child and I couldn't risk that we'd lose our home too ...

> With hindsight and being in a better frame of mind, I'm very much aggrieved that barristers seem to be very much enthralled to the proceedings and the judge and won't say anything that's going to upset them. It's all very well the barrister having shown me this case . . . but it wasn't raised in front of the judge. Why was it being raised in private? (interview participant).

Gender differences in the use of human rights

Furthermore, it appeared from the accounts of the women in our sample that, from the perspective of the women themselves, the understandings and use of human rights were very different for the women's ex-partners. In these cases, the experience of the women was that it was much more common for a father to prioritise his own human rights before those of his child or ex-partner:

> My ex-husband was of the opinion that it was his human right to see his children on a 50% basis. My rights weren't considered, my children's rights weren't considered. [He was] completely controlling and emotionally abusing myself and the children. It was all disregarded, I was branded a liar, the judge never saw any of his behaviour as controlling or abusive, and he got 45% access (focus group participant).

> That's what he went for. Article 8. And my response to that, which my barrister didn't pick up on, was what about my right not to be abused? And the coercive control thing with children. So, let's talk about equality. But no, they didn't go for that, it was just accepted by the judges 'he's got a right, let's give it to him'. And I thought no – he's abusing his children (focus group participant).

We also heard about judges or magistrates actively encouraging ex-partners who were perpetrators of domestic abuse to claim their rights, as in the excerpt below, but there were no examples in our sample of judges encouraging women victims to do the same.

> The judge kept reiterating to my ex that he had rights . . . My ex kept saying 'I'm not doing this anymore, I'm leaving, I can't be doing with this' and the judge kept saying to him 'you do have rights, you've got father's rights' (interview participant).

As a result, women in our sample felt that their own and their children's rights to privacy and family life (Article 8) and to be free from further degrading treatment (Article 3) were breached when unsafe contact was ordered, and evidence of abuse dismissed. Meanwhile, according to the experiences related by the women in our sample, they felt that the rights to family life of fathers who were also perpetrators of domestic abuse were given higher priority than those of the women and their children despite evidence of abuse, thereby creating the impression of a hierarchy within Article 8. As set out above, Article 8 rights are 'qualified rights;' rights that may be interfered with in order to protect the rights of another or the wider public interest. Claims made under the qualified rights in Article 8 should not 'trump' claims made under the absolute rights of Articles 2 and 3, but for some of the women in our sample, who detailed

experience of treatment that would reach the minimum threshold required in order to fall within the scope of Article 3, this is precisely what appeared to have happened. Worryingly, there was little evidence of Article 2 and 3 rights being raised in such cases. Far more often Article 8 rights were raised and given higher priority, even where Article 2 and 3 rights seemed to be clearly relevant.

Some women we spoke to brought up what they saw as the issue of conflicting rights and misinterpreted rights. Research participants discussed what they felt should happen when the human rights of different parties involved in a family court case do not match neatly, or even explicitly clash:

> There's conflicts of rights that are always there when you have two people who have different views. One person's right is evoked and then another person's and they have to decide whose is whose, but I feel that in the family court, the right to family life goes abuser, then child, then mother, normally. I know it's not always with an abused party but that's how it seems to go. Their right to a family life overrides everything (focus group participant).

> But it seems in the family court, you get a non-molestation order but child contact overrides it. His right to family life overrides everybody else's and that kept coming up. Over and over again and I couldn't understand that (focus group participant).

Judicial failures – keeping women safe

Some of the women felt that their own safety had been compromised to such an extent that they were at further risk of abuse which could come within the scope of Article 3. Some of the women we spoke to felt that their former partner had abused their human rights and that the family court process continued this abuse. There was also clear evidence of the courts and Cafcass failing to recognise and discuss the possible applicability of Article 3 to a number of the cases involved, despite it being an absolute right. In the most extreme cases, women felt their lives and sometimes their children's lives had been threatened by the ordering of contact which placed them in unsafe proximity to their former abusive partners, or the revealing of confidential information about their address or location.

> I had all the correct things happen for me, until I got to family court. I was emergency moved by my local council, and my address was protected like Fort Knox. And then in the hearing – my barrister warned me it would happen – we were in the hearing and a report was submitted and it was from the police and they hadn't removed my address ... I was terrified. I had a panic attack and I fainted. I was in tears and I was shaking because now he knew where I lived. And the judge turned around and asked him to not take note of the address. And he sat back in his chair and laughed and said 'I've known it since [month]'. And the judge turned round and said 'look, he's known it since [month], that's a good sign that he's not going to do this anymore'. And I'm thinking 'you've no idea how this works' (focus group participant).

Survey respondents were asked if contact had been ordered in their cases, and if it had, what type of contact it was.[82] Despite a high rate of abuse being disclosed to the court (71 per cent of survey respondents) fact finding hearings were only held in 29 per cent of the cases. This, in addition to the accounts of the minimisation of the abuse may explain why unsupervised contact in different forms, including overnight and weekend stays between the child and a parent who had been accused of domestic abuse, was by far the most common arrangement ordered. Echoing other studies in this area,[83] supervised contact was ordered in only a low number of cases; in 11 per cent of the cases reported by survey respondents. Similarly, an order for no contact was made in only 11 per cent of these cases. A high proportion of respondents (49 per cent) chose the 'other' category; details given about this answer showed that in most cases the contact was a variation of the other categories. For example, supervised contact could take place after the ex-partner had attended an anger management course. This category was also chosen for more complex arrangements; for example, no contact ordered for one child, but unsupervised contact for a sibling.

