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## The archaeology of the courts' domestic violence discourse: Discourse as a knowledge-sustaining system

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### Abstract

In the last several years, the harm of coercive control has been increasingly acknowledged as a domestic violence harm by the England and Wales legal system. In this process of growing acknowledgement of the harm it inflicts in intimate relationships, coercive control is being inserted into existing discourses around domestic violence. The article examines the impact of a discourse on the understanding of a harm: how can the understanding of coercive control be impacted by the structure of the discourse into which it is inserted? The courts' civil domestic violence discourse in England and Wales and its potential impact on the understanding of coercive control is examined as a case study. Using critical theory which links knowledge to social power as an analytical lens, the discourse is seen as not only founded upon a harm that is entirely detached from women's experiences but also as a knowledge-sustaining system, operating on an everyday basis to protect and to further strengthen that alienated knowledge. Through its knowledge-sustaining operation, the discourse prevents a meaningful change in the legal understanding of domestic violence, a change that is required for coercive control to be integrated into the discourse in a way that will reflect its essence and severity.

### Introduction

In the last few years, the legal system in England and Wales has begun to acknowledge coercive control as a harm. The main landmarks include being referred to by the Supreme Court as the "classic case of domestic abuse" (*Yemshaw v Hounslow* [2011] UKSC 3) and its criminalisation through the passage of Section 76 of the Serious Crimes Act, 2015. In this process of naming and acknowledgement, coercive control is, perhaps inevitably, being integrated into existing discourses around domestic violence, since it is a harm which is inflicted in intimate relationships. Yet it is crucial to bear in mind that the discourse into which a harm is inserted can have an effect on the understanding of that harm. I examine the impact of the domestic violence discourse on the understanding of coercive control. I approach my examination acknowledging that discourses are developed and shaped in accordance with social power relations (Foucault, 2005). My aim is to understand the structure of the discourse and the rules of knowledge production it had developed over the years in order to examine how these can shape and impact the way the recently inserted harm of coercive control is understood. To be able to do that, I analyse a corpus of judgments that were given in England and Wales from 1976 until 2019 in civil proceedings surrounding domestic violence.

A discourse is both a site in which knowledge is produced and a system that produces knowledge (Foucault, 1980). Knowledge accepted by society is a mirror that reflects power

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relations: it is only when an individual is a participating subject in her society that her history, reality and standpoint can be reflected in society's accepted knowledge. Equally, unnamed, unacknowledged and not-understood trauma or harms reflect social marginalisation (Foucault, 2003). Knowledge is not only a reflection of power relations, it also actively operates to sustain them and to prevent their change. It is this relationship between power and knowledge that makes the discourse a political system of prime importance. The common image and perception of discourse as apolitical in its essence serves to further strengthen its political effects. In my examination of the domestic violence discourse in the case law, I locate the power/knowledge nexus at the centre, pointing to the structure of the discourse and linking it to questions of social power and agency. To make that connection I use critical theory that links knowledge and social power. I concentrate on theory which points to a core dynamic that directs the course of discourse-development: the dynamic between *a-priori knowledge* – knowledge that pre-existed the discourse and upon which the discourse was formed and developed, and the *everyday operations of discourse*.

I examine the a-priori/everyday dynamic in judgments given in England and Wales in civil proceedings from 1976 until 2019. 1976 is the year that marks an emerging domestic violence discourse in courts in England and Wales. It is the year of the passage of the Domestic Violence and Matrimonial Proceedings Act, an act that was an outcome of a long campaign by the women's movement in the UK. The link between the legislation and the campaign represented the beginning of a shift in social perceptions of domestic violence, one that started to acknowledge its socio-political bases (Gordon, 1988, pg. 251; Wandor, 1990). Such changing social attitudes had to be reflected in the courts' approach. By reading judgments from the early years after the passage of the Act, I was able to see the a-priori knowledge of the discourse, the first element of the dynamic: knowledge that pre-existed the discourse, the old discourse's legacy for the new one. I read the cases that followed this period of time to see the everyday acts of the discourse, whether it operates to sustain the a-priori knowledge or to enable its change. I then focus on a judgment given by the UK Supreme Court in 2011, *Yemshaw v Hounslow* [2011] UKSC 3 (hereinafter: "*Yemshaw v Hounslow*"), a judgment which marks a change in the courts' understanding of domestic violence. The court's activist approach in that judgment and willingness to change accepted meanings, makes it a particularly apt site from which to examine whether the structure of the discourse and the rules of knowledge production it entails, determines the extent of change that can take place. I then continue to see whether the change presented in *Yemshaw v Hounslow* is reflected in the judgments given in recent years. I ask whether the discourse has 'rules of its own' which can direct and monitor the accepted legal knowledge in a way that poses limitations on the understanding of coercive control.

The article takes the following structure: It starts with a summary of the characteristics of coercive control. Seeing these main features is necessary in order to assess the adaptability of the discourse to this harm. In the part that follows I set the a-priori/everyday dynamic as the theoretical lens through which to examine the development of the discourse. In the third part I identify the a-priori/everyday dynamic within the case law. I conclude by analysing the impact of the discourse on the Supreme Court's *Yemshaw v Hounslow* decision and on judgments given in recent years.

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## **I Coercive control**

Women's accounts of their experiences of coercive control started to accumulate at the beginning of the 1980s, approximately 10 years after domestic violence began to be recognised socially and legally, leading to the development of a multidisciplinary body of knowledge around domestic violence spanning over four decades. Already at the beginning of the 1980s it became clear that the dominant understanding of the harm of domestic violence does not capture the harm of coercive control. Whereas according to the dominant understanding domestic violence was mainly outbursts of physical violence or seen as separate incidents of harmful behaviour, coercive control was an entirely different phenomenon which could not be understood according to these lines.

Coercive control is a term which describes a pattern of behaviours used by one partner, the perpetrator, with the aim of creating in the other partner a state of captivity: a sense of entrapment and being unable to flee from the relationship (Herman, 2015; Stark, 2009). Even though it occurs in the context of intimate relationships, it shares its core features with harms of captivity which take place in political contexts, such as being held as a hostage or imprisoned in a concentration camp. The essence, characteristics, and severity of coercive control can be best understood when it is seen as a harm that by its nature is located within the family of captivity-related harms, in both intimate and non-intimate contexts (Herman, 2015). Outwardly, there seems to be a significant difference between these contexts: political captivity begins by a single act of abduction or imprisonment whereas intimate captivity is achieved gradually, over a period of time. However, the most severe harm that is inflicted in a state of captivity is when the captive is being held over a period of time and gradually internalises the tyranny into their psyche: when she or he perceives themselves and the world around them through the captor's eyes. Accounts given by victims of coercive control and by political captives reveal a striking similarity not only in how the harm of captivity is experienced but also in the tyrannical methods used by perpetrators in both contexts (Herman, 2015).

