

## Women and Domestic Abuse

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In their ground-breaking book, *Women and the Law*, first published in 1984, Susan Atkins and Brenda Hoggett (now Lady Hale) set out to examine how women were faring under the law. They suggested that the law reflects and is deeply implicated in constructing and maintaining men's dominance but went on to say that the law could be used to break down that construction provided women learned how to use the law and influence it.<sup>1</sup> Yet, in relation to domestic violence, they observed that, while there had been 'important advances', 'the practical benefits resulting from new legal remedies have always been less than was hoped'.<sup>2</sup>

In her role as a Law Commissioner, and as a Judge, Lady Hale has been instrumental in changing the ways in which women and women's issues, including domestic abuse, are constructed in the law. As she has observed, feminist judges, and she describes herself as one, set the story in a different context and 'bring their own experience and understanding of life to the interpretation or development of the law or its application in individual cases'.<sup>3</sup> Yet, while the changes she has wrought to the law have been positive for women, she herself points out that, 'it is possible to assert that the substance and practice of the law do not (yet) measure up' to the belief that women and men are equal or to the belief that the experiences of women should be recognised as part of the human experience.<sup>4</sup>

This chapter seeks to examine, in the context of domestic abuse, the ways in which Lady Hale has influenced the law and the extent to which there have been changes in its content and application as a result. It also reflects on the extent to which the law itself and, more particularly, the manner in which it is being implemented continue to disadvantage women.

### **The Law Commission: Family Law, Domestic Violence and Occupation of the Family Home.**<sup>5</sup>

Brenda Hale, then a QC, was a member of the Law Commission tasked with reviewing the civil law designed to protect victims of domestic violence. The report made recommendations aimed at providing protection to victims and at regulating occupation of the home.<sup>6</sup> The Law Commission Report is notable for the fact that, at that point in time, in the early 1990s, it acknowledged research demonstrating the gendered nature of domestic violence<sup>7</sup> and for the fact that it adopted a broad

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<sup>1</sup> S. Atkins and B. Hogett, *Women and the Law*, (Oxford: Basil Blackwell, 1984) 5.

<sup>2</sup> *Ibid.*, 126.

<sup>3</sup> B. Hale, 'Foreword' in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice*, (Oxford: Hart Publishing, 2010) v

<sup>4</sup> *Ibid.* v.

<sup>5</sup> Law Commission, *Family Law, Domestic Violence and Occupation of the Family Home*, Law Com No 207, (London: HMSO, 1992)

<sup>6</sup> *Ibid.*, para 1.1

<sup>7</sup> *Ibid.*, para 2.2

definition of the phenomenon. It stated that domestic violence goes beyond physical assaults and includes other forms of abuse such as psychological abuse.<sup>8</sup>

The Report went on to draw a distinction between an order not to be violent or molest a family member and an order to leave or stay away from the home. It stated that, whereas the former can be obeyed without prejudicing the interests of the person against whom the order is made, the latter affects that person's property rights.<sup>9</sup> The legislation which followed, Part IV of the Family Law Act 1996, provides for two types of order: non-molestation orders and occupation orders. The criteria for making these orders differ, with more stringent criteria being enacted for occupation orders.<sup>10</sup>

These new orders were devised to address criticisms of the then existing law. Among the problems identified was the 'assumption that the effects of an exclusion order are invariably so severe as to merit the terms drastic or even Draconian'.<sup>11</sup> Courts took the view that property rights could only be interfered with in exceptional cases. In addition, the old law was interpreted as requiring the court to focus on the respondent's conduct rather than its effects.<sup>12</sup>

The Law Commission observed that the way in which the law would be implemented would be crucial to its effectiveness in protecting victims:

As a recent study has concluded, "whatever legal reforms may be made, and whatever changes may be made to court procedures, without effective enforcement by police officers and by courts, injunctions and protection orders will continue to be 'not worth the paper they are written on'".<sup>13</sup>

This observation remains true. While the law itself changed to reflect broader ideas of what constitutes domestic abuse, the courts applied the law on occupation orders as strictly as they did on ouster orders under the previous legislation; they continued to regard the granting of an order as being dependent on a finding of physical violence.<sup>14</sup> Although it has more recently been held that it is not necessary for an applicant to prove physical violence or a threat of violence,<sup>15</sup> judges still stress the seriousness of orders interfering with property rights and say that they should be used only in exceptional circumstances.<sup>16</sup> And now that breach of a non-molestation order has become an arrestable offence, it appears that courts may be becoming more cautious in granting applications for these too.<sup>17</sup>

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<sup>8</sup> Ibid., para 2.3.

<sup>9</sup> Ibid., para 4.7.

<sup>10</sup> See s 42 and ss33, 35, 36, 37.

<sup>11</sup> Law Commission, n.5, para 2.26(vi).

<sup>12</sup> Ibid., para 2.26(ii).

<sup>13</sup> Ibid., para 2.8 quoting J. Barron and Women's Aid Federation, *Not Worth the Paper: the Effectiveness of Legal Protection for Women and Children Experiencing Domestic Violence*, (London: National Institute for Social Work, 1990), 1.

<sup>14</sup> *G v G (Occupation Order: Conduct)* [2000] 2 FLR 36, 41

<sup>15</sup> *Dolan v. Corby* [2011] EWCA Civ 1664, para 27, *PF v. CF* [2016] EWHC 3117 (Fam), paras 26-7.