Judicial failures - discriminatory practices

A commonly expressed feeling among women in our sample, as illustrated in the excerpts above, was that the treatment they received from legal professionals and during child contact hearings was degrading. Some women described feeling degraded when they had been interrogated about, for example, their sex lives or their mental health, by solicitors, barristers or expert witnesses. Some also felt that their former abusive partner had been allowed to treat them in a degrading manner during cross-examination or mediation.

> I put my life on the line. The things that I told them – the truth, the honest truth, was so humiliating, things that I would never want to admit, I mean some of them, I can't even bring myself to say, that I admitted that he'd done, or that went on in our household. The treatment I got was so humiliating, degrading, and shocking. They delved into every single little aspect of my life and then said that I'd lied about it. But the things that I'd come out with – you couldn't make them up (focus group participant).

> I found he was very empathetic towards my husband, saying – so when the criminal charges were read out he looked straight at my husband and said 'I can see why this is a very difficult situation for you Mr . . . And I was thinking 'what is going on? The police have charged him with this, why am I being made to feel bad?'. If it had been a criminal trial – what I didn't understand was in a criminal trial, when you're a victim of what I'm a victim of, you have certain protections, they're not allowed to ask you certain questions about your previous history, but in the family court it seems they're allowed to ask you about anything, and then you don't just get asked it once you get asked it by every single person (focus group participant).

82 57 (out of 63) respondents answered this question.
83 n 7 above.

The majority of the women did not feel their cases were heard fairly in the family court. A common theme expressed by the women in our sample was a feeling that they were treated differently in ways that were linked to their gender. For example, being expected to be a calm and accommodating mother while aggressive behaviour from fathers was tolerated in the court room, not being given an opportunity to respond or being addressed using discriminatory language, as discussed in the excerpt above. The majority of the women felt they were viewed as over-emotional, difficult, weak or unstable, and they encountered victim-blaming attitudes.

> I thought I had the right to a fair trial, the right to be heard, to speak, but I was repeatedly told by the judge to 'shut up'. By various judges to 'shut up', just 'shut up'. And I was referred to not by my name but by my status as a wife even though I was divorced. And also referred to as 'you'. Not Mrs or Ms or anything but 'you'. Whereas he was repeatedly called by his name, given a status and title while mine was taken away (focus group participant).

> Judges repeatedly use the language of the abuser towards us . . . I was crying and the judge said, cos I'd been asked about intimate things that the criminal trial was about, and he actually said to me and used my name and said 'I'm sorry, I can see why Mr . . . finds you such a difficult woman' and I said 'I'm not a difficult woman' and he said 'And I can see why he's saying you're argumentative' and every time I, I sounded like a petulant child bickering but this man who was meant to be fair, was using the same words (focus group participant).

> When a mother goes into court, you have to come across very calm, you can't show emotion, you can't get upset, if you get upset, well then you're unstable, and you are not healthy for the child. You're not acting in the child's best interests. They say 'if that's what you're like with us then that's what you're like with the child - no wonder she's like she is'. But, if the father goes in and shows emotion, the judge will turn round and say 'well he's hurting, of course he's like this, he's hurting, he's not seeing his child'. It's so different how the two are treated (interview participant).

Several of the women participating in the research spoke about the impact that poor legal representation, or a lack of legal representation had had on their right to a fair trial. They described submitting evidence of domestic abuse that was not considered; a lack of fact-finding hearings; poor legal advice; and inconsistencies between the approaches of different judges and other family court professionals. Accusations of parental alienation were, some women in our sample felt, prioritised and easily believed without an opportunity to provide expert evidence in response, while evidence of domestic abuse was overlooked or dismissed.

> The judge deemed that it was my ex-husband's right to have contact with his children, and who was I to stop contact, and that every child has the right to see both parents, which under normal circumstances I'm fully in support of. However, we had an issue where he assaulted my youngest child. . . . All that the judge kept bringing up were the rights of the children to have contact with their father. Not

> the rights of the children to have normal contact and not live in fear (focus group participant).
>
> My rights were never brought up. My right to walk away and be safe, I mean I was with him for several years and it was just absolute hell. When I was pregnant with the little one he tried to kick him out of me. But they knew all this, it was in the police reports, but they were still pushing for him to have contact (interview participant).

It is clear therefore that for the majority of the participants of the research project the impact of human rights, and particularly the specific development of the applicability of the ECHR on victims of domestic abuse, had been minimal and that they had been unable to harness them to any real positive effect. This disjuncture between their human rights on 'paper' versus their human rights in reality requires interrogation if any progress is to be made with regard to the enforceability of human rights law within this context. The next section will outline the concept of performativity and its applicability to the success of the global women's human rights movement in the creation of current human rights law and practice in the VAW arena. In enabling us to consider the social and discursive forces that construct and normalise legal practice, the concept of performativity can help to explain how this divergence in the experiences of women victims of domestic abuse in the sample and their ability to exercise their human rights on paper versus reality has occurred and how it could potentially be ameliorated.

