

The Contemptuous [M]other

A socio-legal investigation into the use of Contempt of Court as an enforcement tool in child contact disputes in Scotland, England, and Wales

Sharon Marie McAllister

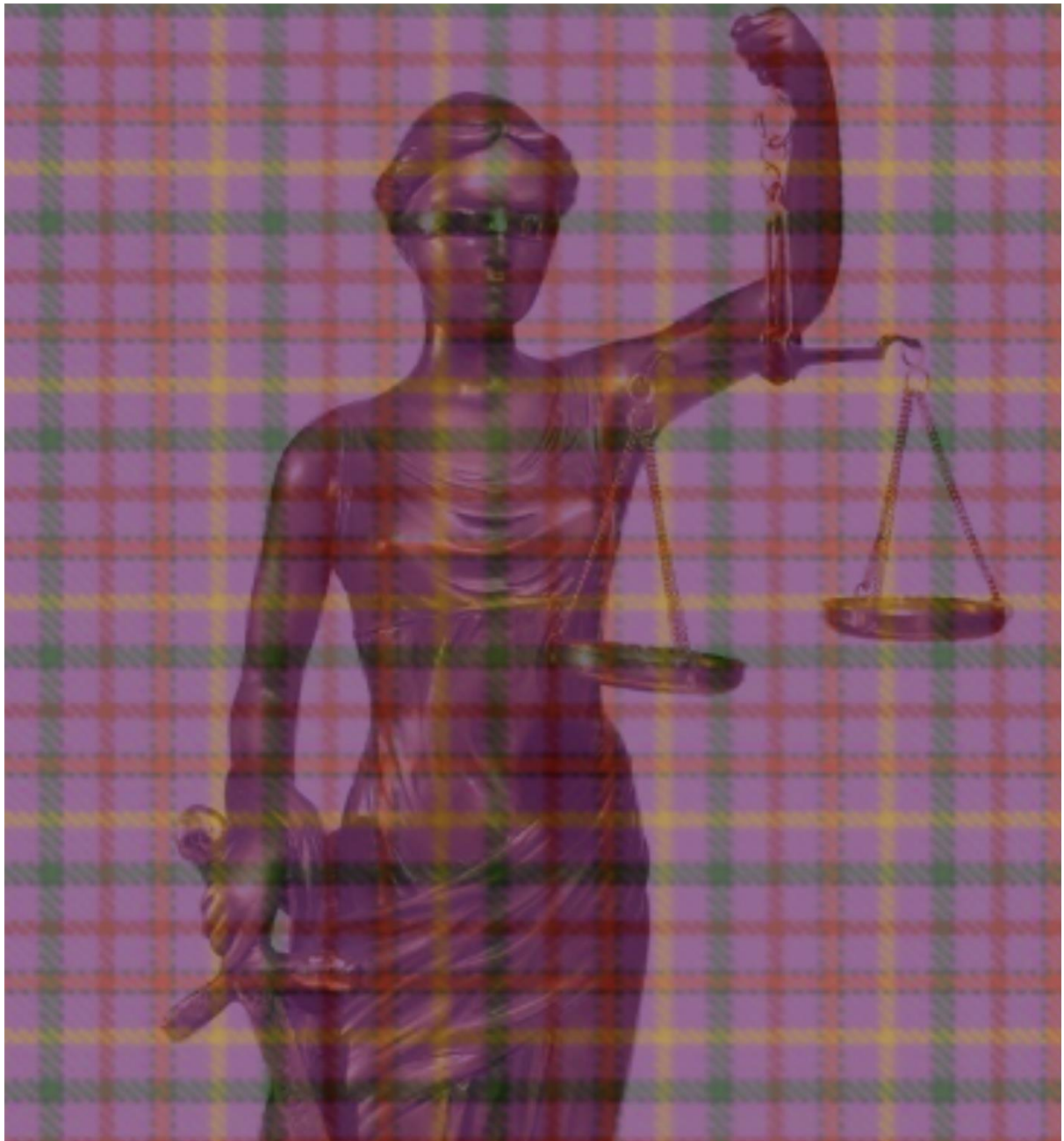
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THE CONTEMPTUOUS [M]OTHER

THIS THESIS WAS
COMPLETED ON THE 40TH
ANNIVERSARY OF THE
ENACTMENT OF THE
CONTEMPT OF COURT ACT
1981.

HOPES FOR CHILDHOOD

In 2000, I designed the first Children's tartan, as a symbol of 'Hope' for each and every child across the world irrespective of race, social class, creed, or nationality. The colours of the tartan all hold individual significance:

1. Purple the Scottish roots of the design,
2. Yellow for Happiness,
3. Red for Love,
4. Pink for a Mother figure,
5. Blue for Father figure
6. Navy edging represented Education.



It was my belief that the foundations of childhood should include role models, education, love and most importantly happiness. My values have not changed over the last twenty years, and this thesis is another symbol of 'Hope' this time for every mother and child across the world, experiencing difficulties in the family courts. Childhood and Motherhood are too important, we must all strive to make our world a safer, just and fairer world for women and children.

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ABSTRACT

Globally, child contact enforcement is regarded as one of the most complex family law issues and most legislatures and courts around the world have grappled with identifying the most appropriate method to address a breach of a child contact order (T.M.C Asser Instituut, 2007; Scottish Government, 2020). In Scotland, England and Wales contact orders are enforced via Contempt of Court, and additional procedures are available in England and Wales. To date there has been a dearth of research into child contact enforcement and into contempt of court. No research has focused on the use of contempt of court as an enforcement tool in child contact disputes in Scotland, England and Wales, this research contributes to that gap.

The research theoretical standpoint was drawn from the work of feminist jurisprudence scholars to explore mothers' experiences of enforcement and critical legal scholar Roberto Unger's work provides a framework to investigate contempt of courts legal indeterminacy. The research includes analysis of case law (42 decisions), statutory instruments, newspaper articles, court orders (25) an online survey (127 respondent), and semi-structured interviews with *Mothers (29)*, *Legal Professionals (6)* and *Lord Wilson, Supreme Court Justice (1)*. A chronological mapping approach was developed as a framework to analyse and present the research findings.

The research found that enforcement was consistently referred to in loose terms, such as '*prison and change of residency*'. But enforcement did not appear to be grounded in a concrete understanding of the different legal issues, which were also not prescribed with sufficient precision and guidance to be predictable or foreseeable (Article 6). Enforcement appeared to be used to coerce mothers to comply with court orders they didn't understand or could put them and/or their children at risk of harm. In addition to procedural concerns, mothers and legal professionals referred to domestic and child abuse as a significant factor in child contact enforcement.

Keywords: Contempt of Court; Child Contact Enforcement, Domestic Abuse, Civil Imprisonment., Legal Indeterminacy, Critical Feminist Indeterminist perspective.

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There is never a perfect time to do a PhD and all PhD studies face challenges. During this PhD I have experienced many external challenges conducting this research part-time over an extended period (*flooding of the University of Stirling campus, multiple staff strikes due to the pay and pension dispute and the global Covid-19 pandemic*). It has been an incredibly painful process, but I am also grateful for all that it has taught me. And so, when people say it takes a community to support a child, I believe it takes a community to support a PhD researcher, as the journey is never easy and the conditions in which we conduct research are never stable. This is therefore my opportunity to say an incredibly special thank you to so many wonderful people (my community), who have supported me on this journey.

First and foremost, I wish to thank both my children. I honestly could not have finished this thesis if it weren't for your patience, understanding and support. I know that I have spent too many hours working on this, and you are both 'fed up' with hearing me say, "*I'm almost there,*" and "*oh no I am not, some more changes.*" But thank you for the cups of tea, the cakes, the meals, and for the movie nights. You both seemed to know just when I needed to be spoiled. I want you both to know that my drive and determination to complete this thesis, was fuelled by a desire for you both to know that irrespective of how bad something is, you can use it to achieve something positive. No matter what life throws at you, never let anyone take your voice or dim your sparkle and always be true to your own moral compass and be kind. I link this to the quote from Elbert Hubbard when he said, "*when life gives you Lemon's make Lemonade*" *my thesis is my lemonade*. And boys always remember I love you both.

Special thanks must also go to my mum, for the childcare, the school runs, meals and for the times when you said, "*you can't give up, this is too important.*" You have always told me to "*qualify my experiences and not to just go through them.*" You may not remember but you also said view life like a game of monopoly, every time you go past GO, collect, develop, and grow. I hope this is what you were meaning!

It is heart breaking that my dad did not see all that I have achieved in the last few years. I don't think he would have been surprised, as he always said I wanted to squeeze as much as possible out of every 24 hours. My dad died a passionate advocate for women's rights, and he was proud to call himself a feminist, when he saw how badly I was treated by the legal system. I think he would have been proud of how I have managed the situation to advance my own skills and knowledge and use the injustice to give me the 'context' to complete a PhD. Becoming a Dr was always a life ambition and from my hardship came my dream.