<sup>16</sup> *PF v. CF*, n. 15, para 27, *Dolan v. Corby*, n. 15, para 27. See also *Chalmers v. Johns* [1999] 1 FLR 392, 397, *G v G* [2003] FCR 53. See also F. Kaganas, 'B v. B (Occupation Order) and *Chalmers v. Johns*. Occupation Orders Under the Family Law Act 1996, *Child and Family Law Quarterly*, (1999,) 193.

<sup>17</sup> *PF v. CF*, n. 15, para 33.

The Law Commission was concerned to protect property rights but it was also concerned to address the needs of victims. However the way in which the legislation has been interpreted and implemented has meant that, in practice, its protective potential for abused women has been diluted<sup>18</sup>

## **Housing Law**

As a judge, Lady Hale was in a position to exert some influence on the way the law is interpreted by courts and by government departments bound to follow it. Her aims included bringing women's voices into the legal arena. In a recent interview, she explained that 'a sense of the position of many women, and the necessity of the law to understand that position, is an important part of my work.'<sup>19</sup> This is apparent from two reported cases dealing with housing law and domestic abuse.

### *Understanding domestic abuse*

Sitting as an Appeal Court judge in *Bond v. Leicester City Council*,<sup>20</sup> Lady Hale demonstrated an understanding of the position of women subjected to domestic abuse in a way that neither the housing authorities nor the court below did.

The appellant was found to be intentionally homeless, a decision upheld by the reviewing officer. The Housing Act 1996 provides that a person is homeless despite having accommodation if it is not reasonable for the person to continue to occupy that accommodation. And, 'it is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence against him'. Section 177(1A) states that "'violence" means – (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out'.

In this case, although the appellant had left the property because of domestic violence from her partner, it was decided by the council that it was reasonable for her to continue to occupy the premises; she had failed to seek remedies in civil or criminal law. The court below in turn found that the risk of domestic violence stemmed more from her 'continuing contact or possibly a relationship with the perpetrator'<sup>21</sup> than from occupation of the home. The decision was reversed on appeal. Lady Hale stated:

29. To hold otherwise would leave it open to local authorities to put pressures upon the victims of domestic violence which fail to take account of some of its well known features. Once begun it is likely to be repeated, often with escalating severity. It induces a sense of shame and of powerlessness in the victims, who often blame themselves and find it impossible to escape. There are various legal and practical remedies available, but it is by no means easy for many victims to invoke these. However hard the family courts try, they are often ineffective. Escape may well be the only practicable answer.

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<sup>18</sup> And the new legislation, currently the Domestic Abuse Bill 2020 may well be applied restrictively too; cl 30(3) states that one of the conditions for making a domestic abuse protection order is that it is necessary and proportionate.

<sup>19</sup> S. Hattenstone, 'Attack of the Spiderwoman' *The Guardian*, Weekend, (11.01. 2020,) 33.

<sup>20</sup> [2001] EWCA Civ 1544, See also *Birmingham City Council v. Ali* [2009] UKHL 36, para 43 where Lady Hale outlined the dilemmas facing victims of abuse.

<sup>21</sup> *Bond* n. 21, para 16.

And in a later housing case, Lady Hale’s familiarity with the dynamics of domestic abuse led to a broadening of the interpretation of the term ‘domestic violence’ in the legislation.

### *Defining domestic violence/abuse*

Evan Stark has observed that, ‘[t]hroughout the world, with a few exceptions, the legal and policy responses to domestic violence are typically built on a violence model that equates partner abuse with discrete assaults or threats’.<sup>22</sup> He pointed out that the violent incident model fails to capture the entrapment of women in a pattern of abuse. The seriousness of each incident is assessed separately and seemingly low level abuse is considered low risk; the context of chronic abuse and its devastating effect is rendered invisible.<sup>23</sup> Women seeking help repeatedly are treated more and more perfunctorily by services and perpetrators are dealt with leniently:<sup>24</sup> The reality, wrote Stark, is that:

[abused] women have been subjected to a pattern of domination that includes tactics to isolate, degrade, exploit and control them as well as to frighten them or hurt them physically. This pattern, which may include but is not limited to physical violence, has been variously termed ‘psychological or emotional abuse, patriarchal or intimate terrorism ... , and coercive control ... , the term I prefer.’<sup>25</sup>

Johnson found that, in heterosexual relationships, intimate terrorism is perpetrated ‘almost entirely by men, not women’.<sup>26</sup> Stark argued that coercive control is tied up in men’s constructions of masculinity and as a response to women’s formal equality; it is a way of imposing gender roles and exerting control in the only arena they can – personal life.<sup>27</sup>

In *Yemshaw v. London Borough of Hounslow*,<sup>28</sup> Lady Hale, in what she has indicated is one of the judgments she is most proud of,<sup>29</sup> reinterpreted housing legislation to include what is, in effect, coercive control. Unlike her fellow judges, she moved away

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<sup>22</sup> E. Stark, ‘Re-presenting Battered Women: Coercive Control and the Defense of Liberty’, Prepared for Violence Against Women ‘Complex Realities and Violence in Changing World’, (Les Presses de l’Université du Québec, 2012), 1-19, 3 [www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_100812.pdf](http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf) 1 (accessed 1/1/21).

<sup>23</sup> See C. Wiener, ‘Seeing What is ‘Invisible in Plain sight: Policing Coercive Control’ *The Howard Journal of Crime and Justice*, 56 (2017), 500-515, 504.

<sup>24</sup> E. Stark, ‘Coercive Control’ in N. Lombard and L. McMillan (eds.), *Violence Against Women. Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation*, (London: Jessica Kingsley Publishers, 2013), 20-21.