THEORISING THE IMPACT OF HUMAN RIGHTS ON VICTIMS OF DOMESTIC ABUSE IN THE FAMILY COURTS – PERFORMATIVITY

The concept of performativity is most often associated with Judith Butler and her work on gender identity and gender performance. However, her articulation of performativity has been applied in a wide variety of contexts and disciplines, not least because it enables us to consider the political and social discursive forces that construct and normalise legal and political practice. In combining Lacanian psychoanalysis, phenomenology, structural anthropology and speech-act theory she provides an explanation as to how social agents constitute and reconstitute reality through their performance of language, gesture and sign through the concept of performativity. A 'performative' is defined as 'that discursive practice that enacts or produces that which it names.'[84] This process is further explained; speech acts are either 'illocutionary', that, in saying, do what they say, and do it in the moment of that saying, or 'perlocutionary', that produce certain effects as their consequence; by saying something, a certain effect follows.[85] The illocutionary speech act is thus itself the deed that it effects, whereas the perlocutionary speech act leads to certain effects that

84 J. Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York, NY: Routledge, 1993).
85 She does this by using J.L. Austin's terminology of illocutionary and perlocutionary speech acts, see J. Butler, *Excitable Speech: A Politics of the Performative* (London: Routledge, 1997) 3.

are not the same as the speech act itself. To give an example within family law, a declaration that a couple is now married (or indeed divorced), would be an illocutionary act; the declaration itself brings about the change in status of the couple without any lapse in time. In contrast, the making of an order for contact to take place to a child would be a perlocutionary act; it will initiate a set of actions which should lead to the contact specified, however, the saying and the consequences in this case are temporally distinct. In either case, however, the enactment that takes place within this process is contingent upon the reference to the law, accepted norm, code, or contract that is cited or repeated in the pronouncement. In this way, by endlessly citing the conventions and ideologies of the social world around us, we therefore enact that reality; in the performative act of speaking, we 'incorporate' that reality by enacting it with our bodies, but that 'reality' nonetheless remains a social construction.

This analysis has been applied to human rights discourse. Janet Zignon has argued that, in contrast to the *declaration* of the inherent existence of human rights found in the Preamble to the UN Declaration on Human Rights of 1948 (UDHR) (the illocutionary effect), it is the *recognition* of that inherence (the perlocutionary effect) that provides the grounds for human rights. As a result, when inherence words in the UDHR such as dignity, inalienability etc are referenced, cited and repeated in and by other documents, and actors, this results in a performative iteration that works to lend legitimacy and authority to an international system.

This, in turn, brings into being and maintains the 'truth' of the global morality of human rights.[86] In doing so, she notes the necessity of the state as the 'constative guarantor' in this process, which is evidenced in every subsequent recital of the UDHR Preamble and addresses either the relationship between the states and individuals or states with one another and provides human rights with actual and practical effect in the world. A similar dialogical relationship between the illocutionary and the perlocutionary is also necessary to maintain this 'truth' once human rights are practised in the world. This, Zignon posits, is achieved in two ways, first, by the continuous reaffirmation of the co-existence of human rights and dignity in each utterance of this link in each document (or by each advocate). This reaffirmation results in the illocutionary effect of the performative iteration of the link between the two concepts of dignity and human rights. Second, the perlocutionary effect of the 'truth' of human rights and dignity in the world is achieved by the manifestation of this truth by the institutions, groups and individuals who provide services or mobilise political action in the name of human rights and dignity. This perlocutionary effect is, in turn, given force by certain 'felicity conditions' provided by the flow of international funding, media support and international and transnational governmental rhetoric and policy aimed at disseminating the transnational moral 'truth' of human rights. In this way, she argues, the

86 J. Zignon, 'Maintaining the "Truth" Performativity, Human Rights, and the Limitations on Politics' (2014) 17 *Political Philosophy* 3. She goes on to argue that the performative nature of human rights language renders it a moral language with a conceptual proclivity for supporting rather than resisting power. See also J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, PA, University of Pennsylvania Press, 1999) 290.

foundation of the global human rights system: the UDHR, was a result of a performative-constative manoeuvre which brought into being the foundational 'truth' of human rights.

Significantly, within this process of repetition or iteration, and more precisely in the gaps that exist between the intended and actual effects of language, lies the opportunity to alter the understanding/effects of language. This has been of particular interest to those utilising a feminist interpretation of the law. As Butler explains, 'language refers to an open system of signs by which intelligibility is insistently created and contested'[87] and understood as a 'sign-chain' of 'ever new interpretations and adaptations whose causes do not even have to be related to one another but, on the contrary, in some cases succeed and alternate with one another in a purely chance fashion.'[88] This capacity to produce the unexpected or the new is what Butler terms the 'excessive' quality of language, which, in turn, has the capacity to undermine the disciplinary power of the state and the law and holds out the promise of transformation.[89] Repetition therefore is not exact replication; signs can be misheard, misinterpreted or deployed in new ways and at new sites in ways that displace the original meaning of a word or norm, changing the way we think or act.[90] Utterances can therefore constitute a repetition of an authorised discourse yet also expropriate or misappropriate it,[91] for example, the reclaiming and redirection of the word 'queer,' hence producing the legitimation of speech in new and future forms.[92] This gap, between speech or norms and outcomes and effects, between 'the originating context or intention by which an utterance is animated and the effects it produces'[93] is where the possibility for political agency and the making of new claims lies.

This analysis has been applied to the political practice of rights claiming, and in particular to the notion of women's human rights by Karen Zivi[94] who argues how, in using the authoritative discourse of human rights, the norms of liberalism are not simply reiterated but challenged. This is because the very norms that are cited are premised on the exclusion of those who cite the norm. When women use the language of rights, which traditionally excluded them from the understanding of the 'human' of human rights, they are not simply suggesting their inclusion into the understanding of human but are, instead, challenging us to rethink the meaning of the human, 'exposing the conventional limitations of the human while challenging its universality.'[95] Butler terms this as 'perverse reiteration,' an unconventional formulation of the universal that not only reveals the limitations and exclusivity of the universal