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CHAPTER ONE

CHILD CONTACT ENFORCEMENT

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CHAPTER ONE

Introduction: Child Contact Enforcement

This thesis is a sociolegal investigation into the use of contempt of court as an enforcement tool in child contact disputes in Scotland, England, and Wales. This chapter will provide a contextual introduction to child contact enforcement in both legal jurisdictions. Currently there is a dearth of empirical research into enforcement and enforcement via contempt of court, as such this chapter draws upon a wide range of sources (newspaper articles, justice committee minutes, wider research studies, written evidence to public consultations, public consultation responses). And as a direct consequence of the limited empirical and official data available Freedom of Information (FOIs) requests were sent to official bodies (Scottish Government, Scottish Legal Aid Board, Scottish Courts and Tribunal Service Scottish Prison Service, CAF/CASS (England and Wales), and the Ministry of Justice) to contextualise this section of the thesis. Furthermore, in addition to exploring enforcement this chapter also touches upon issues which surround child contact more broadly to provide depth to the contextualisation of the research problem. The chapter concludes by introducing the research questions and will provide a summary of the remaining chapters.

Research Problem

Child contact is a term used to describe arrangements for a child to have contact with his/her non-residential parent. Contact arrangements seek to regulate human relations and behaviour within the context of the family (T.M.C Asser Instituut, 2007) and maybe agreed informally or formally via legal professionals and or courts. When courts are involved in determining contact arrangements between parents and their child, the court's primary concern ought to be the welfare of the child, and it should determine contact arrangements which are in the 'child's best interests'. The court articulates these arrangements in a formal and legally binding court order known as the contact order.

And thus, when a contact order is breached, it creates a legally complex problem and it is regarded by scholars, the judiciary, governments, and parents as a notoriously difficult family law issue to tackle (Sutherland, 2017). Part of the difficulty is the notion of concurrent and conflicting rights (between the parents individually and the child), and the modification of the residential parents' rights (Scottish Law Commission, 1995, p7) within an adversarial system. Most legislatures and courts around the world have grappled with identifying the most appropriate method to address a breach of a child contact order (T.M.C Asser Instituut, 2007; Scottish Government, 2020) and each method presents challenges. Some common law jurisdictions such as: Cyprus, Ireland, Malta, Australia, Canada, US, New Zealand, and the UK, have turned to the ancient and technical law of contempt of court to address a breach of a contact order. However, by employing the contempt of court jurisdiction translates allegations of a breach of a child contact order into allegations of disrespecting the authority of the court. And when a courts authority is challenged, the best interest of the child is no longer the courts paramount concern.

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To date there has been limited research into enforcement and a dearth of empirical research into the use of contempt of court as an enforcement tool in child contact disputes. This thesis seeks to contribute to the 'gap' in empirical research by focusing on child contact enforcement via contempt of court in two legal jurisdictions of the UK, namely Scotland, and England and Wales. The following sections will provide an overview of child contact enforcement in each jurisdiction, starting with Scotland.

Enforcement Landscape: Scotland

Since 2000, the number of child contact actions in Scotland has risen to unprecedented levels (FOI(a) but little is known about why there was a surge in court actions and the Scottish Government in a response to the FOI(a) request, explained that their data on contact numbers is unreliable as:

“There was a gap in the statistics between 2002 and 2008/09 and the statistics relating to contact are to be treated with caution as they relate to the main crave (ask) in an action. For example, if a family action is raised seeking divorce as the main crave and contact as an ancillary crave, the family action will be recorded in the statistics as a divorce case rather than as a contact case”.

Although the exact number of contact actions in Scottish courts is unknown, it can be asserted with confidence, that the number rose from the start of the new millennium. In response to the surge in family law litigation, the Scottish Government sought to make legislative changes to the Children (Scotland) Act 1995 in 2005/06. These changes primarily focused on: *rules regulating divorce, parental responsibilities, and rights (PRRs) for fathers; protection against domestic abuse; and the rights of unmarried fathers in relation to parental rights and responsibilities.*

During the passage of the *Family (Scotland) Act 2006*, the justice committee debated the issue of enforcement of (PRRs) as a committee member Dr Silvia Jackson tabled an amendment to the draft bill to include provision for enforcement. Dr Jackson narrated some of the difficulties a father in her constituency had experienced in relation to a breach in a court order for contact. Dr Jackson also asserted that the issue with non-compliance/enforcement was not an isolated issue, indicating similar issues were present in other legal jurisdictions. The amendment was rejected as the committee believed that courts already had powers to deal with a breach of a contact order via the contempt of court jurisdiction. At the same time the committee recognised that this approach was problematic because:

“[A] clear concern was expressed to the Committee that the two sanctions available to the courts – fines or imprisonment – are not effective in resolving situations where a breach has occurred. This is because the breach of a contact order is a contempt of court, punishable only by these sanctions. It appears to the Committee that courts will encourage, cajole, or even threaten resident parents to comply with the terms of a court order but that the bottom line is that the court will not actually penalise the

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resident parent because it would not be in the best interests of the child's welfare to do so".

The committee noted that:

"in a very small number of cases, resident parents appear able to wilfully ignore a decision of the court. The committee recognises that there are no easy solutions to this problem – the committee is not aware that any jurisdiction has been able to find an effective enforcement mechanism in those cases where acrimony persists between the parents".

It appears from these extracts that the committee accepted that this was an area of the law, which was particularly challenging, not only in Scotland but internationally. And yet the committee passed legislation to include parental responsibilities and rights (PRRs) for fathers (Section 23); protection against domestic abuse (Section 24); and introduced legal safeguards for cohabiting couples and their children, with no guidance or sunset clause to review the legislation. In effect, the committee left the issue for the courts to resolve.

Only once the *Family Law (Scotland) Act 2006* was enacted, was research commissioned by the Scottish Government to ascertain the extent to which enforcement was problematic in Scotland. The research was limited in its scope and only Sheriff Clerks were included in the survey. The research concluded that enforcement was a small issue and accounted for 5% of contact cases in Scotland (Wasoff, 2006, p4). In 2007, Wasoff was further commissioned by the Scottish Government to conduct a small literature review on enforcement of contact orders in other jurisdictions. It is unknown how or if the findings of these two studies have been used by the Scottish Government. Despite awareness of difficulties in child contact disputes (Scottish Justice Committee, 2005) the Scottish Government did not commission any research into child contact enforcement between 2006 and 2018 and claimed that this was due to budget constraints. The Scottish Government did stress that although there had been no research commissioned, consideration had been given to enforcement by way of a "*roundtable discussion on enforcement of child contact orders in 2017*" (FOI(a)). A leading Family Law Academic also added that there was also limited research into the behaviour of a father in relation to contact enforcement:

"one thing is perfectible conceivable and understandable but conceptually intriguing is the father who doesn't show up there is no question of him being held in contempt or face prison, or any other enforcement mechanisms to deal with him, it's clear in Scotland there is no appetite to deal with that type of father, or any father who flouts the terms of a contact order" (McAllister, 2018).

Given the perception that there was no appetite for enforcement actions against a father, an FOI request asked the Scottish Government why they had not conducted any research into why fathers may breach a contact order. The Scottish Government responded stating:

"The Scottish Government has a limited research budget and cannot cover all areas of family law" (FOI(a)).

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The Scottish Government further confirmed that it had no intention of removing civil imprisonment for a failure to comply with a child contact order (FOI(a), claiming that courts require this power to be retained:

“There are no current plans to end civil imprisonment generally. As well as in contempt of court cases for failure to obey a contact order, civil imprisonment can also be used in some other areas such as, for example, in some cases where a non-resident parent has wilfully refused or culpably neglected to pay child maintenance arrears” (FOI(a)

However, the Scottish Government’s firm resolve to maintain civil imprisonment is not informed by any data set, or empirical research in relation to child contact enforcement.

Broader issues in child contact disputes in Scotland

Since 2006 there have been limited studies which have explored enforcement (Scottish Government 2020). There have however been numerous research studies commissioned by the Scottish Government since 2000, into issues which surround child contact more broadly. These studies have included mediation in family disputes (Myres and Wasoff, 2000), changes to family relationships and marriage (Scottish Executive, 2004), child contact centres (Scottish Executive, 2004), domestic abuse (McGurkin and McGurkin, 2004), family obligations (Wasoff, 2007), child contact in sheriff courts (Lang and Wilson, 2010), the child welfare hearing system (Whitecross, 2011). In addition to these studies, other non-Scottish Government funded studies have recognised wider issues in the field of child contact in particular: the position and the voice of children in contact disputes (MacKay, 2013; Sutherland, 2014) and domestic abuse (Morrison, 2015; Mackay, 2018; Whitecross, 2017, 2019) these studies illustrate wide-ranging problems in relation to contact. None of these studies explored how the issues may result in allegations of contempt of court and or give rise to enforcement actions.

Structural and procedural issues in the civil justice system

In addition to legislative challenges and broader issues in the field of family law, Lord Justice Clerk, the Rt Hon Lord Gill in 2009 claimed that the civil justice system within which family law cases are heard in Scotland was characterised by antiquated procedures which were slow, ineffective, and costly. He further argued that this resulted in:

“Unnecessarily complex procedural steps and the unquantifiable costs in stress and frustration for the litigants. All of these diminish public respect for the law and cause a loss of confidence in society’s ability to resolve disputes justly” (p1).