<sup>25</sup> Stark, n. 22, p.3.

<sup>26</sup> M. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Hanover, NH: University Press of New England, 2008), 2, 26-30

<sup>27</sup> E. Stark, *Coercive Control: How Men Entrap Women in Personal Life*, (Oxford: Oxford University Press, 2007), 213.

<sup>28</sup> [2011] UKSC 3.

<sup>29</sup> Hattenstone, n. 19, p. 33.

from a construction of violence which placed physical violence at the top of the hierarchy of harms.<sup>30</sup>

The issue in that case was the meaning of the word ‘violence’ in s177(1) of the Housing Act 1996. The leading case was, at the time, *Danesh v. Kensington and Chelsea Royal London Borough Council*.<sup>31</sup> The Court of Appeal in *Danesh* held that the meaning of the word ‘violence’ in s198 of the Housing Act 1996 was confined to physical contact. Lady Hale in the Supreme Court took a different view.

The appellant was a woman who ‘fled after a domestic incident’, said her husband did not treat her ‘like a human’<sup>32</sup> and said she feared he would hit her.<sup>33</sup> The housing officers decided that she was not homeless because her husband had never actually hit her or threatened to do so. A review panel agreed.

Lady Hale stated that, while a natural meaning of ‘violence’ is physical violence, this is not the only natural meaning.<sup>34</sup> By the time the Act was enacted, both domestic and international governmental understanding of domestic violence ‘had developed beyond physical contact’.<sup>35</sup> In support of this contention, she cited various international Conventions and national reports. In all these sources, references are made to sexual and psychological harm and in the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) there is a reference to coercion and deprivation of liberty.<sup>36</sup>

Even if the broader meaning was not intended in 1996, she continued, by 2005, the understanding of domestic violence had ‘moved on’ as evidenced by the cross-governmental definition published by the Home Office:<sup>37</sup> ‘Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional)’.

The issue, she said,<sup>38</sup> was whether an updated interpretation of the word ‘violence’ would be consistent with the purpose of the legislation. The provisions relating to violence had two purposes: to ensure that a person was not obliged to remain in a home where she and her children were at risk and to ensure that such a person had a choice whether to remain in the home and seek legal remedies or to leave.<sup>39</sup> Lady Hale concluded that:

The purpose of the legislation would be achieved if the term ‘domestic violence’ were interpreted in the same sense in which it is used... in [the]

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<sup>30</sup> See N. Ohana, ‘The Archaeology of the Courts’ Domestic Violence Discourse: Discourse as a Knowledge-sustaining System’, *feminists@law*, 9 (2019), 1-23, 17.

<sup>31</sup> [2006] EWCA Civ 1404, [2007] 1 WLR 69.

<sup>32</sup> *Yemshaw*, n. 28, para 17.

<sup>33</sup> *Ibid.*, para 16.

<sup>34</sup> *Ibid.*, para 19.

<sup>35</sup> *Ibid.*, para 20.

<sup>36</sup> *Ibid.*, para 20.

<sup>37</sup> Home Office *Domestic Violence: A National Report* (London HMSO: 2005) para 10 cited in *Yemshaw*, n. 28 para 24. See also the *Homelessness Guide for Local Authorities* (London: HMSO, 2006) cited in *Yemshaw*, n. 28, para 24.

<sup>38</sup> Citing *Fitzpatrick v. Sterling Housing Association Ltd* [2001] 1 AC 27, 49.

<sup>39</sup> *Yemshaw* n. 28, para 27.

Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2) [2009] ...:

‘Domestic violence’ includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.<sup>40</sup>

Having established the purposive construction of the term, she went on to examine the wording of the legislation for anything inconsistent with her interpretation. In *Danesh*, the court said that ‘violence’ could not refer to conduct putting someone in fear of violence; if the word violence already encompassed threats there would be no need for a separate reference to threats. However, Lady Hale took the view that there are forms of conduct such as stalking and silent phone calls that can put a person in fear of violence but which cannot be classified as threats.<sup>41</sup> Moreover, the reference to threats was not redundant. Behaviours such as locking someone up or depriving a person of food or money are now recognised as domestic violence and there is nothing redundant in legislating for threats to do such things, she said.<sup>42</sup>

Lord Brown was more dubious. Psychological abuse, he said, encompasses threats, whether or not they are likely to be carried out: ‘it is the threats themselves which are intrinsically abusive and harmful. It is not generally apt to speak of a threat to carry out psychological abuse’.<sup>43</sup> Nor would the likelihood of carrying out the threats be significant if the statute was referring to psychological abuse.

Lady Hale’s analysis in *Yemshaw* was described by Knight<sup>44</sup> as ‘a master class in persuasive judicial reasoning’ but her decision was ‘doubtless made much easier by the evident moral desirability of protecting those who have been victims of domestic violence’. It can be argued that Lord Brown’s literal analysis of the wording of the legislation is persuasive too; it is indeed not apt to speak of a threat to threaten someone.<sup>45</sup>

However, while she had to engage in some linguistic gymnastics to do so, there can be no doubt that Lady Hale made a decision that had the potential to ameliorate the position of women suffering domestic abuse and her decision was one that sought to inject into the law an understanding of the experiences of these women. Indeed, Lord Brown himself, having read the evidence from Women’s Aid, could not bring himself to dissent.<sup>46</sup>

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<sup>40</sup> *Ibid.*, para 28.

<sup>41</sup> *Ibid.*, para 31.

<sup>42</sup> *Ibid.*, para 32.

<sup>43</sup> *Ibid.*, para 50.