87 J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990) 145.
88 *ibid*, 224.
89 *ibid*, 122.
90 K. Zivi, 'Rights and the Politics of Performativity,' in T. Carver and S.A. Chambers (eds) *Judith Butler's Precarious Politics: Critical Encounters,* (London: Routledge, 2008) 164.
91 n 87 above, 145 and 157.
92 *ibid*, 41.
93 *ibid*, 15,16.
94 n 90 above, 167.
95 J. Butler, 'Restating the Universal: Hegemony and the Limits of Formalism,' in J. Butler, E. Laclau and S. Zizek (eds), *Contingency, Hegemony, Universality, Contemporary Dialogues on the Left* (London: Verso, 2000) 39.

but also mobilises a new set of demands.[96] Rights claiming by women and other traditionally excluded groups, thus entails double-movement, not simply a citation of liberal norms but also their transformation.[97] To make international human rights claims on behalf of women and other excluded groups therefore 'becomes a way of intervening into the social and political process by which the human is articulated.'[98] In this way, 'international human rights is always in the process of subjecting the human to redefinition and renegotiation.'[99] This perverse reiteration and the transformation of the concept of human rights can be illustrated by the success of the women's human rights movement.

Achieving performativity – the women's movement and international human rights law

Women's rights largely fell off the mainstream human rights agenda for more than forty years following the adoption of the UDHR.[100] The foundational 'truth' of human rights at this stage was still based on a set of liberal norms that privileged the realities of men's lives and the marginalisation of women[101] and the performative iteration of the link between human rights and women was yet to be made. That was until the mid 1980s – mid 1990s when feminist scholarship began to interrogate the absence of women from international human rights law by either arguing for doctrinal inclusion and institutional expansion[102] or conducting structural bias critiques[103] of international law which sought to identify a series of dichotomies that perpetuated the inability of international human rights law to cater for women. The most significant of those dichotomies was the public/private distinction; the liberal notion that the public sphere should not interfere with the private realm. These feminist critiques of the public/private distinction[104] also serve as a connection to the recognition of the performativity of rights that subsequently took place. By using the established and authorised discourse and norms of liberalism, feminists made new claims (women's human rights) through the process of perverse reiteration: challenging the international human rights community to rethink the meaning of human and exposing its limitations in its failure to

96 *ibid*, 39, 40.
97 n 90 above, 167.
98 J. Butler, *Undoing Gender* (New York, NY, London: Routledge, 2004) 33.
99 *ibid*.
100 See D. Otto, 'Gender Issues and International Human Rights: An Overview' in D. Otto (ed), *Gender Issues and Human Rights Volume 1* (Cheltenham: Edward Elgar, 2013).
101 A. Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights' (1999) 21 *Human Rights Quarterly* 853.
102 Outlined by K. Engle in 'International Human Rights and Feminism: Where Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517.
103 See H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 and D.Q. Thomas, 'Conclusion' in J. Peters and A. Wolper (eds), *Women's Rights, Human Rights* (New York, NY: Routledge, 1995) 358.
104 See J. Weintraub, 'The Theory and Politics of the Public/Private Distinction, in J. Weintraub and K. Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago, Ill: University of Chicago Press, 1997) 1, 7-34.

reflect the realities of women's lives. In this way, feminists opened up the gap between the foundational norms of human rights discourse and their effects and exploited the potential for political agency it released, dislodging 'human rights' from its original context and re-signifying the meaning of the term.

Thus, starting in the mid-1980s women activists began to question the 'ghettoisation'[105] of women's rights represented by the institutional separation of women's rights and human rights manifested in the existence of special treaties and the UN Commission on the Status of Women. The recognition of the fact that women's lives were not the outcome of individual private choices but subject to systematic patriarchal oppression was illustrated by the iconic, rallying slogan 'the personal is political.'[106] In other words, the private realm represented oppression and the manifestation of the divide in the everyday lives of women. The effect was significant; each illocutionary utterance of 'the personal is political' resulted in the performative iteration of the link between the public and private lives of women, and, today, the continuous reaffirmation of this link serves to maintain its 'truth.' However, the *manifestation* (the perlocutionary effect) of this truth is only made possible via the continuation of certain felicity conditions such as: the flow of donations to fund campaigns and lobbying, media support and the mobilisation of legal and policy developments.[107]

The feminist rejection of the public/private dichotomy has been particularly significant to the issue of VAW and was integral[108] to the success of the Global Campaign for Women's Human Rights in framing VAW as a human rights issue and refocusing the attention of the international human rights community back to the issue of women's rights. The slogan 'women's rights are human rights'' became a powerful illocutionary call for the inclusion of women as full subjects of international human rights law and achieved considerable success, exemplifying the concept of perverse reiteration. In 1992 the UN Committee for the Elimination of All Forms of Discrimination against Women (CEDAW) adopted General Recommendation 19,[109] which expressly links discrimination and violence,[110] laid down a framework on VAW and confirmed the need for 'states to take positive measures to eliminate all forms of violence against

105 C. Bunch, 'Transforming Human Rights from a Feminist Perspective' in Peters and Wolper (eds), n 103 above, 11–17.

106 It was the title of an essay written by Carol Hanisch of the New York Radical Women and published in S. Firestone and A. Koedt, *Notes from the Second Year: Women's Liberation, Major Writings of the Radical Feminists (New York, NY: Radical Feminism, 1970)*. Hanisch does not take credit for the title which she believes was formulated by the editors.

107 It is not being suggested that the public private divide has been successfully broken down – there are a number of areas where it is clearly still in existence, nor is it suggested that this is always of benefit to women, the intention is to set out that, should this be an aim, it will be a continuous project whose success relies upon the performative iteration set out.

108 See D. Otto, 'Disconcerting Masculinities' in D. Buss and A. Manji (eds), *International Law Modern Feminist Approaches* (Oxford and Portland, OR: Hart, 2005) 12. See also N. Reilly, *Women's Human Rights* (Cambridge: Polity Press, 2009) ch 4.