According to common social perceptions, captives are imprisoned in secluded spaces, being prevented from escape by the use of physical barriers. In the intimate context, the physical barriers, even though used more often than might be thought (Herman, 2015), are replaced by social norms which normalise relations of dependence and oppression between the tyrant and the captive. This explains why coercive control is a gendered harm: it is inflicted mainly by men on women in intimate relationships. The social conditions that enable the existence of coercive control are the deeply engrained patriarchal norms which foster and normalise the social dependence of women on men. This creates the dangerous situation by which a woman who is subjected to coercive control might sense from the society she is part of that her reality is perceived as normal.

The main features that characterise coercive control in an intimate relationship therefore are: a systematic and repetitive pattern of behaviours inflicted constantly and covering all aspects of the woman's life; it exists with or without the use of physical violence, but importantly physical violence is not required in order to achieve a state of captivity because that sense can be achieved by the use of other techniques (Johnson, 1995); to an external observer, some of the behaviours would not seem harmful in and of themselves: the harm of captivity can only be seen when the pattern that connects all forms of behaviour is realised (Stark, 2009); coercive

control is a central indication of a life-threatening situation – it is the most relevant factor in risk assessments predicting whether the perpetrator poses a threat to the woman's life; and finally, like other forms of tyranny, the pattern of behaviours is aimed at three objectives: intimidation, isolation and control over bodily autonomy.

Behaviours aimed at intimidation seek to create a constant state of fear through the establishment of a continual threat of death or of serious harm to the partner or to one of her closest relatives. The perpetrator can use different tactics and not only physical violence to make the partner believe that he is capable of violence. Behaviours aimed at isolation cut off the woman from any source of information, material aid or emotional and social support. Control over the body's most basic autonomy, the third objective, shames and demoralises her. It is through this continuous, repetitive, all-encompassing pattern of behaviours of instilling terror and helplessness, deprivation of resources, disconnection and disempowerment, that the partner can increasingly feel that she is losing her sense of self and gradually experience entrapment in the relationship.

The characteristics of coercive control outlined in this part show that it is a harm which is entirely different from episodic violence. Episodic violence does exist. We can see it in the street when a conflict escalates and that same type of violence can be manifested in the family and in relationships as well. However, coercive control and episodic violence are “nearly non-overlapping phenomenon” (Johnson, 1985, pg. 286). The difficulty arises because coercive control is now included in discourses dominated by the episodic violence meaning, even though they do not resemble each other. This means that the existence and severity of coercive control and the danger it poses are assessed through a set of tools designed to assess an entirely different phenomenon.

Coercive control should be understood through tools relevant to its essence, for example, by assessing behaviours aimed at isolation, intimidation and control over bodily autonomy, the three main characteristics of the harm discussed above. This means that the first task in any domestic violence situation is to ask whether the nature of the violence presented is one of coercive control or of episodic violence. This distinction can be made by assessing whether there is evidence of isolation, intimidation and control over bodily autonomy. Only after making the distinction, can decisions on effective responses can be made.

With this characterisation of coercive control in mind, I turn now to the theoretical lens within which I analyse the development and structure of discourse – the dynamic between a-priori knowledge and everyday acts of discourse. This discussion will introduce my examination of whether or not domestic violence discourse can accommodate the harm of coercive control.

## **II(1) The a-priori/everyday dynamic**

Theories on the relationship between knowledge and social power point, in different conceptual ways, to a dynamic which is at the core of knowledge production: the dynamic between a-priori knowledge and everyday acts of communication and expression of meaning. The a-priori is the set of internalised norms, values and perceptions embedded deeply into the psyche and the everyday is the visible layer which comprises the means by which meaning is produced and

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communicated, such as the different uses of language, visual representation, practices and bodily appearance.

Irigaray, Butler and Bourdieu conceptualise this dynamic in different ways. In Irigaray's writing, the dynamic appears in the relationship between the invisible and visible layers of representation. The invisible layer is where categories of perception and judgment reside, whereas the visible layer includes the everyday mediums by which we express meaning, mainly the medium of language, Irigaray's main site of research. In Butler's thought, the dynamic is conceptualised as a relationship between embedded power structures on the one hand (such as phallogocentrism and heteronormativity), and performance on the other, which includes thought, behaviour, language and appearance. Bourdieu represents this foundational relationship through the term 'habitus', using the term to describe the merger between the two layers. Habitus is the interaction between the internalised layer and the everyday layer: the set of models, thought-patterns, dispositions, and taste that is structured within the mind and by which people act in the world.

Each theorist characterised the type of relationship between the a-priori and the everyday in a different way. I explore each way separately since each is relevant to the analysis of the judgments that will follow. Irigaray perceives the internalised layer as entirely governing the everyday layer. She sees the everyday layer as a reflection of the internalised one. The internalised layer creates the rules of what is possible in everyday life and determines in which way objects, subjects and phenomena can be named and understood. Accordingly, she argues that language – a central everyday tool – cannot serve to define certain identities or social phenomena because it is shaped according to the barriers to representation positioned by the invisible layer. For her, the link between the invisible layer and language, its outward manifestation, should be identified and then dismantled in order for language to become a relevant and effective tool for making invisible realities visible (Irigaray, 1991). In my reading of Irigaray I identify an emphasis on the invisible layer in processes of social change. For a process of social change to occur, the invisible layer should be dismantled. It seems that according to Irigaray, the invisible layer will be dismantled as a natural consequence of realising its violent effects.

Butler and Bourdieu on the other hand do not perceive the everyday layer as entirely formed and shaped by the internalised layer. They see a dialectic relationship between them. As does Irigaray, Butler perceives the internalised layer as the layer which determines the very thought of what is possible in life – the limited field of representation that we have for existence. However, unlike Irigaray, she recognises that performative acts also hold a constructive power and are not completely bound by internalised structures. In their operation, performative acts are able to create new meanings or impact an accepted one, either by strengthening the accepted meaning or by challenging, disturbing or transforming it (Butler 2002, 2006, 2013). An example of a performative act able to disturb internalised meanings in Butler's work is drag, troubling the neat constructed division between man and woman, un-stabilising the accepted meaning of the category gender and revealing its contingent and revisable nature. Therefore, whereas Irigaray emphasised the a-priori in processes of social change, Butler puts more attention on the potential of the micro, performative, everyday acts.

Bourdieu perceives the internalised and the everyday as one entirety, the habitus, in which “two moments, the objectivist and the subjectivist, stand up in a dialectical relationship.” (Bourdieu, 1985, pg. 15). The habitus represents the way by which the internalised framework directs thought and action and instils in the mind the sense of what is possible and what are the constraints and limitations of external reality:

“a sense of what one can or cannot “permit oneself” implies a tacit acceptance of one’s place, a sense of limits (“that’s not for the likes of us”, etc), or, which amounts to the same thing, a sense of distances, to be marked and kept, respected or expected.” (Bourdieu, 1985, pg. 729)

Habitus thus represents the understanding that a clear line cannot be drawn between the internalised and everyday layers. The internalised is formed by the accumulation of everyday life experiences while life experiences are shaped by the internalised dimension. Habitus is specific to a social position, a product of shaped and always shaping everyday activities particular to the certain set of social conditions to which one is exposed and within which one lives. Bourdieu perceives habitus as an interaction which is neither stable nor fixed and which leaves room for change to occur (Dezalay and Madsen, 2002). Acknowledging that the two sides of the interaction cannot be clearly separated, Bourdieu sees social change as an outcome of movements and shifts in the interaction itself. Each of these different three focus points of Irigaray, Butler and Bourdieu will serve me in the analysis of the judgments to examine the process of change of the legal understanding of domestic violence.