<sup>44</sup> C.J.S. Knight, ‘Doing (linguistic) violence to prevent (domestic) violence? *Yemshaw v. Hounslow LBC* in the Supreme Court’, *Child and Family Law Quarterly*, (2012) 95, 104.

<sup>45</sup> The judgment has been criticised for going beyond physical violence: R. Ekins, ‘Updating the Meaning of Violence’, *Law Quarterly Review*, 129 (2013), 17-21, C. Bevan, ‘Interpreting Statutory Purpose: Lessons from *Yemshaw v. Hounslow London Borough Council*’, *Modern Law Review*, 76 (2013), 742-747. Compare Knight n. 44; J. Magyar, ‘A Note on *Yemshaw v. London Borough of Hounslow* and Judicial Updating’, (2017), <https://statutelawsociety.wordpress.com/2017/04/03/a-note-on-yemshaw-v-london-borough-of-hounslow-and-judicial-updating/> (accessed 23/12/20).

<sup>46</sup> *Yemshaw*, n. 28, para 60.

And Lady Hale went some distance in departing from the violent incident model criticised by Stark. Her conception of abuse encompasses a pattern of chronic, ‘low level’ violence as well as other forms of abuse.<sup>47</sup> The question to ask, she said, is:

Was this, in reality, simply a case of marriage breakdown in which the appellant was not genuinely in fear of her husband; or was it a classic case of domestic abuse, in which one spouse puts the other in fear through the constant denial of freedom and of money for essentials, through the denigration of her personality, such that she genuinely fears that he may take her children away from her however unrealistic this may appear to an objective outsider?<sup>48</sup>

As Ohana observes, ‘Lady Hale uses the term abuse rather than violence and describes in this paragraph the main characteristics of coercive control as the “classic case of domestic abuse”’. In this way she ‘delivers the message that coercive control should be acknowledged as central to the understanding of domestic violence’.<sup>49</sup> Lady Hale, says Ohana, weakened the foundations of the prevailing discourse according to which domestic violence was conceived of as physical and episodic. Lady Hale’s judgment, she goes on, can be seen as guidance for housing officers.<sup>50</sup>

*Yemshaw* has since been followed in an unreported case concerning a provision in the Housing Act 1988 referring to domestic violence. It was held that this is not limited to physical violence and can extend to controlling behaviour.<sup>51</sup> However, although the concept of coercive control is now accepted in the context of housing law, abused women still have difficulty accessing housing. A recent report by Women’s Aid refers to victim blaming and the failure to take victims seriously. It also refers to rationing of housing in the face of a ‘housing crisis’.<sup>52</sup> Those interviewed said that without an additional factor such as the presence of children or ‘vulnerability’, domestic abuse on its own does not suffice; ‘the “vulnerability test” is used as a gatekeeping tool’.<sup>53</sup>

So while the definition of domestic abuse within housing law may have changed, the notion of vulnerability is now an obstacle. Lack of resources, lack of training,<sup>54</sup> or lack of understanding of the needs and experiences of survivors<sup>55</sup> are undermining Lady Hale’s work.

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<sup>47</sup> Ibid., paras 32-34.

<sup>48</sup> Ibid., para 36.

<sup>49</sup> Ohana, n30, 18.

<sup>50</sup> Ibid., 18.

<sup>51</sup> *London and Quadrant Housing Association v. S*, in S. Fowles, ‘Possession on the Domestic Violence Ground – Without Proving Domestic Violence’ *Local Government Lawyer* (March 22 2019), [www.localgovernmentlawyer.co.uk/housing-law/315-housing-features/40109-possession-on-the-domestic-violence-ground-without-proving-domestic-violence](http://www.localgovernmentlawyer.co.uk/housing-law/315-housing-features/40109-possession-on-the-domestic-violence-ground-without-proving-domestic-violence), (accessed 23/12/20). See also Ministry of Housing, Communities and Local Government, (2018) *Homelessness Code of Guidance for Local Authorities*, (2018), para 21.19.

<sup>52</sup> Women’s Aid, *The Domestic Abuse Report 2020: The Hidden Housing Crisis*, (Bristol: Women’s Aid, 2020) p. 34. See also p. 22.

<sup>53</sup> Ibid. p26. See pp. 25-8.

<sup>54</sup> Ibid, p. 24.

<sup>55</sup> Ibid. p. 23.

And while, since *Yemshaw*, there has been a ‘mainstreaming’ of the concept of coercive control,<sup>56</sup> and the message the law sends out is that it is unacceptable, the way the law is applied does not necessarily benefit abused women; more law and law reform may have normative or symbolic force but have limited effect on the ground.<sup>57</sup>

In the context of contact with children, too, Lady Hale’s aim to shape the law to better reflect women’s experiences remained unrealised for many years. However, recently there have been some signs of potential change.

### **Contact/Child Arrangements.**

The family courts have long operated a de facto presumption in favour of contact between children and the parent who is not the primary carer (usually the father).<sup>58</sup> This, it seems, was and is grounded in ideology and is thought to result from the confluence of welfare and equality arguments made by fathers’ groups as well as the ideology of the separated but continuing family.<sup>59</sup> The empirical research evidence for the benefits to children in general of contact is far from unequivocal.<sup>60</sup> Yet the courts have been prepared to ‘bend over backwards’ to establish or continue contact.<sup>61</sup> For example, in *Re O* the court held that it is ‘almost always’ in the child’s best interests to have contact with the non-resident parent.<sup>62</sup> Mothers who resisted contact were branded as ‘implacably hostile’<sup>63</sup> and courts asserted their resolve to overcome that resistance.<sup>64</sup>

Writing extra-judicially, Brenda Hale pointed to the paucity of research supporting the courts’ approach:

I have never quite understood on the one hand, the courts’ reluctance to say that there is a presumption in favour of maintaining the attachment between a primary carer, usually the mother, and a very young child, the importance of which is clearly demonstrated in standard psychological literature. But on the other hand, they have been prepared to state a presumption in favour of

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<sup>56</sup> See Serious Crime Act 2015, s 76; Domestic Abuse Bill 2019-2, c11; Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Violence and Harm (2017), para 3; *Re H-N and Others (Children) (Domestic Abuse: finding of Fact Hearings)* [2021] EWCA Civ 448.