109 UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation 19: Violence against Women' (1992) UN Doc A/47/38.

110 *ibid*, Art 11 and Art 7(b).

women' by reference to the 'due diligence' standard.[111] Activists at the 1993 World Human Rights Conference in Vienna subsequently organised a global campaign which was so successful, that, as one commentator put it, it '"regender(ed)" human rights'.[112] Consequently, in 1994, the UN Commission on Human Rights[113] appointed the first Special Rapporteur on Violence against Women and the UN issued the Declaration on the Elimination of Violence against Women (DEVAW)[114] which states that three forms of violence may constitute violations of women's human rights: violence in the family, public violence, and violence condoned by the state.[115] The new international norm that VAW is a human rights violation was further confirmed by its inclusion in the 1995 Beijing Declaration and the adoption of the Optional Protocol to CEDAW in 2000 which enables the CEDAW Committee to determine in individual cases whether domestic violence is a violation of international human rights law.[116] UN resolutions[117] and action[118] following the Beijing declaration and the adoption of the CEDAW Optional Protocol established domestic violence as a form of discrimination against women, a violation of human rights and a matter lying within the responsibility of states. Subsequent case law of the CEDAW Committee under the Optional Protocol confirms the engagement of state responsibility for VAW as an international legal norm.[119]

111 The due diligence standard for VAW is laid out in the Declaration on the Elimination of Violence against Women (1993) UN Doc A/RES/48/104, Art 4(c), where States are urged to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.' CEDAW also noted in its General Comment No 19 that 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.'

112 E.J. Friedman, 'Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s' (2003) 26 *Women's Studies International Forum* 313.

113 Now called the Council on Human Rights.

114 n 111 above.

115 *ibid*, art 2.

116 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Optional Protocol) (December 2000) UN Doc A/Res/54/4. See B. Meyersfield, *Domestic Violence and International Law* (Oxford: Hart, 2010).

117 General Assembly Resolution on the Elimination of Domestic Violence against Women (19 February 2004) UN Doc A/RES/58/147; General Assembly Resolution on the Elimination of Domestic Violence against Women (22 February 2005) UN Doc A/RES/59/167; General Assembly Resolution on the Intensification of Efforts to Eliminate all Forms of Violence against Women (30 January 2007) UN Doc A/RES/61/143; General Assembly Resolution regarding the implementation of the Beijing Declaration and Platform for Action and the outcome of the 23rd special session of the General Assembly (7 February 2007) UN Doc A/RES/61/145; General Assembly Resolutions on the Intensification of Efforts to Eliminate all Forms of Violence against Women (7 February 2008) UN Doc A/RES/62/133; (30 January 2009) UN Doc A/RES/63/155; (21 December 2010) UN Doc A/RES/65/187; (20 December 2012) UN Doc (A/RES/67/144.

118 See http://www.un.org/womenwatch/daw/vaw/v-work-ga.htmn for a list of UN action in this area and in general the Reports of the Special Rapporteur on VAW, and the review of them in Meyersfield, n 116 above, 62-66. See also the Inventory of United Nations system activities to prevent and eliminate violence against women, February 2014 at http://www.un.org/womenwatch/daw/vaw/v-inventory.htm.

119 The first communication made to the CEDAW Committee under the Protocol to deal directly with domestic violence was *Ms AT* v *Hungary* (Decision) CEDAW Committee (views adopted

The international legal and policy framework outlined above has been accompanied by the adoption of various legal and policy frameworks at the regional level. There are now two regional Conventions directed solely at eliminating VAW, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and the Council of Europe, Istanbul Convention[120] adopted in 2011. Both require that states parties apply due diligence to prevent, investigate and impose penalties for violence against women and contain detailed provisions regarding the obligations of states to enact legislation and undertake policy initiatives within the field of VAW. Action has also been mandated by the Council of Europe in its Recommendation (2002)5 of the Committee of Ministers to member states on the protection of women against violence. In addition, there is also an increasing body of jurisprudence on violence against women under these regional instruments. Cases heard by the European Court of Human Rights[121] and the CEDAW[122] have recognized VAW as a violation of a number of human rights and directed states to create appropriate criminal legislation; review and revise existing laws and policies; and monitor the manner in which legislation is enforced.

In this way, rights claiming on behalf of women victims of violence resulted in a high level of performativity at the international and regional level, achieved by the transformation of human rights norms in a process of double movement. The meanings of 'human' and 'due diligence' were successfully challenged through a process of perverse reiteration in order to rethink their meaning and expose their limitations in reflecting the experiences of women victims of violence. This bringing into being of the existence of women's human rights was further cemented through the perlocutionary recognition of the constative guarantor: international and regional human rights institutions, courts and state authorities etc, in order to ensure that these rights have had actual and practical effect in the world via the establishment of new legal norms and principles applied by the courts towards individual states.

26 January 2005) Communication No 2/2003 UN Doc CEDAW/C/32/2/2003. There have been a number of others, see Meyersfield, *ibid*, ch 1 and 42-57 in particular for an overview of this case law.

120 The Council of Europe Committee of Ministers adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence on 7 April 2011 and following its 10th ratification by Andorra on 22 April 2014, entered into force on 1 August 2014.

121 See amongst others: *Bevacqua and S* v *Bulgaria* [2008] ECHR 498; *Opuz* v *Turkey* n 66 above; *Eremia and Others* v *the Republic of Moldova* n 65 above; *Halime Kılıç* v *Turkey* n 66 above and *Bălşan* v *Romania* n 66 above.