Irigaray’s, Butler’s and Bourdieu’s theories relate to the operation of the a-priori/everyday dynamic in any site of knowledge production. Transmitted through the various acts of performance, knowledge is formless and can be spread limitlessly and endlessly, produced from moment to moment in all social locations (Foucault, 1990). Knowledge is produced through the use of words (whether internally through thought or externally through speech and writing) and through other mediums, such as bodily appearance, tone of voice, facial expressions and gestures, practices, artistic forms, expression through visual imagery etc. These are all sites of meaning-making in which the dynamic between the internalised and the everyday can be identified and examined. Part of designing a methodology for a research project which analyses this dynamic is to choose a site of meaning-making on which to concentrate – a site in which the workings of the dynamics can be seen and analysed. The site of knowledge production I focus on is discourse – an organised framework and system of knowledge production. In the next part, I set the theoretical framework of the dynamics between the a-priori and the everyday specifically within discourse.

## **II(2) The a-priori/everyday dynamic within discourse**

Foucault theorised the a-priori/everyday dynamic within discourse, the main site of his research projects (Foucault, 2013). Whereas the previous theories provided me with different focus points with which to identify the type of relationship between the a-priori and the everyday in judgments, Foucault’s theory adds to the theoretical framework by providing actual tools with which to identify the a-priori and the everyday within the discourse.

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The a-priori knowledge within discourse is knowledge that pre-existed the discourse and upon which the discourse was founded (Foucault, 2005). Everyday acts can be seen through the discourse's *statements*: written or spoken units which influence in their appearance the construction of knowledge (Foucault, 2011). Foucault sees the a-priori as "a condition of reality for statements" (Foucault, 2011, pg.143) – it governs their appearance, disappearance and their acceptance as statements of truth. A-priori knowledge reflects a position of social power and domination; it is knowledge strong enough to become the foundation of a discourse and it receives the discourse's protection.

Statements emerge, connect to each other, repeat or disappear in relation to their reflection of the a-priori knowledge. In turn, through their appearance and reiteration, statements safeguard, reinforce and strengthen the status of the a-priori knowledge as the foundation of discourse and operate to fix, normalise, legitimise and homogenise it. The channels for knowledge production created in the discourse – its epistemological routes – are set according to an a-priori/everyday dynamic. The channels are designed to produce knowledge of one form that conforms and is adapted to the a-priori foundation. The alignment of the channels available for knowledge production to the a-priori knowledge reassures that meanings which challenge or disrupt the accepted knowledge cannot be produced by the discourse (Foucault, 2013). In the analysis of the judgments, I call these channels 'mechanisms' and show their role in safeguarding the a-priori knowledge.

The ability of the discourse to produce knowledge which will challenge the a-priori foundation is significantly weakened by these processes of discourse formation directed by the aim of safeguarding a certain knowledge. In Foucault's words:

"In every society, the production of discourse is at once controlled, selected, organised and redistributed by a certain number of procedures whose role is to ward off its powers and dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality." (Foucault, 1970, pg. 53)

In their appearance, the statements reveal (1) the a-priori knowledge, (2) how the discourse works to safeguard it, and (3) signs of discontinuity (Foucault, 1980. pg. 112) – signs of interruptions, breaks or transformations in the a-priori knowledge. To uncover the a-priori knowledge and the ways by which the discourse protects it, the following questions are asked: which speech is accepted without justification or controversy? Which statements are often repeated? Is it possible to identify patterns in the appearance of statements – can they be grouped? To find whether signs of discontinuity exist, it is not enough to identify statements which differ in their content from the a-priori knowledge. The question is whether these statements are isolated or are part of a group of statements that can challenge the a-priori knowledge. An isolated statement, which was not repeated but which disappeared after its appearance does not show a sign of discontinuity.

Through this type of discourse analysis, it becomes possible to identify knowledge of 'high status' – knowledge that despite not reflecting the reality of many, is shielded by the discourse, while reflective knowledge goes unnoticed:

“(Which rules determine that statements) do not withdraw at the same pace in time, but shine, as they were, like stars, some that seem close to us shining brightly from afar off, while others that are in fact close to us are already growing pale.” (Foucault, 2011, pg. 146)

Having set up the theoretical framework with which to identify the a-priori and the everyday within a discourse, as well as to identify the type of relationship between them and how they operate to sustain knowledge or allow change to occur, I turn now to the analysis of the dynamic within the courts' domestic violence discourse in England and Wales.

### **III(1) The a-priori/everyday dynamic in the courts' domestic violence discourse: selection of data**

The legal meaning of domestic violence is a socio-legal construct, constructed by different, legal and non-legal discourses. The courts' discourse, whilst central to the processes of meaning construction, is not an isolated discourse but is shaped by and shapes discourses around it. Legislation, case law and the parties' arguments are among the elements that influence the courts' discourse and understanding of domestic violence. These elements and surrounding discourses contributed to the creation of the courts' a-priori knowledge, the knowledge accepted by courts as uncontroversial truth. This is a crucial point because once an uncontroversial meaning is established, the discourse, through everyday acts as explained in the theoretical part above, develops in alignment with it, influencing its solidity and monitoring the ability to change it.

Recognising the impact of this dynamic on the ability to change the legal meaning of domestic violence, I analysed cases to identify the a-priori and everyday acts in the courts' domestic violence discourse. I searched for cases in England and Wales from 1976 until 2019. I narrowed the search of cases to all areas of civil law, where courts, generally speaking, have more room for interpretation than in criminal law, and therefore are potentially more able to divert from a-priori knowledge. I was aware in my reading of the fact that different elements, such as legislation, precedents and parties' arguments can bind courts' interpretation in civil proceedings as well and took that into account in my assessment of statements in judgments, asking whether the court could have written these statements differently.

I conducted two searches using the Westlaw UK database. In the first search, I entered the key terms “domestic violence” and “women”. The purpose of using the term domestic violence in quotation marks was to filter the cases in which the courts perceived the circumstances of the case as the social phenomenon they term ‘domestic violence’. I added the word “women” for two reasons. Firstly, this was done in order to filter the cases that discussed the issue of domestic violence against women and not other forms of violence in the family. Secondly, by using the plural word ‘women’ and not the singular ‘partner’, ‘wife’ or ‘girlfriend’, I aimed to find the cases in which the courts connected the particular circumstances of the case to the broader social phenomenon of domestic violence against women. This search generated 452 cases. I searched within these judgments for the ones in which the judges presented their understanding of the meaning of domestic violence against women and in which they evaluated the severity of the violence.