<sup>57</sup> For criticism of the Domestic Abuse Bill, see ‘Joint Recommendations Briefing for the Domestic Abuse Bill’, (Bristol: Women’s Aid, 2019) 1, 3. See also C Hanna (2012) ‘The Paradox of Progress: Translating Evan Stark’s Coercive Control into Legal Doctrine for Abused Women’ VAW 1459; Wiener n, 21 505; A. Barnett, “Greater than the Mere Sum of its Parts” Coercive Control and the Question of Proof’, *Child and Family Law Quarterly* 29 (2017) 379. See on evidential problems in the criminal law context, C. Bishop and V. Bettinson (2018) ‘Evidencing domestic violence including behaviour that falls under the new offence of “controlling or coercive behaviour”’ *Intl J of Evidence and Proof* 3. See also Home Office, *Review of the Controlling or Coercive Behaviour Offence*, Research Report 122 (2021) p.5.

<sup>58</sup> See, for example, *Re H (Minors) (Access)* [1992] 1 FLR 148, 152. See, for a discussion of the cases, A. Diduck and F. Kaganas, *Family Law, Gender and the State*, (Oxford: Hart Publishing, 2012), 446ff.

<sup>59</sup> See, for an overview, Diduck and Kaganas, n.58, 338ff.

<sup>60</sup> See e.g. Diduck and Kaganas, n.58, 388-397.

<sup>61</sup> J. Hunt and A. Macleod, *Outcomes of Applications to Court for Contact Orders after Separation or Divorce*, (London: MOJ, 2008), 190; Diduck and Kaganas, n. 58, 392ff.

<sup>62</sup> *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128.

<sup>63</sup> See *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1, 7-8.

<sup>64</sup> See *Re O*, n. 62, 129-30.



maintaining or even creating a relationship with the other parent, usually the father, the importance of which is much less clearly demonstrated by research.<sup>65</sup>

On the bench, she challenged the assumption that recalcitrant mothers are generally unreasonable. In *Re D (Contact: Reasons for Refusal)*,<sup>66</sup> she said:

It is important to bear in mind that the label “implacable hostility”... can be misleading. It is ... an umbrella term that sometimes is applied to cases not only where there is hostility but no good reason can be discerned either for the hostility or for the opposition to contact, but also where there are such good reasons. In the former sort of case the court will be very slow indeed to reach the conclusion that contact will be harmful to the child ... It is rather different in the cases where the judge or the court find that the mother’s fears, not only for herself but also for the child, are genuine and rationally held.

Later, in 1999, she wrote of this statement:

I thought at the time that this was bold enough, but was later taken to task by [an] eminent child psychiatrist, ... for suggesting that the objections must be rational: an abused woman may suffer from post-traumatic stress disorder and have genuine anxieties which bear no relation to the actual level of danger she or the child suffers.<sup>67</sup>

She went on:

We are also beginning to recognise that violence to others, especially the mother, can be relevant in several different ways: the effect upon the child of seeing and hearing it, of being afraid for the mother and for himself; the likelihood that if a person is prepared to be violent to one person weaker than himself he will sooner or later turn on another; the problem, particularly for boys, of perpetuating the cycle; and the effects on mothers of having to be reminded and exposed to renewed risk through the contact arrangements.<sup>68</sup>

Already in 1999 she was conscious of the negative impact that family courts were having on women’s lives when applying the law. She referred to her ‘developing perception that most of my time was spent oppressing women: specifically,

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<sup>65</sup> B. Hale, ‘The view from Court 45’, *Child and Family Law Quarterly*, (1999), 377, [www-lexisnexis-com.ezproxy.brunel.ac.uk/uk/legal/search/journalssubmitForm.do](http://www-lexisnexis-com.ezproxy.brunel.ac.uk/uk/legal/search/journalssubmitForm.do) (accessed 4/1/21). See, for a discussion of the law and child welfare knowledge. See also F. Kaganas, ‘When it Comes to Contact Disputes, What are Family Courts For?’, *Current Legal Problems*, 63 (2010) 235-271, 241-2. See also I. Thery, ‘“The Interest of the Child” and the Regulation of the Post- Divorce Family’, in C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (London: Routledge, 1989), 95; R. van Krieken, ‘The “Best Interests of the Child” and Parental Separation: on the “Civilizing of Parents”’, *Modern Law Review*, 68 (2005), 25-48, 30; J. Pryor and B. Rodgers, *Children in Changing Families: Life After Parental Separation* (Oxford: Wiley-Blackwell, 2001). See also Diduck and Kaganas, n. 58, ch 9.

<sup>66</sup> [1997] 2 FLR 48, 53

<sup>67</sup> Hale, n.65.