122 In particular, *A.T.* v *Hungary* Case No 2/2003, *Fatma Yildirim* v *Austria* Case No 6/2005, *Sahide Goekce* v *Austria* Case No 5/2005, *Karen Vertido* v *the Philippines* Case No 18/2008, *V.K.* v *Bulgaria* Case No 20/2008, *Inga Abramova* v *Belarus* Case No 23/2009, *S.V.P.* v *Bulgaria* Case No 31/2011, *Isatou Jallow* v *Bulgaria* Case No 32/2011, *R. P. B.* v *the Philippines* Case No 34/2011, *Angela González Carreño* v *Spain* Case No 47/2012, *X and Y* v *Georgia* Case No 29/2009, *Belouosova* v *Kazakhstan* Case No 45/2012, *A.S.* v *Hungary* No 4/200), *Kell* v *Canada* Case No 19/2008, *M.W.* v *Denmar*k Case No 46/2012 and *L.R.* v *Republic of Moldova* Com No 58/2013.

From the international to the local – non-performativity of the human rights of victims of domestic abuse in the family courts in England

In contrast, the domestic realisation of women's human rights for individual women is clearly an ongoing project, dependent as it necessarily is on individual state commitment to the implementation and monitoring of the rights guaranteed in international treaties and/or interpreted by regional human rights courts such as the ECtHR. Unfortunately, the results of the research indicate a high level of *non – performativity* of the human rights of the women that participated in the project. Some of the women were aware of the relevance of human rights to their situation but felt they were simply unable to claim them. Others were very good at raising the issue of domestic abuse in their cases, either to their legal representatives, Cafcass officers or the courts and more often than not, with supporting evidence, however, the majority of them felt that they were not heard. In this sense, it seems that these women were effectively silenced, unable to utter, let alone reiterate any resultant claims to their human rights. Furthermore, according to the responses received in the research, if any claims were made in relation to human rights, the majority were made on behalf of their children but, again, to little effect. To these women, the act of raising/claiming their or their children's human rights did not have any illocutionary effect; it appeared to change nothing:

> In terms of what my perception of what my human rights are before I went through the family courts, and what my perception of what my human rights are having been through the family courts, there's a huge difference in what I thought my rights were, and what I experienced my rights to be (focus group participant).

> I think I walked in thinking I had them and I walked out thinking actually, no I don't. I walked into court thinking I had rights, but I came out thinking actually I don't (focus group participant).

Other women simply felt unworthy, dehumanised by the whole court process; not a person to whom rights apply. In this sense the research demonstrated the importance of recognising that while victims of domestic abuse may acknowledge abuses of their human rights retrospectively, some may be in no position to claim their own rights in the family courts at the time of proceedings. It also demonstrates the need for the judiciary and legal professionals to take the lead and make these claims on their behalf where relevant:

> Through the court process I still didn't even feel - because I was still very much a victim - that I was even a person at that point. I didn't exist. I was very much in that place of being a victim. My whole world revolved around making sure that my ex was not upset was not unhappy because when he gets unhappy then I suffered, the children suffered. So, as I was going through the court process - the right to [freedom from] torture didn't even enter my mind because that was my role and is my role in this relationship, is to be the one who's tortured (focus group participant).

> For me because of where I was as a victim, I wasn't in a place to even imagine I had any worth, to have rights. Because of my education I can write you an essay on it, I know all about it, and I know the ethics but as a person the place I've been put by this man meant that I didn't have any rights because that's the whole point of a violent and abusive relationship is you are there because your rights have been taken away ... (focus group participant).

If the experience of the women involved in the research is widespread then the effect of this should not be underestimated in terms of the impact upon the effectiveness of human rights law in this area. If victims of domestic abuse in the family courts are unaware of the applicability of human rights to their situation they cannot make the crucial performative first step of claiming them. For those who *are* aware of the applicability of their human rights but find that their claims are not heard/acknowledged by the courts this will also inevitably lead to the non-performativity of those rights. The family courts have a crucial role as the 'constative guarantor' in the process of recognising and ensuring that those rights have a performative and perlocutionary effect, hence, if there is no citation, no repetition to the applicable human rights law, or human rights norms there will be no performative iteration that works to lend legitimacy and authority to the implementation of the HRA in this context and to bring into being and maintain the 'truth' of the human rights of the women who seek to claim them. Thus, if women remain aware of their human rights or are silenced in their attempts to claim them, the process of performativity is simply unable to start.

> They talked about listening to the children but they didn't talk about their rights. And they didn't talk about my rights. That wasn't brought up. Human rights weren't brought up at all (interview participant).

> Well the judge used the language (of human rights), and so did my child's father who was self- representing. And it was always said that it was the child's rights and the father's rights (interview participant).

> I never got the feeling from anybody that it (the use of human rights) was considered important. It was only when final judgements were being made that it was vaguely referred to kind of as a 'we need to put this in because'. It was literally, in pages of judgements it was a paragraph, just going through the motions of this is how you do a judgement (focus group participant).

In terms of this sample of women, it is clear that the impact of human rights law for the women was minimal if not non-existent. The interpretation of the survey and focus group responses suggest that this could be due to three main reasons. First, although feelings of unworthiness to either claim human rights such as those expressed above can be partially explained by the effects of experiencing domestic abuse, this perception was quite obviously exacerbated by a court environment which appears to have failed in its duty to act in a manner that is compatible with the rights of victims, and by members of the legal profession who seemed either unwilling or unable to advise victims

on the applicability of the ECHR to their situation. Responses to both the quantitative and qualitative questions indicate that Article 8 was the dominant right referred to but the Article 8 rights of the victims did not appear to have been given full and separate consideration within the majority of the cases. Rather, the focus seems to have been almost entirely upon the Article 8 rights of the abusive partner. In addition, the experiences of the victims in the sample indicate that due diligence duties in relation to Article 2 and 3 may not have been sufficiently followed by the courts; in particular, fact finding hearings did not take place where domestic abuse was alleged.