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In the second search I used the terms “coercive control” and/or “coercive behaviour” and/or “controlling behaviour”, in conjunction with the terms “relationship” and/or “marriage” and in conjunction with the terms “wife” or “girlfriend” or “partner”. The objective of this search was to find all cases in which the courts granted any significance to controlling behaviour within a relationship. This search generated 132 cases. I searched within these judgments for the ones in which the judges presented their understanding of the significance of coercive control in a violent relationship and of the severity of this harm.

These searches resulted in the final corpus of 250 judgments for analysis. I analysed these judgments to identify the a-priori knowledge, everyday acts of discourse and the dynamic between them. To identify the a-priori knowledge, I searched for statements in which the courts present the harm inflicted by the perpetrator in an uncontroversial manner. It reflects the courts’ perception that the knowledge presented is taken for granted and does not require justification or explanation. To identify the everyday layer, I looked at the ways by which the harm of domestic violence is presented to see the relationship between the a-priori and everyday acts. I also looked at common practices of knowledge production within the discourse and reflected on their role in sustaining the a-priori knowledge or enabling its change.

### **III(2) The a-priori knowledge in the courts’ domestic violence discourse**

I approached the judgments with awareness of the dominant meaning of domestic violence expressed by courts in England and Wales which comprises two intertwined elements: first, violence is understood to be episodic by nature – a collection of separate harmful incidents, and second, physical injury is perceived as its most severe and dangerous manifestation (Bishop, 2016). I aimed to see whether this dual-component meaning is in fact the discourse’s a-priori knowledge. Understanding it to be a-priori knowledge will explain how this accepted knowledge is being strengthened and safeguarded by the discourse, which develops according to the very aim of protecting it.

The a priori knowledge that informs the discourse presents itself clearly in the reading of the judgments. A domestic violence a-priori knowledge can be identified through three features: it pre-existed the discourse – was applied from the first judgments given after the 1976 legislation; it was assumed as axiomatic knowledge central to the discourse – the essence of what violence is – and was therefore located at the foundation of the discourse; and it was presented from the outset as obvious and taken for granted, without questioning or justifying its validity to intimate violence.

The following is a good example of how a-priori knowledge was applied by courts. It is taken from a judgment given in 1978 by the Court of Appeal in relation to an application for an injunction under the Domestic Violence and Matrimonial Proceedings Act, 1976:

“In the last year or two the relationship between the parties has seriously deteriorated. There have undoubtedly been incidents of violence between them”. *B v B (Domestic Violence: Jurisdiction)* [1978] Fam. 26, pg. 31.

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Despite being seemingly insignificant, the second sentence – “there have undoubtedly been incidents of violence between them” – is in fact a statement which represents the a-priori knowledge of the discourse: domestic violence is an episodic phenomenon, physical violence is seen as its core. Following this statement, the court goes on to detail incidents of only physical violence, showing that the use of the word ‘violence’ must mean only physical violence. Here we see the knowledge which pre-existed the discourse that started to form around the new legislation. The court felt no need to offer an explanation or justification for adopting this specific lens through which to express the harm it described, confirming that this lens is uncontroversial and will be seen as such by all potential readers of the judgment. By presenting this meaning of domestic violence in an uncontroversial manner, the existence of doubt or of other possibilities of understanding are obscured while the foundational knowledge is further strengthened and validated.

One way by which the discourse operates to strengthen the a-priori is through the constant repetition of a-priori statements. Each statement presenting the harm through the a-priori lens serves to strengthen the a-priori content and to further engrain its status as the foundation of discourse. Repetitive statements express not only that violence is episodic and that its worst harm is physical, but also that understanding the harm this way represents a natural truth. These statements are often found in the background or introduction to the factual section of judgments, preceding the specification of incidents on the basis of which the judgments are given. The following is an example of a common repetitive statement taken from a social housing case. The court described the incidents as “a series of violent and brutal assaults” (*R v Broxbourne BC ex parte Willmoth* [1989] 22 HLR 118, pg 120) and it followed this statement with the specification of incidents of physical violence. The next example is taken from a civil injunction case: “That there were other incidents I have no doubt. That they were not of a level such as to justify medical intervention is a comment, but it is rightly said that the Act does not become invoked only when there has been violence suffered by somebody to an extent necessary to call for medical intervention” (*Grant v James*, Court of Appeal (Civil Division), unreported, 16 December 1992). In both examples, the court strengthens the a-priori knowledge by addressing violence as episodic and by focusing on the severity of incidents of physical violence. Through not providing any explanation or justification for using this specific lens to describe the harm, the court acts to strengthen the perception that this understanding is obvious and free from doubt. It is through constant repetition that a-priori knowledge is strengthened and engrained (for example, in: *Davis v Johnson* [1978] 2 WLR 182; *Davis v Johnson* [1979] AC 264; *Lewis v Lewis* [1978] Fam 60; *R v London Borough of Ealing, Lambert v London Borough of Ealing, R v Wyre Borough Council* [1981-82] 2 HLR 45; *Spencer v Camacho* [1984] 12 HLR 130; *Stannard v Stannard*, Court of Appeal (Civil Division), unreported, 28 November 1989; *Re O-S (Children: Care Order)* [2001] EWCA Civ 2039; *Re L (A Child) (Contact: Domestic Violence)*, *Re V (A Child)*, *Re M (A Child)*, *Re H (Children)* [2001] Fam 260; *AS (Pakistan) v Secretary of State for the Home Department* [2007] EWCA Civ 703).

Statements that differ in their content from the a-priori knowledge exist but they did not form, in my view, a sign of discontinuity. They are sporadic and isolated and therefore could not be seen as belonging to a competing group of statements which is challenging the dominant one. An example is several statements in Lord Scarman’s judgment in *Davis v Johnson* [1979] AC 264, a House of Lords appeal on the interpretation of the Domestic Violence and Matrimonial

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Proceedings Act, 1976. Lord Scarman interpreted the harm of domestic violence against which the legislation was aimed to protect as: “Conduct by a family partner which puts at risk the security, or sense of security, of the other partner in the home. Physical violence or the threat of it, is clearly within the mischief. But there is more than that. Homelessness can be as great a threat as physical violence to the security of a woman (or man) and her children. Eviction – actual, attempted or threatened – is, therefore, within the mischief: likewise, conduct which makes it impossible or intolerable, as in the present case, for the other partner, or the children, to remain at home.” (pg. 348). These statements divert from the a-priori knowledge not because they show recognition of non-physical forms of violence but because they replace the a-priori lenses of episodes and physical violence with two different lenses through which to assess the violence: sense of security and intolerability to live in the home. Even though these statements were written in a judgment given by the highest court of the UK at the time, and therefore potentially could have had a significant impact on the discourse, I found that they remained isolated in the discourse. For a sign of discontinuity to exist, there needs to be evidence of the competing meaning being part of a group of statements that exist alongside the dominant one and challenges it and that could not be found in the judgments analysed. A statement that could be grouped with Lord Scarman’s statement was written more than 30 years later by Lady Hale in *Yemshaw v Hounslow* as will be shown below.