<sup>68</sup> Ibid.

mothers'.<sup>69</sup> She went on to say that '[t]he most troubling aspect of my perception is that some women are being pursued and oppressed by controlling or vengeful men with the full support of the system.'<sup>70</sup>

Her observations here, like her pronouncements in her judicial capacity, reflected the point of view of the women and children caught up in contact disputes but this perspective was not widely adopted by other judges.<sup>71</sup> Lady Hale's bid to deepen understanding of the experiences of women and children at the hands of abusers had little impact on the way disputes about child arrangements have been dealt with in court. The family courts continued to operate a de facto presumption in favour of contact after *Re D* and refused to consider what was then termed domestic violence as a bar to contact.<sup>72</sup> Despite the recommendations of expert witnesses that there should be a presumption against contact in such cases,<sup>73</sup> the court held, in *Re L, V, M and H* that allegations of domestic violence should be examined but that, at most, domestic violence would 'offset the assumption' in favour of contact.<sup>74</sup> And a Practice direction (PD12J) requiring courts to consider the safety of mothers and children has had little effect either.<sup>75</sup>

### *Discounting Women's Experiences of Abuse*

It has been estimated that domestic abuse is an issue in a high proportion of contact disputes<sup>76</sup> yet, little attention has been paid to it by family courts.<sup>77</sup> They prioritise contact over safety.<sup>78</sup> Research has revealed that courts have ordered no contact only in cases of recent, very severe physical violence.<sup>79</sup>

While Lady Hale has sought to inject an understanding of women's experiences into the law, courts have become more determined to make sure that contact happens<sup>80</sup> and they have become more punitive to mothers who oppose it.<sup>81</sup>

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> But see *Re P (Contact: Discretion)* [1998] 2 FLR 696, 703–704, *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, 56; *Re M (Minors) (Contact: Violent Parent)* [1999] 2 FLR 321, 333.

<sup>72</sup> *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, 56

<sup>73</sup> C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' *Family Law* (2000), 615–629.

<sup>74</sup> *Re L (Contact: Domestic Violence; Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334, 341–2.

<sup>75</sup> Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Violence and Harm (2017) is the latest version of the original 2008 'Practice Direction: Residence and Contact Orders: Domestic Violence and Harm' which was incorporated into the Family Procedure Rules 2010 as PD12J. See Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases, Final Report*, Executive Summary (2020) para 19; A. Barnett, *Domestic Abuse and Private Law Children Cases. A Literature Review*, (London:MoJ, 2020), pp 8–9; .Sir James Munby, 'The Crisis in Private Law' (Clevedon: The Transparency Project, 2020). [www.transparencyproject.org.uk/the-crisis-in-private-law-by-sir-james-munby/](http://www.transparencyproject.org.uk/the-crisis-in-private-law-by-sir-james-munby/) (accessed 18 March 2020).

<sup>76</sup> HMICA, *Domestic Violence, Safety and Family Proceedings*, (HMICA, 2005), 17; Cafcass and Women's Aid, *Allegations of Domestic Abuse in Child Contact Cases*, (2017), 3.

<sup>77</sup> See also A. Barnett, 'Contact at All Costs. Domestic Violence and Children's Welfare' *Child and Family Law Quarterly*, 26 (2014) 439, 441–3.

<sup>78</sup> See eg. Barnett, n. 75, ch 7; MoJ, n. 75, p42.

<sup>79</sup> Barnett, n. 75, p. 9.

<sup>80</sup> See eg. *Re C (Direct Contact)* [2011] EWCA Civ 521 para 47.

The drive to emphasise the importance of contact has also led to legislation aimed at getting mothers to accept contact. Most recently, in 2014, Section 1(2A) of the Children Act 1989 was enacted and provides that the courts must presume that involvement of both parents in their child's life furthers that child's welfare.<sup>82</sup>

While it appears from a study of reported judgments that the courts are still relying on the welfare principle rather than s1(2A),<sup>83</sup> they continue to regard paternal involvement as fundamental to children's well-being.<sup>84</sup> They minimise abuse and cast resistant mothers as the problem.

Barnett, in a literature review carried out for the Ministry of Justice, wrote:

Qualitative and quantitative studies revealed a widespread view among courts and professionals that mothers who opposed or sought to restrict contact or even raised concerns about it were 'implacably hostile' or, more recently, 'alienating', which has led to an increasing perception among courts and professionals that mothers raise false allegations of domestic abuse.<sup>85</sup>

Birchall and Choudhry found that survivors of domestic abuse felt that they were not taken seriously by the courts and professionals involved in child contact cases; there was a failure to understand the dynamics and impact of domestic abuse. This led to potentially unsafe decisions about contact.<sup>86</sup> The more recent Harm Report published by the Ministry of Justice identified 'deep-seated and systematic issues that were found to affect how risk to both children and adults is identified and managed' in the family courts.<sup>87</sup>

### *Coercive Control and the Family Courts*

Family court judges, it seems, proved impervious to Lady Hale's move to broaden the meaning of domestic abuse as well as her efforts to increase understanding of it from the survivor's point of view. However two recent reported judgments mark a shift in perspective.

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<sup>81</sup> See eg. *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215, paras 4-10; *Re C (Residence Order)* [2007] EWCA Civ 866, para 26; *R (Parental Alienation and Suspended Transfer of Residence)* [2019] EWFC 61.

<sup>82</sup> See F. Kaganas, 'A Presumption that "Involvement" of Both Parents is Best: Deciphering Law's Messages', *Child and Family Law Quarterly*, 25 (2013) 270-293; F. Kaganas, 'Parental Involvement: A Discretionary Presumption', *Legal Studies*, 38 (2018), 549-570.