In response to Lord Gill’s report, the Scottish Civil Justice Council developed a ‘Family Justice Modernisation Strategy’ (Scottish Government, 2019) to improve procedures in legal disputes involving children. Then in 2012 concerns about protracted (Scottish) litigation was raised by the UK Supreme Court in the case of NJDB (Appellant) v JEG and another (Respondents) (Scotland) [2012] and again five

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years later by the Court of Session in *SM v CM* [2017]. In addition to procedural issues, Lord Brailsford also believed that the judiciary required modernisation, as he was quoted as saying that it was, *“equally importantly, that we attempt to bring about a cultural change amongst both sheriffs and practitioners as to the conduct of litigation in this area”* (Scotsman, 2013).

Then in 2018, as a result of mounting pressure from scholars and the judiciary (and also the public and third sector organisations), the Scottish Government launched a public consultation, *“A Review of Part 1 of the Children (Scotland) Act 1995”*. The consultation found that family law did require clarification and modernisation. The main themes that emerged from this consultation were concerns about the voice of the child, domestic abuse, and a fathers’ rights to contact.

The consultation also included a section on breaches of contact orders and enforcement. Responses to these issues revealed some of the inherent tensions in this area of contact. Individual respondents who were mostly fathers favoured criminal sanctions (Scottish Government, 2019). Other respondents (scholars, third sector organisations and professional groups) indicated that more information was required to understand the underlying difficulties in child contact disputes before considering any sanctions. The Scottish Government made no determination regarding enforcement but committed to further reviews of this matter (Scottish Government, 2019) to date no reviews have taken place. Thus, a gap in empirical evidence on enforcement of child contact orders in Scotland remains.

Scale of Enforcement in Scotland

Political and legal recognition of difficulties in child contact disputes, (Scottish Justice committee, 2005) has not deterred courts from taking action to enforce the terms of contact orders. In Scotland, the Contempt of Court Act (1981) is the legal framework of choice for enforcement of civil contact orders as demonstrated in (see *NJDB v Mrs JEG V Joel Noel James Andrew Solicitor* [2010], *CM V G.L* [2013], *SM v CM* [2017], *TB v SB* [2017] and *B (AP) v A (AP)* [2021]). Yet, since at least 2000, there have been no published court statistics on the scale of child contact order breaches, enforcement nor transparency in sanctions used by courts in Scotland.

Legal Aid Data on Enforcement

According to (FOI(b) data from the Scottish Legal Aid Board (SLAB) requested for this thesis, there were four applications for funding for a contempt of court action related to children in 2001, the cost of which totalled £1,366. There were two further cases in 2002, totalling £2,012. There are no contempt of court cases officially recorded in the following years from 2002 to 2004. However, since 2005, contempt of court has become a regular feature in child contact actions and the total cost of contempt of court in child contact actions from 2007 until 2017 was £1,057,700. Recent figures from the Scottish Government (2020, p7) suggest that between 2017-2020 there were *“361 applications granted for Legal Aid to seek to hold a person breaching a contact order in contempt of court”* but the cost of the 361 actions is unknown.

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The issue with SLAB data, is that not everyone raising or defending a contempt of court action requires legal aid and in some cases they may not be eligible. SLAB explained that how a request for funding is made can have an impact on how it is recorded and counted (FOI(b)). In response to another (FOI(c) request for this thesis, the Scottish Courts and Tribunal Service (SCTS) confirmed that it did not hold any figures in relation to the number of parents threatened with contempt of court in contact disputes nor the number of contempt of court actions raised from child contact disputes as they are recorded in the principle action. What can be concluded is that data on enforcement is patchy but is likely to be significant and involve more cases than indicated by the data held by either SLAB, SCTS and the Scottish Government.

Scottish Sanction Data

Data in relation to sanctions imposed is also elusive. The Scottish Courts and Tribunal Service (SCTS) confirmed that it did not hold any figures in relation to contempt of court sanctions. In fact, SCTS confirmed that in general terms:

“a breach of an order under section 11 of the Children (Scotland) Act 1995 is normally dealt with as part of the proceedings in the original civil case rather than a criminal prosecution. Where there is a finding of contempt of court in a civil case and a penalty imposed, it would be recorded on the SCTS Criminal Case Management System (COP2) for the purposes of administering any penalty” (FOI (c)).

This suggests that contempt of court sanctions are recorded within the criminal data set rather than civil. This makes tracing the sanctions more problematic as the information straddles two data sets. Case law confirms that mothers have been sanctioned to civil imprisonment in Scotland arising from a breach of a child contact order (see *A.M v M.J.S* [2009], *AG v JB* [2011], *SM v CM* [2017]). However, the Scottish Prison Service (SPS) state that they do not hold any data on the actual number of civil prisoners, or the number of individuals incarcerated for non-compliance with a child contact order. The SPS website explains the reason for this difficulty is that the civil imprisonment is not a single category (Scottish Prison Service, 2019, FOI(d) and includes a wide range of prisoner types. More recently, the Scottish Government has claimed that the number of parents incarcerated for breaches of a child contact order are very low and they have estimated it to be between 0-3 people per year for the period of 2011 to 2018 (Scottish Government, 2020, p7). However, the report does not explain how this estimate was reached and does not address the above issues identified in the SLAB, SCTS and SPS data sets. But what these cases, FOI responses and the Scottish Government (2020) report confirms is that parents are incarcerated in Scotland for non-compliance with a contact order. What is unknown is how the incarceration may impact on the child, the parents and the contact action. Furthermore, more broadly, with regards to other sanctions for contempt court such as fines, again this is problematic to identify as SCTS data is not transparent.

Public Perceptions of Enforcement in Scotland

So far in this chapter, enforcement in Scotland has been discussed from the perspectives of the government, legal professionals, and scholars. The final

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perspectives to be explored in contextualising the issue of enforcement in this introductory section, is public opinion. During the Scottish Government consultation into family law in 2018, Gareth Rose, Scottish Political Editor for the Scottish Mail on Sunday wrote an article titled “Mums could get criminal record if they deny father’s access to kids”. Father4Justice founder Matt O’Connor said:

“Courts already have the option of enforcement but choose not to use it..... Nothing in the consultation changes this damaging and harmful failure to enforce contact orders which makes a mockery of our justice system” (Scottish Mail, 2018).

In response Martha Scott, CEO of Scottish Women’s Aid’s CEO explained that:

“the highest number of calls to the organisation relate to contact orders. It’s used as a threat, a mechanism to exert control. We don’t think the solution for anybody is to be criminalised and put in prison.

Women are sentenced because they do not comply with orders, women are sent to prison. But there’s always a danger the legal system will interpret changes in a way that will make things even worse” (Scottish Mail,2018).

These quotes reveal the tensions inherent in enforcement of a child contact order which appear to filter through family law in Scotland, in highly gendered terms. There appears to be greater public knowledge and endorsement of father’s rights perspectives than Women’s Aid concerns.

In Conclusion: Scotland

What is evident is that there has been little scholarly attention on non-compliance and enforcement of child contact orders in Scotland. There does appear to be gendered tensions inherent in enforcement and certainly the dominant public discourse discusses enforcement in gendered terms. However, the lack of empirical research and official data into these matters means that it is unknown if and how broader issues (gender, domestic abuse, voice of the child, legal processes and procedure, judicial attitudes) which surround contact disputes may impact on contact orders in practice. It is also unknown how these issues may influence enforcement in the courts and mothers and their children’s experiences in the family court system.

Enforcement Landscape: England and Wales

In England and Wales, there has been more research on enforcement than in Scotland. Smart & Neale (1999, p173) noted in their research that since the implementation of the Children Act (1989) judges had begun to “*interpret the law in such a way as it gave rise to imprisonment of mothers for refusing to allow contact, when they were in fear of the father of their children*”, and that judges viewed non-compliance of a contact order as contempt of court. Smart & Neale (1999, p173) also noted that the then Justice Hale, had stated that courts should take a mother’s fear into account, and that “*it was not justified to imprison such a mother or label her as implacably hostile when she is genuinely afraid*” (see Re D (Contact: Reasons for Refusal) CA [1997]). There was also a history in the 1980s and 1990s of imprisoning

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mothers as in the case of *R v N (Committal Refusal of Contact)* [1997] 1 FLR 533. This case involved a mother who had refused to facilitate contact due to domestic abuse (Smart and Neale, 1999, p206) and in another case *Z v Z* [1996] whereby the mother was given a short jail sentence which sought to help the mother to understand the need to comply with a contact order. But imprisoning mothers in the 1980s and 1990s did not resolve the wider issues of contact.

Ministers in England and Wales did revisit the issue of child contact enforcement when they were debating the Children (Contact and Adoption) Bill 2005. In a report on the draft Children (Contact and Adoption) Bill (Government, 2005, p29) it was claimed that the courts had limited options for enforcing a breach of a contact order under the *Children Act 1989*:

They may ignore the breach, or they may hold the person breaching the order in contempt of court (or, in the case of the Magistrates' Court, may use the powers in section 63 of the Magistrates' Courts Act 1980), resulting in a fine or imprisonment, neither of which is often likely to be in the best interests of the child. If appropriate, the court may alter the residence or contact arrangements as regards the child.