This taken-for-granted presentation represents in Bourdieu’s theory a *doxic relationship* within the habitus. This is a situation in which a certain perception – in this example, the perception towards the meaning of intimate violence – is absorbed into the mind so deeply that it is perceived as a natural truth, existing beyond the realm of controversy or doubt. Reaching a doxic state is the crucial element required for the continuation of a perception in its existing form and therefore it bears a political meaning: it is responsible for people’s reluctance to rebel against the status quo and fight for other possibilities (Bourdieu, 1985, Bourdieu and Zanotti-Karp 1968). Interpreting domestic violence as bearing the single meaning of episodic violence and presenting that meaning as uncontroversial, acts to obscure the harm of coercive control. A concealed harm or a lack of discourse-tools with which to understand it create apt conditions in which the harm can be perpetuated. Since coercive control is a manifestation of oppression against women, by concealing or distorting its meaning, the discourse actively participates in maintaining the status quo of power relations that enables its existence.

Accepting episodic violence as the discourse’s a-priori knowledge reflects on the power of social naming and agency. Episodic violence is an experience known from non-intimate contexts – such as the outbursts of violence in the street – and experienced in those contexts more by men than by women. Despite that fact episodic violence became the dominant meaning of violence in a discourse that was meant to address intimate violence directed mainly against women. This had to be done through excluding women’s accounts of coercive control from that process of meaning making, in a society in which men’s experiences are accepted as paradigmatic without struggle. Irigaray explains how a known meaning formed in one context can be incorporated into a different context even if it is inadequate to it:

“[O]ur ‘I see’ is equivalent to ‘I recognize’: I recognize a form, I recognize a concept. I recognize something that already has a face according to a model, a paradigm, an *eidōs* that I have been taught.

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Thus, seeing as understanding generally corresponds for us with knowing again, knowing a second time... [W]e submit ourselves here to a model learned and memorized. If in part we want to discover things that we do not yet know, this remains within the limits of a complicity with the already known and recognized.” (Irigaray, 2002, pg. 144)

The episodic-physical lens of domestic violence is therefore Irigaray's “model learned and memorized” that was incorporated from one context to a very different context, in detachment from the accounts of people who experience it. New knowledge around intimate violence “remains within the limits of a complicity with the already known and recognized”. In Foucault's theory, understanding one phenomenon by adopting a meaning formed around another phenomenon, is a form of continuity, which limits from the outset new possibilities of understanding:

“We must question those ready-made syntheses, those groupings that we normally accept before any examination, those links whose validity is recognised from the outset; we must oust those forms.” (Foucault, 2011 pg. 24)

I continue the reading of the judgments in the next section to see how the discourse developed in accordance with its a-priori knowledge, creating mechanisms aimed at strengthening and safeguarding its status as the foundation of the discourse.

### **III(3) The everyday in the courts' domestic violence discourse**

I found that the discourse operates to strengthen the a-priori not only through the repetition of a-priori statements but also, through the development of mechanisms – channels of knowledge production – that were formed on the basis of the a-priori understanding of domestic violence and that serve, in their everyday operations, to sustain it. These mechanisms are used commonly by courts when representing the harm inflicted by the perpetrator. The mechanisms are: (1) distinguishing physical violence from all other forms of behaviour, (2) itemisation of incidents, (3) hierarchy between incidents and (4) classification of non-physical forms of behaviour to separate categories. My intention here is not to identify the mechanisms themselves, since they are known to any legal scholar or practitioner in the domestic violence field, but to show their role in preserving the a-priori knowledge and their subsequent impact on the pace of change in legal perceptions.

#### ***Distinguishing physical violence from other forms of behaviour***

The first mechanism creates a preliminary distinction between incidents of physical violence and other behaviours. Statements produced through this mechanism act to clearly state whether physical violence had occurred and to distinguish it from all other non-physical incidents. Statements isolate the physical-violence element by describing it, for example, as “real violence” (*Rennick v Rennick* [1977] 1 W.L.R. 1455, pg. 1456) or as “actual violence” (*Horner v Horner* [1982] Fam 90, pg. 93) or by clearly stating whether the incidents were of a violent nature or not (*Spencer v Camacho* [1984] 12 HLR 130, pg. 133). Distinguishing physical

violence from all other behaviours, a very basic mechanism in domestic-violence civil proceedings (other examples include: *R v R (Breach of Order)* [2001] EWCA Civ 2098; *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, pg. 10), is vital for the protection of the a-priori knowledge since it can only receive its precedency above all harms when it is clearly extricated and isolated from all other conduct.

### ***Itemisation of incidents***

The itemisation of incidents is another common mechanism that is vital for the preservation of the discourse's a-priori knowledge (*Re S (Minors)* Court of Appeal (Civil Division), unreported, 15 July 1988; *DT v LBT (Abduction: Domestic Violence)* [2010] EWCH 3177 (Fam)). The following is a common example demonstrating this practice:

- “1. Soon after his arrival in England in November 2000, the Applicant made a threat to kill the Respondent.
2. On one occasion soon after the Applicant pushed the Respondent onto the sofa.
3. Towards the end of February 2001 the Applicant slapped the Respondent twice across her face.
4. The Applicant locked H in the bathroom for 45 minutes.
5. Around March 2001 the Applicant beat the Respondent whereby he slapped and pushed her, causing her to bang her head against the door....” (*Re H (A Child) (Contact: Domestic Violence)* [2005] EWCA Civ 1404, para 1).

This mechanism is amplified by the practice of the submission of a schedule of findings, a document submitted to court by the parties before a fact finding hearing, in which they specify their allegations of violence in an itemised way. The schedule of findings, a central document in the proceeding, reflects the courts' meaning of violence. When the court chooses to use the schedule of findings as the frame for its judgment, addressing each allegation separately, this shows that the incidents included in the schedule are adapted to the meaning of violence as the court understands it.

Compartmentalising the harm into separate incidents strengthens the a-priori knowledge. It decontextualises the violence (Hunter et al, 2018) and thereby can obscure the harm of coercive control. However, it is not the practice per se that strengthens the a-priori knowledge since the practice of itemisation can be used to establish any harm. For example, coercive control can be established through itemisation by specifying behaviours aimed at isolation, intimidation and control over bodily autonomy, the three main characteristics of the harm. It is the fact that the list of incidents is compiled according to the a-priori criteria that makes itemisation, as applied by courts, a mechanism that strengthens the a-priori meaning.

### ***Hierarchy of harms***

The third mechanism, a predictable consequence of the previous two, is the creation of a hierarchy which orders the separate incidents according to their perceived severity (for example: *Davis v Johnson* [1979] AC 264; *R v Broxbourne BC, ex parte Willmoth* [1989] 22

HLR 118; *Grant v James* (Court of Appeal (Civil Division), unreported, 16 December 1992); *Friswell v Chief Constable of Essex* [2004] EWHC 3009). Statements produced through this mechanism create a pyramid of incidents and locate the most severe incident of physical violence at its top, for example, by the use of the words “a much more serious incident” and “violence of a much lesser nature” (*Holmes v Clarke*, Court of Appeal (Civil Division), unreported, 6 April 1990) to describe incidents. In later judgments, non-physical incidents were added to the pyramid of harms and positioned clearly below physical violence. This third mechanism rests on both a-priori components: the hierarchy can be created only upon the perception of harm as fragmented into episodes and upon the notion that physical violence is the worst of harms that could be inflicted. Therefore, every time the mechanism is applied, the a-priori knowledge becomes more ingrained as the foundation of the discourse.