<sup>83</sup> Kaganas (2018) n. 82. See also Sir James Munby n. 75.

<sup>84</sup> Barnett n. 75, 59ff.

<sup>85</sup> *Ibid.*, 5.

<sup>86</sup> J. Birchall and S. Choudhry, *What About my Right Not to be Abused?* (Bristol: Women's Aid, 2018) 23-24. See also Private Law Working Group, *Second Report to the President of the Family Division*, (2020).

<sup>87</sup> MoJ, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases. Final Report* (London: MOJ, 2020) 4. The issues included a pro-contact culture, difficulties evidencing abuse and silo working. See also M. Hester, 'The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence', *British Journal of Social Work*, 41 (2011), 837-853

In *F v M*,<sup>88</sup> in a judgment following a fact-finding hearing, the court observed:

There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals.

In *Re H-N* the Court of Appeal set out to provide new guidance<sup>89</sup> for the judiciary on how to deal with allegations of domestic abuse in child arrangement cases. The court noted that the central question that courts need to examine is likely to be whether there is a pattern of coercive or controlling behaviour.<sup>90</sup> It went on to make it clear that coercive control need not involve physical abuse and that incidents may be part of a wider pattern of abuse.<sup>91</sup>

The court described the various ways in which domestic abuse affects children<sup>92</sup> and stated that a finding of coercive control impacts on the assessment of the risks attached to contact.<sup>93</sup> And the judgment clearly rejects the assumption, often made by family courts, that abuse in the past is not relevant to future risk as well as the assumption that the end of the relationship means the end of abuse.<sup>94</sup>

The the court issued a warning:

Where ,, an issue properly arises as to whether there has been a pattern of coercive and/or controlling abusive behaviour,,, and the determination of that issue is likely to be relevant to the assessment of the risk of future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error.<sup>95</sup>

The court in *Re H-N* took the view that errors are not common because judicial '[t]raining together with a proper application of PD12J largely ensures' that courts do not fall into error.<sup>96</sup> However it is clear from the four decisions subject to appeal in this conjoined case that family courts continue to engage in victim blaming, refuse to believe victims, minimise abuse, fail to recognise the risks of post-separation abuse and maintain stereotypical images of mothers.

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<sup>88</sup> [2021] EWFC 4, para 4. See also paras 60-61, 102.

<sup>89</sup> *Re H-N and Others (Children) (Domestic Abuse: finding of Fact Hearings)* [2021] EWCA Civ 448, para 1.

<sup>90</sup> *Ibid.*, paras 28, 51.

<sup>91</sup> *Ibid.*, para 27.

<sup>92</sup> *Ibid.*, para 31.

<sup>93</sup> *Ibid.*, para 51.

<sup>94</sup> *Ibid.*, para 52.

<sup>95</sup> *Ibid.*, para 53.

<sup>96</sup> *Ibid.*, para 224. See also para 53.

In their response to the judgment, Women's Aid expressed doubts about the adequacy of judicial training<sup>97</sup> and, like other domestic abuse organisations, considered the judgment disappointing. They point out that the court failed to address the entrenched pro-contact culture identified in the Harm Report and failed to 'send a clear message that culture change is necessary'.<sup>98</sup> Rights of Women stated that the court failed to prioritise the safety of women and children.<sup>99</sup>

### **Making a difference**

There can be no doubt that Lady Hale has been instrumental in achieving some of the gains that women (and their children) have made in the development of the law on domestic abuse. Her statements while a Law Commissioner, and while sitting at all levels of the judiciary, demonstrate an understanding of domestic abuse beyond that of her judicial colleagues. Despite many judges' limited understanding of abuse, Part IV of the Family Law Act 1996 has been important in providing safety for some women and coercive control has now gained wider legal recognition. *Yemshaw* in turn may have widened access to housing for some abused women and their children. Finally, in *Bond*, and in her extra-judicial writing, she brought an understanding of the experiences of abused women into the legal arena.

However, although some women will have benefited from Lady Hale's efforts, the exercise of discretion by judges as well as by housing officers has allowed them to circumvent the expanded definition of abuse and to persist in a culture of disbelief. While Lady Hale set a binding precedent regarding the interpretation of domestic 'violence', the concepts of priority need and vulnerability have remained open to interpretation. In the context of a housing shortage, the concept of vulnerability has replaced that of domestic abuse in order to ration housing. In the context of child contact, family court judges have used their discretion to impose their understandings of welfare and the relative importance of contact and abuse. They have remained deaf to women's experiences.

The Domestic Abuse Bill currently passing through parliament will curtail the discretion of housing officers; it will provide 'that all eligible homeless victims of domestic abuse automatically have "priority need" for homelessness assistance'.<sup>100</sup> However, in relation to child contact the signs of change are limited. The relatively modest acknowledgement of the viewpoint of mothers in *Re D* and Lady Hale's more forceful extra-judicial observations have disappeared under a welter of judgments insisting that the welfare of children means that mothers should facilitate and encourage contact even in the face of abuse. *Re H-N* should at least force the judiciary to consider the risks posed by coercive control but there is no guarantee that courts will not continue to deal with cases by minimising abuse, disbelieving victims and prioritising contact.

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<sup>97</sup> Lucy Hadley, Women's Aid, 'Court of Appeal misses opportunity to effect culture change needed in family courts', (2021) <https://www.womensaid.org.uk/court-of-appeal-misses-opportunity-to-effect-culture-change-needed-in-family-courts/> (accessed 31/3/2021).