The bill at 11H to 11I and sought to change this and implement the following enforcement provisions:

- a. impose community-based "enforcement orders" for unpaid work or curfew; or
- b. award financial compensation from one party to another (for example where the cost of a holiday has been lost).

The bill gained royal assent and became the *Children and Adoption Act 2006* and the courts' powers in cases involving breach of a contact order were increased by adding:

- a. a power to make an enforcement order imposing an unpaid work requirement.
- b. a power to order one person to pay compensation to another for a financial loss caused by a breach.

These provisions were in addition to the courts' powers to use contempt of court and were influenced by the economic/ business case which suggested that workload and costs could be saved as a result of these provisions by:

- a. Reducing the case load of enforcement applications from 7,000 per year to around 1,400.
- b. Reducing legal aid applications which were estimated at 4,200 repeat applications
- c. Reducing the cost of enforcement activities

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Since the 2006 Act was enacted researchers have found that enforcement has been perceived by legal professionals and the public (Hunt and Macleod, 2008; Trinder et al, 2013) to be related to the notion of the '*implacably hostile mother*' (Hunt and Macleod, 2008, p206). Legal professionals also believe that the problem is exacerbated by the courts unwillingness to use their enforcement powers (despite frequently threatening parents with fines and committal) along with variation in judicial approaches to breaches, and the appearance that courts favour changing the child's residence rather than punish a parent (Hunt and Macleod, 2008). Legal professionals also felt that the powers courts had to deal with non-compliance were either "*impractical, counter-productive or likely to have adverse effects in the child*" (Hunt and Macleod, 2008, p207) and they believed that something should be done and called for swift action. Despite this evidence courts have used their sanctions and mothers have been imprisoned for alleged breaches of contact orders (see Gibbs v Gibbs [2017]).

In a later study by a group of academics from Exeter University into enforcement of contact orders in England (2013). Researchers also found the notion of the implacably hostile mother was still largely linked to public and legal discourses on non-compliance and enforcement. The report noted that:

"public perception of enforcement cases is of implacably hostile mothers deliberately flouting contact orders and the courts failing to be robust and ensure compliance. Implacably hostile mothers do exist, but they are a small minority of enforcement cases. The most common type of case involved parents whose conflicts with each other prevented them from making a contact order work reliably in practice. The second largest group involved cases with significant safety concerns, followed by cases where older children themselves wanted to reduce or stop contact" (Trinder, et al., 2013, p2).

The study also found that most enforcement cases were raised by non-residential fathers (86%) and (9%) by non-residential mothers (Trinder et al., 2013. p21). In a more recent study into domestic abuse and private law children cases, Barnett (2020, p115) claims applications for enforcement of contact orders are rare and *one-sided*:

"contact orders can only be enforced against the resident parent. The court has no powers in which to enforce a non-resident parent" to have contact with the child.

Barnett also notes that women who have experienced domestic abuse are in an invidious position as "*opposition to the contact sought by the father [is] overridden, including in high-risk cases involving domestic abuse*" (ibid, p117). This suggests that for over forty years allegations of non-compliance with a contact order has been linked to the implacably hostile mother and has been discussed through a gendered lens. Similarly, during the same period domestic abuse has been raised as a serious issue in contact disputes by mothers.

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Structural Issues in the civil justice system in England & Wales

In addition to the complexities surrounding enforcement, a report by Bach (2016, p5) into the Justice system in England and Wales concluded that the legal system was technologically dated, expensive, and that legal processes were complex and time-consuming. As such, few people could access legal aid and legal advice was inadequate and disjointed (Bach, 2016). A report by the MOJ (2016, p13) also noted that *“family law rules and forms are long and complex and have changed little since the 1970s”*. Hunter (2019, p37) claimed that there was sense of crisis in family courts in the latter part of the last decade (and remains the case) which was in part due to expanding caseloads, pressure to reduce processing times, and courts were making a *“wait and see”* (ibid, p37) contact order. Hunter also suggested that the complexity in addressing domestic abuse in contact disputes was problematic in the family courts (ibid, p38) and that with the removal of legal aid, parents were left, *“floundering, trying to negotiate a complex and uncoordinated terrain of web-based information, unbundled services and do-it-yourself-offers”* (2019, p44). According to a Channel 4 Dispatches programme ‘Torn Apart’ (2021) a linked online survey found that family *“[c]ourt proceedings were reported to have taken on average 18 months to complete, with 1 in 10 cases lasting more than 5 years. The average cost of proceedings was said to be around £13,000, though 1 in 20 claimed they had spent over £100,000”*. This may suggest that the structural issues in the justice system are having a real and significant impact on children and their families.

Scale of Enforcement in England and Wales

Ministry of Justice (MOJ) Data

As mentioned at the outset of this chapter there is a dearth of empirical research and data on child contact enforcement. This position is an enduring issue, as it was noted in the research by Hunt and Macleod (2008) and in the report by Exeter University (Trinder, et al., 2013, p2). Both studies documented concerns about the lack of, MOJ and CAF/CASS official data. This was also a problem in obtaining information via the (FOI(e) requests for this thesis as the MOJ claimed it did not collect enforcement data from Her Majesty’s Courts and Tribunal Service (HMCTS). It was also confirmed that HMCTS data on enforcement is contained within individual case files and, as such, without identifying and interrogating individual files, it is hard to ascertain the true extent of the cases experiencing enforcement (FOI(e). The MOJ also advised that it has no data relating to the Family Court (Contempt of Court) (Powers) Regulations 2014 and said, *“given the number of Child Arrangements Orders (contact) made it may be very difficult if not impossible to identify relevant cases”*. Furthermore, legal aid in England & Wales was withdrawn from a wide range of family actions in 2012, as a result of the Legal Aid, Sentencing and Punishment of Offenders Act (Laspo) 2012. According to the Guardian Newspaper (2012) cuts to legal aid were, *“intended to trim £350m off the annual legal aid budget; it eventually reduced spending by more than £600m a year”*. Although this did have an impact on contact disputes, legal aid funding was still available for contempt of court actions but again, this data is not published (FOI(e). This may suggest that the lack of data also illustrates a lack of political concern for these issues, and those affected.

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CAFCASS DATA

Another organisation linked to the family court in England and Wales is CAFCASS which was established in 2001, replacing the Family Court Welfare Service, Guardian Ad Litem Services and the Children's Division of the Official Solicitor in England and Wales. According to CAFCASS' own data set, the number of C79 [enforcement applications have increased significantly from 1388 in 2012 to an all-time high in of 3258 in 2018 (FOI (f). It also appears from the CAFCASS dataset that most enforcement cases are concentrated in Birmingham, the Black Country, Shropshire, Worcestershire, and Staffordshire (FOI(f). In the CAFCASS dataset for Wales, both the number of child arrangement orders and C79 enforcement applications are higher in South Wales than in any other region. CAFCASS advised that although they register the number of C79 orders, they do not monitor or inspect compliance. They therefore could not provide any details as to the reasons why contact orders are breached or who breaches the orders and the data, they hold is unreliable. They also advised that the Family Court does not always make them aware of enforcement applications and as such their data must be viewed as patchy and incomplete (FOI(g).

Public Perceptions of Enforcement in England and Wales

Finally in understanding enforcement in England and Wales it is also important to consider public perceptions, which, as in Scotland, appear to be gendered. Fathers4Justice have embarked on a range of high-profile campaigns, linked to well-known celebrities. In 2013, Kate Winslet was the focus of a campaign, which saw Winslet pictured on posters alongside the caption: "*Kate, every child deserves a father this Christmas*". The row stemmed from an interview Kate Winslet, had given to Vogue magazine in which she said she protected her children by making sure they lived with her (Telegraph, 2013). It was also alleged that film director, Guy Ritchie turned to Fathers4Justice, in a bid to get advice about contact with his son, Rocco after he split from Madonna (Independent, 2016). In April 2019, ahead of the birth of Prince Harry's son Archie, newspaper headlines read, "Dads wearing Thomas Markle masks stickered waxworks of the Royal couple with stickers that read "*GrandFathers4Justice*", "*Don't be a Dummy Mummy! Kids need their Grandparents*", and "*Don't be a Tom, Dick or Harry! Kid's need their Dads*". In addition to vilifying celebrity mothers, Fathers4Justice, have also previously protested on the roof of Buckingham Palace to raise their profile and their agenda. More recently Kerry Katona was accused by Matt O'Connor, founder of Fathers4Justice, of having blood on her hands as her ex-partner died of an overdose. O'Conner posted:

"Tragic news about the passing of George Kay who came to Father4Justice for help. He was heartbroken after @kerryKatona7 denied him access to daughter Dylan-Jorge. Katona's not 'heartbroken'. She has blood on her hands".