### ***Classifying harmful incidents into categories***

The fourth and last common mechanism is the classification of harmful incidents into separate categories (for example, *R v R (Breach of Order)* [2001] EWCA Civ 2098; *AG (India) v Secretary of State for the Home Department* [2007] EWCA Civ 1534; *R (on the application of Balakoochi) v Secretary of State for the Home Department* [2012] EWHC 1439). It goes hand-in-hand with the previous mechanisms, and rests also on both components of the a-priori understanding of harm. Alongside the other three mechanisms, this mechanism organises those episodes into groups – into separate categories: physical violence, sexual violence and psychological violence. The following is an example taken from a relocation judgment given by the Family Division of the High Court.

“The reason for this state of affairs is to be found in the mother’s evidence. I accept her account that she has been subjected by the father to sustained emotional, physical and sexual abuse stretching back to the early days of their relationship and continuing until its conclusion.” (*DT v LBT (Abduction: Domestic Abuse)* [2010] EWHC 3177 (Fam), para 10).

After this introductory paragraph, the judge dedicates one paragraph to each separate category. On first impression, it might seem that acknowledging different, non-physical categories of behaviour as harm represents a shift in the court’s perception of the harm inflicted in intimate relationships. I argue though, and will develop this argument further in the next section, that the acknowledgement of non-physical harms is only a change that remains within the available space that the a-priori knowledge had left available. This change was readily accepted into the discourse *because* it conforms to the rules set by the a-priori knowledge, and therefore, through the everyday application of the mechanism of categorisation, the a-priori foundation is being strengthened. Acknowledging non-physical harms was done in a way that did not challenge or disturb the a-priori knowledge, but rather reinforced it.

The image presented through the reading of the everyday manners by which the discourse safeguards the a-priori knowledge is of a harm that is continuously fragmented by the discourse. Through the a-priori/everyday dynamic, the harm is fragmented in three stages: first, it is separated into incidents, second, the physical violence component is distinguished from other non-physical conduct, and third, other conduct is affiliated to separate categories of harm.

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This process of continuous fragmentation can capture episodic violence but will completely obscure coercive control. To become legally intelligible, women in violent relationship of the nature of coercive control, are required to express their harm by breaking it into components that are relevant to the legal proceeding but are irrelevant to their own experiences. This gap between the legal meaning of the harm in violent relationships and women's experiences of coercive control represents the absence of women from the formation of accepted legal knowledge. Their absence is reflected not only in the dominant understanding of domestic violence but also in the inadequacy of the channels available within the discourse to express their harm. This is an absence in Irigaray's sense of the concept – an absence from the categories of perception through which realities can be named and understood. As she writes, this absence creates fragmented realities (Irigaray, 1992), which are clearly expressed in the case of domestic violence and result in a detached and impoverished understanding of harm. Since the existing domains and categories are irrelevant to the harm of coercive control, and even act to obscure it as they erase the relevant underlying link between separate incidents, for many women the translation of harm to a legally intelligible language is not possible.

My reading of the judgments shows the manners by which the courts' domestic violence discourse developed in accordance with the a-priori/everyday dynamic. Through the repetition of a-priori statements and through the use of mechanisms when presenting and evaluating the harm, the two components of the a-priori knowledge are being protected and strengthened. With layers of homogenous knowledge piling up, it can become less and less possible to alter the foundations of the discourse (Foucault, 2011, pg. 44-47). I suggested that changes in courts' perceptions are possible only if they remain within the boundaries set by the a-priori knowledge. This, I argue, can be seen clearly in the judgment in *Yemshaw v Hounslow*, given by the Supreme Court in 2011 and considered as a precedent in the area of the legal understanding of the harm in violent relationships.

#### **IV(1) *Yemshaw v Hounslow* (2011)**

In *Yemshaw v Hounslow* the UK Supreme Court ruled that the definition of the word 'violence' in the Housing Act, 1996 includes not only physical violence but other forms of violent conduct as well. The Court's ruling overturned the Court of Appeal's decision (*Yemshaw v Hounslow* [2009] EWCA Civ 1543) which accepted the housing authority's interpretation of 'violence' as including solely physical violence. This was the last judgment that was given both by the Supreme Court and by the Court of Appeal of England and Wales, which addressed directly the meaning of domestic violence in civil proceedings.

The question I ask is whether the judgment actually represents a strengthening or a diversion from a-priori knowledge. In the previous discussion, I showed how discourse mechanisms were developed to strengthen the discourse's a-priori knowledge and how this process of strengthening took place even when it seemed that the perceptions towards domestic violence were changing. This was recognised in the judgments that acknowledged psychological harm as a form of violence. By processing the violence through the four mechanisms, psychological violence became a separate harm positioned at the bottom of the hierarchy of harms. This way, the a-priori knowledge was preserved while seemingly changing: the violence was still fragmented to incidents and physical violence was positioned at the top of the hierarchy. The

structure of the discourse was therefore still not adapted to coercive control. Did *Yemshaw v Hounslow* follow the same route of strengthening a-priori knowledge while seemingly changing it or does it represent a judgment that genuinely shifts perceptions and opens a possibility for coercive control to be accommodated in a way that reflects its significance?

Before analysing the judgment I start by setting the basic facts and the relevant legislation discussed. The issue in the case was the interpretation of the word 'violence' in section 177(1) of the Housing Act, 1996 which reads as follows: "It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him." According to section 177(1A): "For this purpose 'violence' means – (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is 'domestic violence' if it is from a person who is associated with the victim." If an applicant succeeds in proving that it is not reasonable for her or him to occupy their own accommodation, they will be considered as homeless for the purposes of the Act, and consequently eligible for social housing. The specific question before the court was whether the word 'violence' in section 177(1) was limited to physical contact or whether it included non-physical forms of conduct as well.

The appellant sought the help of the local housing authority, explaining that she had to leave the matrimonial home with her children because of her husband's violence against her. She described his behaviour to the housing officers, but because it did not include physical violence, the housing officers declined her application. They interpreted the word 'violence' in the Act as meaning solely physical violence, and accordingly decided that she was not considered homeless. The Court of Appeal refused her appeal, confirming that the word 'violence' in the Act was limited to physical contact.

The appellant appealed to the Supreme Court. Lady Hale gave the leading judgment and ruled that the word violence includes not only physical but also non-physical forms of violent conduct. Lord Brown and Lord Rodger wrote separate judgments while agreeing with her ruling. I analyse the three judgments through the a-priori/everyday theoretical framework, asking whether they represent an actual change in legal perceptions or follow the previous route of acknowledging psychological violence while maintaining the foundational understanding.