<sup>98</sup> Ibid.,

<sup>99</sup> Ibid., Olive Craig. See also O. Craig 'The Domestic Abuse Appeals; A Missed Opportunity for Cultural Change?' (2021) <http://www.transparencyproject.org.uk/the-domestic-abuse-appeals-a-missed-opportunity-for-cultural-change/> (accessed 6/4/21)

<sup>100</sup> Home Office, *Domestic Abuse Bill 2020: Overarching Factsheet*, 2020.

Reece argued that ‘the indeterminacy of the paramountcy principle has allowed other policies and principles to smuggle themselves into children's cases’.<sup>101</sup> Certainly, a particular construction of welfare, unsupported by clear empirical evidence, has been smuggled into children’s cases and into legislation on children’s welfare. And this construction of welfare has been driven by the demands made by men’s groups<sup>102</sup> as well as the views of pro-contact child welfare experts. The importance to children of ties with biological fathers is axiomatic in the family courts.

Yet it is this very indeterminacy of the welfare principle that seems to allow for the possibility of change. The court in *Re H-N* showed some understanding of the harm domestic abuse does to women and children and, by spelling out the harm to children, it may conceivably influence the prevailing interpretation of welfare and lead courts to decide cases differently.

## Conclusion

Lady Hale, when giving oral evidence to the House of Lords Constitution Committee, was asked whether decisions would be different if the composition of the courts were different. She said that they would.<sup>103</sup> And in the Fiona Woolf Lecture she suggested that women judges can make a difference. She listed decisions, including *Yemshaw*, which she thought had been influenced by her experience and perceptions of life.<sup>104</sup> She is also reported to have said, at an event organised by the UK Association of Women Judges, that half of all judges should be women.<sup>105</sup>

Whether it is simply female judges who would make a difference is questionable. Rather, as Hunter says, it is feminist judges who would.<sup>106</sup> Feminist judging, she says:

is informed by feminist theories and an understanding of gendered experience, but this may result ... in a range of approaches, including noticing the gender implications of apparently neutral rules and practices, challenging gender bias in legal doctrine and judicial reasoning, or promoting substantive equality. Particular characteristics of feminist judging include paying attention to previously excluded or marginalized voices and experiences and construing the facts of the case from that perspective; ...; placing facts and issues within their broader social and legal context, often drawing upon relevant social

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<sup>101</sup> H. Reece ‘The Paramountcy Principle. Consensus or Construct?’ (1996) 49 *Current Legal Problems* pp. 267-304, p. 268

<sup>102</sup> See *V v V (Contact: Implacable Hostility)* [2004] EWHC Fam 1215 para 4, *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC Fam 727 para 4. See also *Re C (Residence Order)* [2007] EWCA Civ 866 para 24. See also F. Kaganas (2013), (2018) n. 82.

<sup>103</sup> House of Lords Select Committee on the Constitution, *Judicial Appointments Process*. Oral and Written Evidence (HL 2011, 272) [www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledEvidence28032012.pdf](http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledEvidence28032012.pdf) (accessed 11/3/2020).

<sup>104</sup> Lady Hale, *Fiona Woolf Lecture for the Women Lawyers’ Division of the Law Society: Women in the Judiciary 1*, 21 (2014), (accessed 11/3/2020)

<sup>105</sup> D. Taylor, ‘Lady Hale: at least half of UK Judiciary should be female’, *The Guardian* (24/3/2019). <http://www.theguardian.com/law/2019/mar/24/lady-hale-at-least-half-of-uk-judiciary-should-be-female>.

<sup>106</sup> R. Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-making’, *Current Legal Problems*, 68 (2015), 119-141, 129. See also R. Hunter ‘The Power of Feminist Judgments?’ *Feminist Legal Studies*, 20 (2012) 135-148, 135, 139, 146.

science research...; and reasoning from context and the reality of lived experience rather than in abstract, categorical terms.<sup>107</sup>

Lady Hale is an avowed feminist. In a recent interview, she said: ‘... I have never hesitated to call myself a feminist.... It should never be a term of abuse or embarrassment’.<sup>108</sup> And, in the Fiona Woolf lecture, she said: ‘Pioneering women must champion the cause of women generally, otherwise the world will slip back into its complacent old masculo-centric ways’.<sup>109</sup>

Brenda Hale has, in the context of domestic abuse, put into practice the elements of Hunter’s feminist judging. She has put women’s perspectives, experiences and interests into the foreground and construed the facts of cases from that perspective. She has challenged gender bias in judicial reasoning. She has placed facts and issues within their broader social and legal context and reasoned from context and the reality of lived experience rather than in abstract, categorical terms.<sup>110</sup>

However, while she has to some extent succeeded in weakening the support within law for men’s dominant perspective and position, the forces of resistance from politics, entrenched understandings of the world and the influence of men’s interest groups have made and continue to make it hard to achieve change. It remains the case that the practical benefits of law reform are ‘less than was hoped’.<sup>111</sup> For women, learning how to use the law and influence it is an ongoing project.

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<sup>107</sup> R. Hunter (2015) n. 106, 119, 131

<sup>108</sup> Taylor, n. 105. See also J. Rozenberg, ‘An insider’s account of the “Brenda agenda” ‘ 3 Feb 2020 *The Law Society Gazette* (3/2/2020) <https://www.lawgazette.co.uk/commentary-and-opinion/an-insiders-account-of-the-brenda-agenda/5102903.article> (accessed/10/2/2020)

<sup>109</sup> Hale, n 104, 1.

<sup>110</sup> R. Hunter (2015) n. 106, 119, 131

<sup>111</sup> Atkins and Hoggett (1984) n. 1.