Katona's daughters responded demanding the post be removed highlighting the post was inappropriate (Telegraph, 2019). Fathers4Justice are not the only fathers campaigning group in the UK, but they are arguably the one which is most vocal on this issue of non-compliance and enforcement. Much of the media has historically

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endorsed the narrative by framing these issues via the '*implacably hostile mother*' narrative as noted by researchers (Hunt and Roberts 2008 and Trinder et al, 2013). This narrative has also dominated the media's reporting of issues, which can be seen in headlines appearing in the press such as: '*Hostile*' mother loses custody (Guardian Newspaper, 2004) or '*Three months*' jail for mother who kept child from his father (Telegraph, 2004) and Mum loses custody of three children after coaching them to badmouth her ex-husband (Metro, 2019).

There has however been a slight change in the way in which the media report on child contact issues in the family courts since around 2017. A Victoria Derbyshire (BBC) programme presented a segment on the '*secret family court*' (BBC, 2019) to discuss some of the challenges women face in the family court system. A campaign group called the 'CourtSaid' also arranged a public protest outside Parliament in October 2019, claiming that domestic abuse survivors and children were being put at risk by the family courts (BBC NEWS, 2019). The Mail newspaper also ran an article linked to a campaign launched by MP Louise Haigh, which sought more protection in the family court for those who had experienced domestic abuse (Daily Mail, 2019). This was also the position presented by a range of experts in the Guardian newspaper in May 2019.

And the Independent Newspaper (2020) published an article with the headline "*Domestic abusers winning time with children by accusing mothers of parental alienation, study finds*", which referenced research by Dr Adrienne Barnett which had found that:

"Playing the parental alienation card is proving more powerful than any other in silencing the voices of women and children resisting contact with abusive men. Parental alienation is not an equal counterpart to domestic abuse, it is a means of obscuring domestic abuse, and should be recognised as such"

Further concerns that the family courts in England and Wales were putting children at risk was covered in the media, when, Women's Aid Bristol identified 29 children had been killed because of court-ordered contact between 1994-2004. Justice Cobb was reported in the Guardian newspaper (2017) saying:

"It is indeed most disturbing to note that for at least 12 children [in seven families], of the 19 children killed ... contact with the perpetrator [the father] was arranged through the family courts.....For six families, this contact was arranged in family court hearings [two of these were interim orders], and for one family, contact was decided as part of the arrangements for a non-molestation order and occupational order."

The Guardian Newspaper (2021a) and the BBC News (2019) also shared findings from a CAFACSS serious case reviews which had found that four children had been killed during access granted by the family courts (BBC News, 2019). And the Telegraph Newspaper (2020) ran an article '*I don't live now. I exist: Mother of boys killed by abusive father begs government to overhaul family courts*', whereby the boy's mother Claire Throssell sought to highlight the dangers for children ordered to go to contact with an abusive father. The CAFACSS Serious case review reported by

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BBC News (2019) also found that that “*four further children had been sexually abused or seriously injured, or both*” at court ordered contact.

While a Channel 4 Dispatches programme (2021) aired footage of “*police forcibly removing children from their [beds and] mother at midnight, to be taken to go and live with their father*” and according to legal professionals who took part in the dispatches survey this type of forced removal is not unusual. Given the seriousness of the issues which surround contact and the family courts there has been calls for greater transparency (Guardian 2021b) and radical action (Sunday Times, 2019). But with greater transparency comes renewed concerns for the child at the centre of the dispute and their privacy (Guardian, 2021c).

In terms of alleged non-compliance mothers have also featured in newspaper articles when courts have ordered that a child’s residence should be changed due to as a result of the non-compliance. In one case of Mother Rebecca Minnock most newspapers in England covered her disappearance with her three-year-old son in 2015. The Daily Mail headline in June 2015, read “*Mother goes on the run with son, three, after losing bitter custody battle - and judge accuses her family of helping her hide* “. In this case members of her family were incarcerated under contempt of court and were told they would also be facing perjury charges if they did not tell the court where Rebecca and her son were. When Rebecca returned with her son the Daily Mail reported that:

“Rebecca Minnock was a ‘scourge’ on the court system who now ‘owed her liberty’ to her ex-partner, the High Court Judge Stephen Wildblood said”

In all of these instances the focus appears to be the actions of the mother. This suggests that contact and enforcement continues to be viewed through a gendered lens.

In Conclusion: England & Wales

Enforcement is recognised as an issue in child contact disputes in England and Wales therefore, but like Scotland, there is a dearth of data, and an enduring perception that it accounts for only a small number of cases. There are also antiquated structural issues in the family courts which may add to the issues faced by parents. In addition, a strong narrative that enforcement cases only exist because of the behaviour of ‘*implacably hostile*’ mothers persists. However, there is also some recognition in the media and by Justice Hale that mothers who experience domestic abuse are in an invidious position given the presumption that a child’s best interests require contact with the non-resident parent.

The Enforcement problem in Scotland, England & Wales

What can be drawn from this overview of enforcement in Scotland, England & Wales is that little is known about the workings of enforcement. Data is extremely limited; it is either not collected or not publicly available. Despite awareness of problems relating to enforcement in child contact disputes at times when new legislation was passed in Scotland, England, & Wales in 2006, such research was not commissioned, and it was left open to the courts to find a solution. The evidence that

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does exist suggests that there are complex and wide-ranging issue which surround non-compliance and enforcement of child contact orders. These issues can be categorised into several themes: **Social Issues** (family relations and the framing of parents in hostile and polarised positions. While mothers are referred to as implacably hostile, and contact issues are framed as being as a result of the actions of mothers suggest gendered tensions, inequality and prejudice) **legal issue(s)** (legal drafting of social issues and technique and complex language, accessibility concerns), **court processes** (court procedures, complex litigation, judicial interpretation, legal practitioners' interpretation of the law, structural issues) **coercion and punishment** (enforcement processes, judicial authority, contempt of court, punishment & sanctions, non-residential parents' immunity from sanctions) and finally the **impact on the child, family, and society** (welfare of the child public, family life, family relationships and public finances).

These themes will be explored in this thesis, which seeks to investigate the use of contempt of court as an enforcement mechanism in child contact disputes in Scotland, England & Wales. The research asks the following questions:

1. What behaviour is considered contemptuous and how is contempt of court used as an enforcement tool in child contact disputes?
2. How do mothers experience contempt of court in child contact disputes?
3. What are the implications of using contempt of court in child contact disputes against mothers?

These questions are approached through a socio-legal lens based in the fields of sociology and the law. The thesis' theoretical standpoint is drawn from the work of critical legal scholar Roberto Unger and feminist jurisprudence scholars, notably Carol Smart, which will be discussed in *chapter four*. These theoretical approaches are shaped by examining the law as a social phenomenon. As the research concerns issues which are complex and messy, several research methods were used to gather the data (*documental analysis, qualitative interviews, and an online survey*) and a five-stage chronological mapping approach was adopted. These methods will be explored in *chapter four*.

THESIS OVERVIEW

The remainder of the thesis is structured in the following way:

Chapter Two: The Elusive Law of Contempt of Court

Chapter two begins by reviewing the early roots of contempt of court and how its indiscriminate use by the Monarch paved the way for an equally unintelligible use by the courts. The chapter goes on to discuss the how this unpredictability is also found in the unique and complex legal procedures, used by the court to address behaviour, and conduct seen as contemptuous (non-compliance with contact orders, disrespecting the authority of the court) which is beyond the scope and reach of any other law. These powers have been limited to some degree by the passage of the *Contempt of Court Act (1981)* as a result of Human Rights concerns, but the law

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remains complex and technical. As such, the discussion turns to focus on contempt in general, in particular the use of civil imprisonment for '*disobedience of a court order*' and how this sanction may have significant consequences for mothers and children in child contact disputes.

Chapter Three: The Contested Contact Dispute

The stakes are high for children and mothers when contempt of court becomes a feature in the contact dispute. As such this chapter will explore how the contested contact dispute paves the way for coercion and enforcement. The chapter begins by discussing the historical roots of family law to provide a contextual introduction to how motherhood was positioned in the law. The chapter then moves on to explore how women experience the law, drawing upon feminist scholarship and in particular Marianne Hester (2011) conceptual three planets model to discuss domestic abuse, child welfare, and child contact. The chapter highlights that mother who allege abuse are often portrayed by fathers, legal professionals, and members of the judiciary as hysterical, manipulative, and dishonest. The chapter will then move onto discuss domestic abuse in the context of child contact disputes (Trinder et al, 2013; Arnold, 2015; Neilson, 2017; Douglas, 2018) into child contact disputes. This literature suggests that abusive fathers use contact to continue to control and abuse mothers, and that this abuse may intensify, as mothers are legally compelled to engage with the father. In contrast, when mothers react to the violence and harassment, and make allegations of abuse, the result is a morass of competing legal procedures, which cross professional boundaries into police, social work, health, and psychology. At the same time mothers' behaviour is positioned as a direct challenge to the authority of the court, leading to allegations of contempt of court and imprisonment.