I argue that *Yemshaw v Hounslow* is a judgment that represents an interruption in the habitus as theorised by Bourdieu and explained in Part I. In short, Bourdieu sees the a-priori and everyday as layers merged to an extent that when processes of change take place, it cannot be clearly identified whether the change is directed by the a-priori perceptions or by the everyday acts. Instead of focusing on either the a-priori or the everyday, Bourdieu focuses on the balance that was created between them and which forms the habitus. A change in perceptions is identified when an interruption in that balance can be seen. I argue that *Yemshaw v Hounslow* cannot be seen as a judgment that represents a change in legal perceptions but as a sign of interruption in the balance between a-priori and everyday acts that can then lead to change in the future.

An interruption rather than change in foundational knowledge was seen through noticing two opposite directions in the judgment occurring at the same time: on the one hand, a consistent strengthening and justification of a-priori knowledge and on the other hand, several statements

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by Lady Hale, representing in Butler's theory performative acts, pushing the discourse towards dismantling the a-priori knowledge.

***Strengthening and justifying a-priori knowledge:***

In interpreting the legislative purpose of the Housing Act, 1996, Lord Rodger and Lord Brown point at texts that they interpret as showing that in passing the legislation, Parliament had originally intended to protect victims of physical violence and not victims of psychological violence. The distinction between physical and psychological harms runs through Lord Rodger and Lord Brown's judgments, reinforcing the lines of the discourse's a-priori knowledge. The strengthening of a-priori knowledge takes place, not through interpreting the original purpose this way (although the purpose could have been interpreted differently) but through the statements in which Lord Brown and Lord Rodger justify this division. For example:

“Parliament therefore seems to have been concentrating on the paradigm case of battered wives, women who feared physical violence – *understandably enough*, since the new Act was imposing novel obligations on local authorities.” (Lord Rodger, para 42, italics added).

“If one considers just why it is that domestic violence (indeed, violence generally), in contradistinction to all other circumstances, has been thought to justify a deeming provision – a provision, that is, which deems it unreasonable that a probable victim of future such violence should continue to occupy his or her present accommodation, the explanation would seem to me to lie partly in the *obvious need* for the speedy re-housing of those identified as being at risk of violence in order to safeguard their physical safety, and partly in the comparative ease with which this particular class of prospective victims can be identified. With the best will in the world I find it difficult to accept *that there is quite the same obvious urgency in re-housing those subject to psychological abuse*, let alone that it will be possible to identify this substantially wider class of prospective victims, however precisely they may be defined, with anything like the same ease.” (Lord Rodger, para 54, italics added).

Justifying an approach that relies on the separation and hierarchisation of harms strengthens and shields the discourse's a-priori knowledge. Therefore, even though their final ruling was that the word 'violence' should be interpreted as including psychological violence, by justifying the classification of harms and their ensuing hierarchy, Lord Rodger's and Lord Brown's judgments go along the lines of the previous judgments discussed, which actively reinforce the a-priori knowledge while seemingly changing it.

***Performative acts***

Several statements in Lady Hale's judgment push the discourse in a different direction and therefore I acknowledge them as performative acts. In their content they abandon the a-priori

foundations and instead point at foundations that are reflective of the meaning of coercive control.

The first statement clarifies that the term 'violence' should be released from any attachments to prior meanings when interpreted:

“Violence is not a term of art. It is capable of bearing several meanings and applying to many different types of behaviour. These can change and develop over time.” (para 27)

By releasing the term 'violence' from any prior meanings and by clarifying that it can develop and change, Lady Hale acts to weaken the existing a-priori foundations and frees the discourse to create new ones. Lady Hale does not address the a-priori knowledge directly but instead clarifies that it has no dominating status over the discourse. This might prove to be a strategy that has a stronger potential to steer the discourse in a different direction rather than the potential that directly challenging the existing foundations might have had.

In the following sentences Lady Hale strengthens the performative potential of her judgment by directing the discourse specifically towards coercive control. The following paragraph appears at the end of her judgment, in a section in which she guides the housing authority officers on the question they will need to ask when making decisions in cases of domestic violence:

“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?” (para 36, italics added)

Lady Hale describes in this paragraph the main characteristics of coercive control as the “classic case of domestic abuse”. By using the term “classic case” when describing these main features, Lady Hale delivers the message that coercive control should be acknowledged as central to the understanding of domestic violence, and by that she again weakens the current foundations of the discourse – the episodic and physical violence lenses. She provides a whole new lens through which to look at the harm, one which reassembles the elements that were previously separated by the a-priori lens. In this paragraph Lady Hale addresses a possible scenario in which a housing officer would decline an application on the ground that the behaviours constitute abuse and not violence, and clarifies that a line between these terms should not be made in these situations. Lady Hale's choice of the word 'abuse' and not 'violence' in this paragraph deserves attention, especially as this choice is made in a judgment which defines violence in a broad way that includes different and not only physical forms of behaviour. I believe that this choice strengthens the performative potential of this statement: by choosing the word 'abuse' when describing to the housing officers what would constitute violence according to the Act, Lady Hale weakens even more the conventional understanding of violence. She delivers the message that there is no room for distinction between violence

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and abuse in the domestic violence context. By inserting behaviours that would commonly be perceived as abuse into the definition of the term ‘violence’, Lady Hale takes a further step in challenging the a-priori foundation, since this type of behaviour can be identified only if the a-priori lenses are abandoned.

Even though these are powerful performative acts, reading them within the entirety of Lady Hale’s judgment and together with Lord Rodger’s and Lord Brown’s judgments, leads to the conclusion that they do not represent yet a change in the accepted legal meaning of domestic violence. The majority of the statements in the judgments still accept the foundations of the existing a-priori knowledge. In addition to the statements quoted above from Lord Rodger and Lord Brown’s judgments, the following statement in Lady Hale’s judgment reinforces the a-priori knowledge by justifying the fragmenting lens: “The advantage of the definition adopted by the President of the Family Division is that it deals separately with actual physical violence, putting a person in fear of such violence, and other types of harmful behaviour” (para 34). Lady Hale does not explain why addressing harms separately is an advantage and it is not clear whether she meant that separate classifications is a procedural advantage or an advantage for the women who approach the court. By presenting fragmentation as an obvious advantage without explanation, the foundations of the discourse are being strengthened.

Therefore, Lady Hale’s performative acts do not testify of a change in the discourse’s a-priori knowledge. Instead, their importance lies in the opening they provide for a significant change to occur in the future. I recognise that *Yemshaw v. Hounslow* simultaneously strengthens the a-priori knowledge and provides a path for its change. It does not represent a change in foundational knowledge but a disturbance in the solidity of that foundation. Going back to the three theoretical focus points described in Part I, the change that *Yemshaw v Hounslow* represents is not a dismantling of the a-priori knowledge, Irigaray’s focus point in processes of change. The existence of Lady Hale’s performative acts in the judgment, reflects Butler’s emphasis on the ability of everyday acts to effect change even when a-priori knowledge is presented as intact. It mostly reflects Bourdieu’s theorisation of the habitus, showing that change can be recognised through small disturbances in the balances between the a-priori and the everyday that create the habitus, rather than in definite events that reflect clear change.