> None of the judges – and I had one male and five female judges – none of them did any fact findings. None of them looked for anything to find out, and I was in the court building, and he was harassing me as I was walking out of court, and he followed me into the ladies toilets to continue harassing me, and I brought it to the attention of the judge, she shrugged her shoulders. Her attitude was 'boys will be boys' and she actually said 'well emotions run high' (focus group participant).

This could have been due to the allegations not being relevant to the proceedings or that they were uncontested, however, most of the accounts of the women in our sample indicated that it was largely due to either their legal representatives failing in their duty to ask for them or the courts failing in their duty to ensure that they happened. Moreover, in some of the cases where fact finding hearings did take place, and where there was clear evidence of domestic abuse and a further risk of harm, unsupervised contact was still ordered.

Second, the sample also revealed a number of cases where the women felt that court proceedings were undertaken in a discriminatory manner and that they experienced a climate of disbelief in relation to the domestic abuse they had suffered and a disregard for factual evidence indicating that contact would not be safe for them and their children.

> As women we've been given these rights but if we try to exercise them in any way shape or form we are still treated like some sort of Victoriana maniacs. I've been made to feel that I should be grateful to have a roof over my head (focus group participant.)

> I was advised with particular judges that they didn't like women in domestic violence cases who chose to have screens and separate entrances because it gave the wrong impression and wasn't fair because it hadn't been proven at that point (focus group participant).

Other victims felt that there was an active demonstration of bias towards perpetrators of domestic abuse and that facilitating their rights to family life seemed to be the primary concern of the family court.

> The judge was constantly pushing, stating that the father had a right to a relationship with the children. My relationship with the children didn't even come into play. There was no equality (focus group participant).

> Well he's bringing up private family rights, but I've got the same rights as him in this world. My response to that is, why has no one looked at my right not to be abused? No one's looked at it from that perspective. And I was sat there saying I'm the victim I've been abused, and he's even manipulating the system now, I can see how he's manipulating you but you can't see it ... it makes you want to scream (focus group participant).

If this is widespread in the family courts then this concerning, not least because it is in direct contrast to the presumptive priority that should be given by the courts, in accordance with ECHR jurisprudence, to the need to ensure that the Article 2 and 3 rights of victims of domestic abuse are preserved if the abuse was within the scope of those articles; the right to family life under Article 8 should therefore not override the right to be safe from treatment which comes within the scope of Article 3 or a risk to life under Article 2 in these cases. In our sample some of the women who raised these issues provided accounts that would suggest the engagement of Article 2 and/or 3; these cases also raised concerns for their rights to be free from discrimination under Article 14.

> He could do anything – he was dragged out of the courtroom three times by security ... And we had one day when he was kicking off so bad, we got another six security from another part of court to come and stand on that floor, So, that's how it was, constantly, but his behaviour was tolerated. In fact, the judge praised him one day and said 'can I just say thank you for being calm' (interview participant – the father in this case was awarded supervised contact).

> The recorder was talking to my husband's barrister about the meal they'd been to the night before and actually said 'don't worry I know you've got to get off' cos there was a golf thing, 'we'll have this over and done with quickly'. As I was standing there in the doorway. And within ten minutes – we didn't even get to speak – there were no submissions, and they gave him interim contact straight away. Without hearing any evidence, and they didn't care that my husband was on bail ... which is why I was saying about the difficulty between the family court and criminal court. My husband was on bail with very strict conditions of where he can and can't be and he put in the order that I had to take the children to his house and he was allowed to come back to my house to drop them off. Regardless of the bail conditions ... So, your right to be protected – I know there's no specific right to be protected (focus group participant).

As a result, this research provides a snapshot of an element of the family court system (concerned with private law contact applications) that, to the women involved, appeared to be a deeply gendered and largely private arena and which shielded the continued abuse and domination within their relationships before it, from the full application of international and domestic human rights law. Furthermore, on the basis of the experiences recounted by the victims of domestic abuse in our sample, it seems that the gains made by the feminist movement over the last forty years on the international stage are yet to filter through to this aspect of the family courts in England. Far from mirroring the 'perverse reiteration' of women's rights as human rights evidenced on the international stage and ensuring the application of the rights guaranteed

under the HRA and the ECHR to women victims of domestic abuse in child arrangement cases, it appears that for most of the women in our sample, their experience of the family court was that it reproduced the authorised and established discourse and norms of human rights in their unreconstructed liberal form. For these women, and their contact disputes the public private dichotomy was alive and well; the regulation of the 'private' sphere of family and the relationships between individuals was left within the family courts' discretion, undisturbed by human rights law. In sum, from the perspective of the women involved in the sample, there was little or no evidence of the rethinking of human rights law and practice to include women victims of domestic abuse and to reflect the realities of these women's lives. The reiteration of human rights claims within this context, for these women, thus remained untroubled by feminism; the norms of traditional liberalism remained unchallenged and untransformed.