Chapter Four: Exploring the Social within and out with the Legal

This chapter discusses the research design, methodology and theoretical standpoint adopted in this thesis. The research is approached from a critical socio-legal position and the thesis' theoretical underpinnings, are drawn from the work of both critical legal scholar Robert Unger and various feminist jurisprudence scholars and in particular Carol Smart. Unger's work reveal the structural limitations and indeterminacy of contempt of court. While feminist scholarship provides a route to discuss mothers experiences of the legal system, and, in particular, the family court. Several research methods were used to gather the data (*legal case analysis, qualitative interviews, and an online survey*). And a socio-legal chronological mapping approach was created as a framework to discuss the research findings. The chapter concludes by presenting the ethical considerations of researching with a diverse group of participants.

Chapter Five: Demystifying Contempt of Court

This chapter is the first of the three findings' chapters and focuses on the complexity and indeterminacy of contempt of court, by analysing and mapping contempt of court case law. This chapter suggests that the law of contempt of court is misunderstood, misused and results in injustice. Many of the principles of Article 6 of the Human Rights Act 1998; such as a holding a hearing within a reasonable time, a hearing in front of an independent and impartial decision-maker, and clear and separate

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processes were absent or overlooked in the case law, raising fundamental questions about procedural fairness and judicial decision-making in child contact disputes.

Chapter Six: Censoring Abuse in the Family Court

This chapter is the first of two chapters which focus on mothers' experiences of the family court. These experiences are mapped to stages in the litigation, from the breakdown of the parental relationship to the cusp of enforcement and are interspersed with the experiences and views of legal professionals in Scotland and England along with the views of Lord Wilson, Supreme Court Justice. Throughout this chapter mothers share their experiences of abuse, inequality, prejudice, and oppression. The evidence shows that the mothers' perception of their position in the family courts is that they are marginalised, silenced, and ridiculed. These perceptions are supported to some extent by the legal professionals in both jurisdictions. The mothers' experiences also reveal a maze of inaccessible legal processes, which they claim perpetuates and conceals domestic abuse. The voices of the mothers and legal professionals paint a stark, brutal, and hopelessly exhausting picture of conflicted and confusing legal processes. This chapter sets the scene and paves the way for chapter seven to focus on enforcement.

Chapter Seven: Punishing Motherhood

This chapter is the second chapter to map the mothers' experiences both individually and collectively and deals specifically with the gendered nature of enforcement. Throughout this chapter, mothers, and legal professionals, claim that mothers are treated differently from fathers in relation to non-compliance with a child contact order. The implications and impact of the structural concerns relating to procedural fairness such as judicial decision-making, timely and accessible procedures, and awareness of legal rights identified in chapter five are seen to have an overwhelming impact on the mothers. The concerted efforts of the judiciary, professionals, and the father to enforce and secure compliance with child contact orders, results in the expansion of litigation which spirals out of control. Allegations of non-compliance are positioned as a direct attack upon the authority of the court, and as such the court takes steps to prevent the power of the court being undermined by mothers. The process used to protect the power of the court is argued to be flawed however as it often results in action taken which does not comply with the prerequisites of Article 6 of the *Human Rights Act 1998* and detracts from the '*best interests of the child*'. As such the chapter concludes by discussing the diverse implications for mothers and children, all of which included some form of physical and or psychological damage. All mothers claimed that their experiences of the family court and enforcement were harrowing and resulted in life-long implications for them and their families.

Chapter Eight: A Fair and Just Society for Children and Mothers

The thesis concludes the process of stripping back '*legal assumptions and understandings*' (Unger, 1992, p.2) and reveals how the indeterminacies in contempt of court affected mothers' experiences in the contact dispute. The evidence in this thesis supports previous research as far as it finds that contempt of court is used by abusive fathers to conceal and legitimise domestic abuse and harassment; (and that) allegations of contempt of court are used deliberately to distract the judiciary into prioritising the wishes of the father, moving the focus away from the '*best interests of*

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the child,' and from allegations of domestic abuse. As such, abusive fathers can capitalise on the indeterminacies of contempt of court to prolong and intensify the domestic abuse and to prioritise their wishes in the child contact action. Furthermore, drawing on the work of feminist scholars the research finds that institutional misogyny, prejudice and bias, contributes to the way in which allegations of a mothers' non-compliance with the child contact order, are positioned as a direct challenge to the authority of the court.

FINALLY, A NOTE ON TERMINOLOGY USED IN THIS THESIS

Child Contact: Since April 2014, in England and Wales the term 'Child Contact' was replaced with the term 'Child Arrangement Order'. As amended, the 1989 Children Act states: an order regulating arrangements relating to any of the following— a) with whom a child is to live, spend time or otherwise have contact, and b) when a child is to live, spend time or otherwise have contact with any person. For the purpose of this research, 'Child Contact' will be retained as this term remains in force in Scotland.

Domestic Abuse:

This thesis will use the definition of domestic abuse as contained in the Domestic Abuse Act 2021 (England and Wales) at Section 1:

- (1) This section defines "domestic abuse" for the purposes of this Act.
- (2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—
 - (a) A and B are each aged 16 or over and are personally connected to each other, and
 - (b) the behaviour is abusive.
- (3) Behaviour is "abusive" if it consists of any of the following—
 - (a) physical or sexual abuse;
 - (b) violent or threatening behaviour;
 - (c) controlling or coercive behaviour;
 - (d) economic abuse (see subsection (4));
 - (e) psychological, emotional or other abuse;

Family Court: In Scotland there are no specialised Family Courts where these actions take place. But the term is used widely in England and Wales. As this is a multi-jurisdictional thesis this term will be used throughout, in reference to all jurisdictions

Socio-legal Research: According to the University of Oxford, Socio-legal research is "the study of law as a historical and culturally specific mode of social organisation that takes a variety of forms within and across society" (University of Oxford, 2020). This thesis draws from the fields of law and sociology to explore how the law of contempt of court is used in a specific social context, which is the contested child contact dispute.

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CHAPTER TWO

THE ELUSIVE LAW OF CONTEMPT OF COURT

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Introduction: The Elusive Law of Contempt of Court

Courts in Scotland, England and Wales use the contempt of court jurisdiction as an enforcement tool to address allegations of non-compliance with a contact order. This chapter begins by exploring contempt of courts historical roots which can be traced to the reign of King Henry III of England and his indiscriminate use of this law. It is this historical context which explains why contempt of court is a legal anomaly in our contemporarily legal system. The chapter then turns to explore some of contempt of courts indeterminate characteristics before moving on to discuss how civil contempt of court is used to address civil disobedience. It is within the context of civil contempt that the chapter concludes by discussing how the ultimate sanction of civil imprisonment can be, and is, used to punish individuals as a result of the contempt of court jurisdiction. It is this position which paves the way for contempt of court to be explored in the following chapter in relation to child contact.

Before moving on to discuss contempt of court it is important to note at this junction that there is a dearth of scholarship on contempt of court and the literature which is available is of some vintage and it also has a strong American influence. However, academic articles included in this chapter, are in some part relevant to exploring some of the enduring issues linked to contempt of court, (Dudley, 1993; Golfarb, 1961; Pekelis, 1943) and cite English case law which refer to contempt's English common law roots. While more recent scholarship has emerged from countries such as India (Ojha, 2020) and Russia (Hendley, 2017) these are less relevant as they address issues which are not as pertinent to this thesis. As this is a socio-legal study academic literature is complimented with contemporary case law and political commentary.

Contempt of Court's Historical Roots

The earliest recorded cases of contempt of court can be found in the reign of King Henry III of England. In 1225 King Henry put his seal on the Great Charter (Magna Carta) which ended unlawful incarceration, limitations on feudal payments to the crown and enabled barons to access justice swiftly. However, King Henry III also wanted to restore sovereign power and authority and established contempt of court as the sovereign's ultimate weapon against disobedience to the crown (Oswald, 1911). By 1252, King Henry III was as accustomed to punishing Sheriffs and senior politicians as he was to punish the public for challenging and defying the will of the sovereign (Oswald, 1911). King Edward I, followed in his father's footsteps and continued to use contempt of court erratically as he presided over the common law courts (Oswald, 1911). King Edward I, had a keen interest in the law and spent much of his reign reforming the common law through statutes, but he continued to exert and to extend the power of the sovereign to ensure that everyone adhered to the sovereign's laws and to prevent any challenge to the Crown. During his reign, people were ordered to have their hands cut off (Oswald, 1911), were sentenced to life in prison, locked up in the Tower of London, or ordered to pay fines or forfeit land and goods to the King, all in the name of contempt. These early historical roots illustrate how contempt of court was used as a legal tool to satisfy the whim of the sovereign and was and remains today an elusive and unsettled law (The Sunday Times v UK

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(6538/74) in 1979). There have been many attempts over the proceeding centuries to reform the law, notably in 1883, 1892, 1894 and 1908. All these attempts were unsuccessful. There have also been several Law Commission consultations in recent years into contempt of court (2012), Contempt of Court: Scandalising the Court (2013) and Contempt of Court: Juror Misconduct and Internet Publications (2013) Contempt of Court: Reporting Restrictions consultation (2014) and the final review was Contempt in the face of the court, but this was suspended (date unknown). All these reviews continued to raise a wide range of concerns about contempt of court.

What is Contempt of Court?