## **IV(2) Recent period**

In recent years, coercive control has been increasingly acknowledged as a legal harm. One of the most prominent signs of its recognition is the passage of section 76 of the Serious Crime Act, 2015 by which controlling or coercive behaviour in intimate relationships came to be recognised as a criminal offence in England and Wales. Another significant development is the revision in 2014 of Practice Direction 12J of the Family Procedure Rules, 2010 to incorporate controlling and coercive behaviour. I will return to the Practice Direction in the discussion that follows. These developments and recent case law leave no room for doubt that coercive control in intimate relationships is now acknowledged as a legal harm in England and Wales. However, whether its meaning is understood is a separate question. In *Yemshaw v Hounslow*, Lady Hale created a fracture in the solidity of the a-priori knowledge which led the way to a future path

in which the alienating barriers and lenses of the discourse will be abandoned. Is there evidence in recent judgments that this fracture is expanding?

I base the discussion on judgments given in proceedings that addressed coercive or controlling behaviour in intimate relationships. I focus on the last two years, starting in October 2017 when the latest revision of Practice Direction 12J came into force, which replaced the term 'domestic violence' with 'domestic abuse'. The Practice Direction sets out what is required of Family Courts and the High Court in England and Wales in any proceeding that involves a reason to believe that a child or a party has experienced 'domestic abuse'. The definition of 'domestic abuse' includes 'controlling, coercive and threatening behaviour'. The definitions section includes separate definitions of 'coercive behaviour' and 'controlling behaviour'. A group of judgments were published following the revision of the Practice Direction which enabled a reflection on the impact of the discourse on the understanding of coercive control.

Reading the judgments leads me to the conclusion that the significance of coercive control is being lost in the process of integrating it into the discourse. The judgments show that coercive control is being processed through the a-priori knowledge and through the mechanisms that were developed within the discourse over the years. As a result, its meaning and centrality to the violent relationship is misunderstood. The discourse obscures the significance of coercive control in three inter-connected ways.

### ***Coercive control is a new category of harm***

First, through the mechanisms of the discourse, the harm that was supposed to re-assemble all fragmented elements is eventually further deepening the process of fragmentation. In the judgments, coercive control is clearly seen as a new category of harm, added to the other categories that were already formed, or "headings" as sometimes termed in judgments, alongside, for example, physical violence or verbal aggression. This is the same mechanism of categorisation seen in the judgments from previous years that serve to sustain the discourse's a-priori knowledge. For example:

"The mother attended the hearing with an un-numbered schedule containing no fewer than 77 allegations across numerous categories – physical, verbal, control... Doing the best [the District Judge] could she quickly identified that the first 8 in particular contained allegations of physical harm and they amounted to domestic abuse if true. She also recognised the possibility that allegations under some of the other headings – such as verbal abuse or coercive control – might have amounted to domestic abuse" (*A v C* [2018] EWFC B76).

This statement by the Family Court shows how coercive control is seen as a new category of harm and eventually strengthens the continuous fragmentation of the violence. Through selecting and prioritising incidents from the mother's schedule, the court shows its understanding of coercive control and of its place within a violent relationship.

### ***The discourse obscures the relevance of coercive control for the evaluation of all behaviours***

Second, the discourse obscures the significance of coercive control as the element that connects between all behaviours. Without seeing the relevance of coercive control to all behaviours,

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their severity can be misevaluated and the level of risk the perpetrator presents can be underestimated. Judgments such as *M v F* (Family Court, unreported, 7 June 2019) show how coercive control is acknowledged as a separate allegation but its relevance to other allegations is not realised.

### ***The danger of coercive control is underestimated***

Third, the discourse leads to an underestimation of the danger of coercive control by subjecting it to the hierarchy of harms. Through the known mechanism of hierarchisation, coercive control is located at the lower part of the hierarchy, while physical violence, still evaluated as a separate allegation, is located at its peak. We can see this practice clearly in *M v F* (Family Court, unreported, 7 June 2019). The fact that the father isolated the mother from her family and friends for years was presented as one allegation. Financial control was added as another separate allegation. The allegations that followed concerned physical violence or threats of physical violence. The Court then addressed each allegation separately, concluding that isolation and financial control are not forms of domestic abuse and including in that term only the physical violence incidents. We can see this also in the fact that just as in the period before coercive control was acknowledged, applications receive strength only when the applicant can prove that the perpetrator used physical violence (see for example: *SD v AFH and OMD* [2019] EWHC 1513 (Fam) showing that the necessity to schedule a finding of fact hearing to establish violence became clear only after an incident of physical violence, despite the father's persistent bullying behaviour that preceded that incident; and *F v L (Child Arrangement Order: Relocation)* [2017] EWCA Civ 2121 in which the Court of Appeal overturned the judgment given by the High Court which recognised the significance of coercive control and upheld the judgment by the Family Court which ignored it). Perceiving coercive control as a less severe harm is amplified by the Practice Direction, which in its latest revision from 2017 established that it is not a form of violence. 'Controlling, coercive and threatening behaviour' was included as a sub-form of abuse alongside 'violence'. Given the dominant perception of physical violence as the most severe harm in a relationship, creating a situation where the word 'violence' can maintain its narrow meaning without interruption, and clarifying that coercive control is not included under that term, can strengthen the hierarchy further. These examples show that through the engrained mechanism of hierarchisation of harms, the risk embedded in coercive control is dangerously misevaluated.

Recent judgments show that the significance of coercive control was lost through its integration into the discourse. The discourse was not changed by coercive control but rather subjected it to its rules. The discourse maintained its structure and I did not find evidence that the openings made by Lady Hale in *Yemshaw v Hounslow* are expanding. The integration of coercive control into the discourse therefore results in distorting its meaning and in misevaluating the danger it presents.

### **Conclusion**

In the context of the growing acknowledgement of coercive control as a domestic violence harm, I examined the courts' domestic violence discourse, in order to reflect on its adaptability to the harm of coercive control. My reading of judgments showed that the courts' domestic

violence discourse was not only formed upon a-priori knowledge which is different, detached and alienated from women's experiences of coercive control but that it acts on a daily basis to protect, sustain and further strengthen that knowledge. Through an alignment of the everyday acts of discourse with the discourse's a-priori knowledge, the discourse acts as a knowledge-sustaining system – an apparatus that protects its a-priori knowledge by creating channels of knowledge production that can only produce knowledge of the same type.

Since coercive control is knowledge of a whole different type, it cannot be integrated into the existing discourse. The foundation, structure and everyday operations of the discourse were revealed to be unsuitable for the understanding of coercive control. The discourse's a-priori knowledge is based on the episodic violence harm, whereas coercive control is a harm of an entire different type. The gap between the harms and the ensuing development of the discourse reflect on social power relations and agency. The effort to integrate coercive control into the discourse leads to a distortion in its understanding and dangerously to an underestimation of the life threatening risk that it presents.

The analysis leads to the conclusion that coercive control must be extricated from the current domestic violence discourse in order to be adequately understood. It requires a separate discourse, one that is based on a relevant foundation and is operated according to an effective set of tools and practices. These can start to develop only once coercive control will not be bound by the barriers enforced by the discourse it is currently part of.

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