In contrast, according to the accounts of the women in our sample, there seemed to be a high level of performativity of human rights for the male perpetrators of abuse and applicants for contact who were able to successfully claim human rights discourse as their own and in some cases were actively assisted in doing so by the court. There was also evidence from some of the women in our sample that they were treated demonstrably differently to the male perpetrators and/or were simply not believed. According to these women in our sample, where it was made, each illocutionary utterance of the right to family life by the male applicants for contact was, in the majority of cases, followed by an obvious perlocutionary effect; the award of unsupervised contact, despite, in some cases, clear evidence of domestic abuse and clear risk to the survivor and the children. In these cases, the family court appeared to have acted as the constative guarantor of a perpetrator's right to family life, continuously reaffirming it within the court process by advocating for and in some cases insisting on its existence and importance. The manifestation of the 'truth' of this claim was further made evident via the actions of the court and Cafcass in facilitating and ordering contact where it did not appear to be safe or appropriate and in elevating such claims above the right to family life and to remain free of inhuman and degrading treatment of the adult and child victims of domestic abuse. When viewed against the felicity conditions provided by a favourable and sympathetic public discourse around father's rights within the UK media, and the success of father's rights campaigns in terms of legal and policy changes (notwithstanding the well acknowledged negative public perception of human rights discourse in the UK[123]) it can be seen how the rights claims by male perpetrators of violence in these cases may have been given further force and moral 'truth.'

123 Research conducted by research carried out by the Equality and Diversity Forum in 2012 on public attitudes towards human rights across the UK found that while there are some (26%) who hold 'strong hostile attitudes' to human rights and human rights laws and a similar number (22%) who hold 'strong positive attitudes', by far the largest proportion of those polled (over 50%) hold conflicting or neutral attitudes to human rights. Equality and Diversity Forum, 'Equally Ours, Telling the story of everyone's rights, every day' November 2013 at http://www.equally-ours.org.uk/blog/wp-content/uploads/2013/11/13-11-18-Briefing-1-vFinal-Approved.pdf.

Clearly more research needs to be undertaken to ascertain if the experiences of the women in our sample are more widespread and, if this is the case, to understand why, from the perspective of judges and practitioners. The attitudes evidenced by the research indicate a concerning lack of awareness of the dynamics of domestic abuse, gendered attitudes towards victims and a lack of awareness of the obligations imposed by domestic and international human rights law upon the courts.

> The judge said something like women don't go back to men who truly hurt them (focus group participant).

> Even if we do produce the physical, medical evidence and everything else, we are not believed. And that is where this balance of probabilities is not right . . . judges are very quick to say it didn't happen or it wasn't . . . most offensive remark I ever had said to me was 'we won't mention that, that and that. That's low-level abuse.' Well I'm sorry but someone standing with their hand around my throat is not low level because if I was to do that right now to you everyone in the room would be shocked (focus group participant)

It is difficult to assess the effectiveness of the training currently offered to the judiciary and Cafcass on domestic abuse and human rights law as there is very little publicly available information on what training is currently offered and to whom. In a recent answer addressed to the Family Justice Council[124] on this it was confirmed that domestic abuse is the subject of specific training modules in all public and private training law modules at the Judicial College. Thus, every judge sitting in family law cases will receive training on this issue at least once a year. No detail was provided in terms of the content of these modules, for how many hours it is provided and how long it has been provided on a yearly basis. In terms of Cafcass, no real detail is forthcoming except their own framework for assessing cases where domestic abuse, is a feature: the Domestic Abuse Practice Pathway.[125] As a result it is unclear what the training is, who receives it and whether it is mandatory and updated on a continuous basis. Various organisations have called for regular, mandatory training for both the judiciary and other court professionals involved in decisions concerning contact on the nature and effects of domestic abuse and how, in particular, perpetrators can employ coercive control tactics in family law proceedings. The accounts of some of the women in the sample certainly support the need for this to take place. What is also needed is training on the HRA and developments in the area of human rights, domestic abuse and gender-based violence/discrimination at the ECHR, particularly for the judiciary. This should help towards combatting, as evidenced by this small-scale study, the suggestion of an underlying institutional culture, which works against women victims and fails to keep them safe.

124 See minutes of meeting on 23 April 2013 at https://www.judiciary.uk/wp-content/uploads/2018/07/Final-minutes-23-April.pdf.

125 See Cafcass website at https://www.cafcass.gov.uk/grown-ups/parents-and-carers/domestic-abuse/.

> They (human rights) should be the founding of our system. So like I said before when we go up before these judges it should be inherent in their culture to do the just thing and to be knowledgeable, to be accountable, for the training they've had, to be up-to-date with what coercive control means and domestic violence, everything, what the definitions are, to understand how a victim presents and how sometimes she can present hostile because of years of abuse, she can sometimes can be defensive, all of those things should be understood (focus group participant).

Finally, the failure to utilise human rights discourse and narratives by the women's movement may also have played a part in the non-performativity of women victim's rights in this context. There is a clear need to reclaim the human rights narrative by women's organisations in the UK in order to facilitate human rights claims in family courts by victims and to provide for the possibility of those human rights to become a 'truth'. The constative guarantor for these claims is already in existence, by virtue of the duty of the courts under section 6 of the HRA to act compatibly with the rights contained in the ECHR. However, grass roots organisations need to revive their historical role within the international human rights movement at the domestic level and contribute towards the felicity conditions required for the reclaiming of human rights by women victims of domestic abuse in the family courts to take place. Mobilising, campaigning and engaging in awareness raising of the applicability of the human rights framework to victims of domestic abuse is required in order to not only enact, but also to *maintain* this 'truth' and to avoid the current situation where for some victims in our sample, their experiences in the family courts resulted in the view that staying within the relationship was the better option in terms of risk management:

> This is shocking but this is what I've thought at various stages as I've gone through the court process. I wish I had never gone to hospital. I wish I had just kept ... shut up about it. I wish I had just kept on biting the pillow. Because actually going to court was the worst thing ever. I couldn't protect my children anymore because of the law (focus group participant).