Defining what is classed as contempt of court is an enduring and vexing question (Oswald, 1911; J.H.T, 1946). Justice Williams, in *Miller v Knox* (1878), noted that given that contempt of court is so manifold, it is difficult to lay down any exact definition. Similarly, legal scholar Joseph Moskowitz described contempt of court as '*the Proteus of the legal world, assuming an almost infinite diversity of forms*' (Moskowitz, 1943, p. 780). Lord Bridge echoed Moskowitz' and Miller's observations in *Re Lonrho Plc* [1990] where he declared that contempt of court was so "*fraught with difficulties and uncertainties*" it was difficult to determine contempt. The lack of a clear definition appears to have been circumvented by courts by stating that contempt of court is, "*based on the broadest principles, namely that the courts cannot and will not permit interference with the due administration of justice. Its application is universal*" (*Attorney General v Newspaper Publishing* 1988).

Attorney-General v Sunday Times Newspaper Ltd [1973]

However, this universal and indiscriminate law presents numerous challenges. One case which illustrates the inherent difficulties with contempt of court is that of the *Attorney-General v Sunday Times Newspaper Ltd* [1973]. This case involved allegations that the Times Newspaper had breached reporting restrictions in the Thalidomide case [1]. The case was heard by the House of Lords and during the litigation process, issues, and concerns about the obscure law of contempt of court came to the forefront. The House of Lords were so troubled by contempt of court that the UK Government established a committee under the leadership of Lord Justice Phillimore to review contempt of court (Parliament UK, 1978). In 1977, the Phillimore committee published their report, raising concerns about the lack of definition, purpose, procedures, delay and, the limitations within the law of contempt to address "*circumstances [raising] deep public concern and strong parliamentary protest*" (p99). One member of the committee believed that the Thalidomide, "campaign of

¹ Thalidomide is a drug that was marketed as a sedative and treatment for morning sickness in pregnant women in the late 50s and early 60s. This drug subsequently caused babies to be born with a range of disabilities. initially no compensation was paid. However, in February 1968, following a legal battle led by their families, compensation (at 40% of the level of assessed damages) was paid to 62 thalidomide-affected children born in the UK by Distillers as a result of an initial (infant) settlement. However, this compensation was widely recognised as being completely inadequate and a high-profile campaign was launched in 1972, led by the Sunday Times. As a result, in 1973 a final settlement was agreed by Distillers. This includes a lump-sum payment for a further 367 children affected by thalidomide in the UK (on the same basis as the initial 62) together with the establishment of The Thalidomide Trust to provide 'support and assistance' – including annual grants – to all thalidomide survivors. (Thalidomide Trust, n.d)

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protest and pressure had made a mockery of the law of contempt” (p100) and had revealed it to be powerless against social will. The report was debated in the House of Lords, and the minutes of this debate reveal feverish frustration by the Lords at being unable to pin contempt of court down. Lord Diplock said

“There is an abundance of empirical decision upon particular instance of conduct, which have been held to constitute contempt of court. There is a dearth of rational explanation or analysis of a general concept for contempt of court, which is common to cases where it has been found to exist.”

Lord Scarman was recorded as saying that:

“It is high time; I would think that we rearrange our law so that the ancient and misleading term “contempt of court” disappears from the laws.

Despite the intense and heated debate about the issues in the report, none of the Phillimore committees’ recommendations were implemented. However, the Attorney-General v Sunday Times Newspaper Ltd [1973] case was appealed from the House of Lords to the European Court of Human Rights (ECHR) and the ECHR judgement [2] also contained dissenting opinions. In his dissent, Judge Evrigenis importantly commented that:

Of course, no one can disregard the special features of a domestic legal system in whose formation case-law is traditionally called upon to play a prominent role; neither can anyone lose sight of the fact that the delimitation of the restrictions mentioned in Article 10 (2) (art.10-2) of the Convention employs indeterminate concepts which do not always sit well with the existence of legal rules of conduct that are quite precise, certain and foreseeable in their identification by the judge

This quote reveals the tension within a system which seeks to legislate for indeterminate conduct within what are regarded as precise and defined legal rules. This case also highlights the uncertainty and confusion present at the highest level of the legal profession with regards to contempt. Ultimately the ECHR determined that the UK had breached Article 10 ECHR as the court had prioritised the UK manufacturer Distillers Biochemicals Ltd ‘*right to a fair trial*’ to the detriment of the ‘right of freedom of expression’ of the Times Newspaper. In response, the UK Government enacted the *Contempt of Court Act (1981)* to bring the law in line with the ECHR, and it remains in force today. It should be noted however that contempt of court retains its common law jurisdiction and as such its reach extends beyond *the Contempt of Court Act (1981)*.

The All-Encompassing Reach of Contempt of Court

The Contempt of Court Act (1981) is now forty years old and has wide ranging powers which can be applied in the broadest terms to the greatest number of diverse situations and can take on multiple forms. For example, the Contempt of Court

² The Sunday Times v UK (6538/74) in 1979)

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Act(1981) [3] section (12) highlights that it can apply to conduct ‘in the face of the court,’ examples of which include: disruptive behaviour, interrupting proceedings or making a recording of court proceedings (see R v Stephen Yaxley-Lennon [2019]), jury misconduct (see M v P [1992]) or if a solicitor is late for court (see Murdanaigum v Henderson [1996]). Miller (2000) notes the phrase ‘*in the face of the court*’, appears to lack defined boundaries to determine the limits of the court’s powers. The same section of the Act also has provision for contempt of court ‘outwith the court’ and again this can be extremely varied. Some examples may include a juror searching for an accused on Facebook (Deans, 2011), jurors failing to attend court (Wilson, 2018), sharing images, if they reveal a person’s identity, (see Attorney General v McKeag [2019] and Attorney General v Baker [2019] [4]) or publishing an newspaper article in breach of reporting restrictions or an online blog which allegedly revealed the identities of women in the Alex Salmon case by ex-diplomat Craig Murray (HMA v Craig Murray [2021]. Or in the case of Z v Z and others (Secretary of State for Justice Intervening) [2021] whereby a Prison Governor indicated that he would not facilitate contact with a prisoner and his children despite it being ordered by the Family Court and also interfering with witnesses and jury members [5]. In M v P [1992] CA, Lord Donaldson explained that contempt is further complicated as it involves three categories of people:

‘In all contempt cases, justice requires the court to take account of the interests of at least three categories of persons, namely, (a) the contemnor (b) the ‘victim’ of the contempt and (c) other users of the court for whom the maintenance of the authority of the court is of supreme importance.’

These cases illustrate the breadth of issues which can give rise to contempt of court, and suggest that at its core, contempt of court has two main principles: a) to protect the due administration of justice and b) to ensure a defendant has the right to a fair trial.

³ Section (12) states:(1) A magistrates’ court has jurisdiction under this section to deal with any person who—(a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court

⁴ These cases related to an image of Jon Venables being shared in breach of a global ban.

⁵ Recently, R v Stephen Yaxley-Lennon [2019] (AKA Tommy Robinson) EWCA Crim 1856 was found to be in contempt of court for live streaming on Facebook, issues being determined in court which were restricted from publication under the Contempt of Court Act 1981. He appealed the decision which was upheld but remitted back to the court. The court reheard the issue, and found him to be in contempt, in the judgement Her Majesty’s Attorney General v- Stephen Yaxley-Lennon [2019] EWHC 1791 (QB) the court held that the live streaming on Facebook was contemptuous and sentenced him to 19 weeks in prison. Another case involved actress Tina Malone, who was accused of sharing an image of James Bulger’s killer, The GOV.UK website states “Tina Malone has admitted that she is guilty of contempt of court for publishing information purporting to be of Jon Venables. She has been sentenced to 8 months in prison, suspended for 2 years”. There is also the case of Ryan War, this case is believed to be “the first time an internet-based contempt’ was referred to the court. In the case of two schoolgirls who were on trial for murdering Angela Wrightson, as a result of the extensive commentary on social media the trial had to be abandoned and the girls re-tried. There have also been several cases in the press around jury misconduct and members of the jury being sent to prison for searching the defendant online during a trial

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Criminal versus Civil Contempt Classification

In addition to the innumerable situations which may give rise to contempt of court, a further 'doubly vexing,' issue is determining the classification of the contempt. In England and Wales, contempt of court can be either civil or criminal. Criminal contempt can be understood as “*an act which so threatens the administration of justice that it requires punishment from the public point of view*” (Fisher and Herd, 2019, p31). Civil contempt is regarded as a “disobedience of a court order or undertaking by a person involved in litigation. In these cases, the purpose of the imposition of the contempt sanction has been seen as primarily coercive or “remedial” (Fisher and Herd, 2019, p31). In Scotland all contempt are civil, and in both jurisdictions, contempt is regarded as ‘*sui generis*’ [6], which means that contempt is something with a ‘separate nature of its own’ (Justice Committee, 2011). In the case of the Director of the Serious Fraud Office v B, OB v Director of the Serious Fraud Office, R. v O'Brien [2014] the UK Supreme Court outlined the distinctions:

“English law had long recognised a distinction between civil contempt namely conduct which was not in itself a crime but which was punishable by the court in order to ensure that its orders were observed, and criminal contempt. Although the penalty for civil contempt contained a punitive element, its primary purpose was to make the court’s order effective. A person who committed this type of contempt did not acquire a criminal record. A criminal contempt was conduct which went beyond mere non compliance with a court order and involved a serious interference with the administration of justice.”

This extract does not explain what might constitute criminal contempt. However, as Dudley (1993, p1025) argues: “[p]erhaps the only certainty in criminal contempt is that it is a theoretical and procedural morass”. Miller (2000, p6) further adds to the opaqueness of criminal contempt by explaining that it uses summary procedures, which do not include a jury [7]; a finding of contempt is reached solely at the discretion of the judiciary and may be heard in courts with civil jurisdiction. Furthermore, there are no summons or indictments, and, in some instances, there may also be no formal proceedings if the court acts upon its own motion (*ex mero motu*). Courts also have limited sanctions of a fine and or prison under the *Contempt of Court Act 1981*. However, a period of incarceration does not constitute a conviction.

Similar confusion arises in relation to civil contempt which uses the same summary procedure as criminal contempt. The purpose of civil contempt of court [8] is “to force

⁶ Sui Generis means something that is unique or different.

⁷ the courts of Common Law did not punish criminal contempt’s by summary punishment without a jury until after the abolition of the Court of Star Chamber in 1641, when the power to punish summarily was passed on to the Court of King's Bench. The King v. Barber, 1 Stranger 444 (1721) was the first case that a conviction without a jury.

⁸ An example of civil contempt’s purpose. The Anglo-American solution of this situation, namely, to send the debtor to jail until he chooses to deliver the painting-theoretically for life- simply does not occur to the Latin lawyer. His first reaction to this common-law practice is generally: "Don't you think that this kind of punishment is a little too severe for a simple refusal to deliver?" The answer of the

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a reluctant defendant to comply with a court order" (Livingston, 2000, p352). One example that Miller (2000, p646) refers to in his work is how contempt of court was used to address civil disobedience during the 1970s trade union movements. The National Union of Mineworkers (NUM) refused to comply with court orders preventing strike action. This was classed as "*a deliberate contempt by the union and on 10 October, Mr. Justice Nicholls fined the union £200,000 and ordered the fine to be paid within 14 days*" (Hansard, 1984). The mineworkers refused to pay the fine and by the time the court made an order for sequestration; the NUM had transferred the money out of the reach of the court. The Attorney General issued another court order, for the payment of the funds which was also not complied with, and the Attorney General told Parliament the actions of the NUM rendered the court powerless (Hansard, 1984). This case reveals once again that strong '*social will*' and opposition exposes weaknesses in the legal system, as also noted in the Phillimore report (1977).

The Intersection Between A Contempt of Court Action And Other Litigation

In addition to ambiguities in the system, further important human rights issue arises with regards to the intersection between contempt and the principal action. Miller (2000, p107) claims that this can create a real dilemma in determining the timing of the contempt action and result in 'prejudice' to all proceedings. Furthermore, concerns have also been raised about the duplicity of issues which may give rise to contempt but may also give rise to a statutory criminal offence. As Miller (2000, p17) notes, there is some overlap with criminal contempt and statutory offenses and the potential overlap of punishments. This area of law remains uncertain and unresolved [9].

Inequality in Contempt of Court Sanctions

Irrespective of whether contempt is civil or criminal, in the face of the court or out with the court, the sanctions available under the *Contempt of Court Act (1981)* are limited. The *Contempt of Court Act (1981)* section (17) (2) limits the Sheriff Courts in Scotland and Magistrates courts in England and Wales to making an order for up to 3 months' imprisonment, or a fine not exceeding £2,500 or both. [10] Superior courts in Scotland, England and Wales can make an order for imprisonment of up to two years, a fine or both. Superior courts are also able to make a '*hospital order*' if the courts deem a person accused of contempt to be mentally unfit or insane to be sent to prison.

common lawyer-which only adds to the astonishment of the civil lawyer-is that of course we are faced here with so-called civil contempt; there is no punishment involved, the proceeding is not a criminal one. He just disobeyed-a term that for a Latin lawyer's ear is likely to suggest a parent-child relation, rather than a court-party relation-he has disobeyed the court, he has been a bad boy, and he has to stand in the corner until he changes his mind. Nothing mysterious about it (Perkin's, 1943, p699)

⁹ According to Miller (2000, p 19) double jeopardy is located in part of the conversion which is out with the scope of the HRA 1998 and as such it may sit out with Article 6.

¹⁰ In any such case the court may order any officer of the court, or any constable, to take the offender into custody and detain him until the rising of the court; and the court may, if it thinks fit, commit the offender to custody for a specified period not exceeding one month or impose on him a fine not exceeding [F17£2,500], or both

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The application of these sanctions may be indicative of inequality and points to further uncertainty, as contempt of court sanctions appear to be applied differently to different groups. This can be seen in case law whereby members of both the UK and Scottish Government [11] have on occasions breached court orders in relation to prisoners' rights [12] and in asylum cases [13]. Despite being found to be in contempt, the court has not applied any sanction, as a finding of contempt was determined to be serious enough. In contrast, newspapers are routinely fined significant sums of money [14] for contempt of court but are seldom sent to prison [15] but can be incarcerated only in exceptional circumstances (*Cumpana and Mazare v Romania* (2005)). Prison and fines both appear to be reserved for individuals who are found to have been in contempt of court such as the online blogger and ex-diplomat Craig Murray who was sentenced to 8 months in prison in 2021 (*HMA v Craig Murray* [2021]). The *Contempt of Court Act (1981)* does not however make any references to certain groups being precluded from certain sanctions. The practice of how these sanctions are applied has been developed from common law.

Harsh Punishments & Sanctions for Civil Disobedience

But it maybe the complex and harsh civil enforcement situations, which can illuminate and draw attention “*on a small scale, into institutional experiments*” (Unger, 1996, p33) and injustice. As noted previously, non-compliance with a court order can result in civil punishment. In this regard, Goldfarb (1961) argues that punishment for the purpose of “*coercing an individual to act in a certain way in the future (civil contempt) is ineffective*”. Livingston (2000, p407) also notes that:

¹¹ While in Scotland the Scottish Executive was found to be in Contempt of Court in 2005. In the case of Beggs, a prisoner at Peterhead Prison, he alleged Prison staff opened his mail and he complained about the actions of prison staff. Scottish Ministers gave an undertaking to the court that his mail would not be opened. Despite this his mail continued to be opened by Prison Staff, Lord President, : Lord Cullen stated: In our opinion the Scottish Ministers were in Contempt of Court', In the circumstances of the present case, we do not consider it is appropriate for us to impose any penalty on them'. The issue was not resolved, and second prisoner Mr Smith complained that his privileged mail was being opened by prison staff, the ministers were again found to be in contempt of court and a further undertaking was made. Less than one month. While in Scotland the Scottish Executive was found to be in Contempt of Court in 2005.

¹² In 2012, Theresa May was found to be in Contempt of Court she was Home Secretary, when she failed to release Mr Aziz Lamari despite agreeing to release him

¹³ In another case the Home Secretary Amber Rudd who was accused of Contempt of Court for violating court rulings ordering a deported asylum seeker to be returned to the UK. Lord Falconer, a former Lord Chancellor wrote in the Guardian newspaper that '*Amber Rudd confused herself with a 16th Century monarch last week, seemingly believing that she has a divine right to rule, irrespective of the law*'. Amber Rudd was not sent to prison, nor was she ordered to pay any fine nor was the Home Office

¹⁴ The Sunday Mail was ordered to pay the court £75,000 to the court and £54,000 in costs in a £10m trial against Leeds United footballer Lee Bowyer and Jonathan Woodgate (Hodgson, 2002) And in 2018, the Scottish Daily Record was fined £80,000 for breaching reporting restrictions relating to court actions.

¹⁵ The media routinely mis report Contempt of Court and often talks about Convictions, but in Scotland contempt's are not classed as convictions. I asked the Scottish Government in an FOI about the misreporting of Contempt cases. I asked if the media misreporting of the use in contempt of court in family cases would be addressed by the Government and I was told: "The regulation of the Press is an independent body. The Royal Charter on independent self-regulation of the press was agreed with the Scottish and UK Governments. The Royal Charter puts in place a process to implement the recommendations of the Leveson Report and this process is ongoing"

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“Coercive civil contempt seems to exist in some kind of jurisprudential no man's land. Theoretically, it does not exist to punish the defendant for disobeying the court order or to compensate the injured plaintiff for its losses. Its purpose is to induce compliance with the court's decree. For some plaintiffs, coercion may be the only effective means of obtaining full relief.”

These quotes suggest that civil contempt is used to coerce people to comply with the will of the court rather than punishing for criminal conduct. Pekelis (1943, p 668) claims that the magnitude of the coercive penalty in civil contempt is “*measured by the resistance to be overcome rather than the gravity of what has been done*”. And further contends that although “*societies punish people for what they have done, only the common law punishes man in order to do violence to his incoercible freedom to do or not to do something*” [16] (Pekelis, 1943, p673). Goldfarb, (1961, p2) also wrestles with the idea of coercive orders and queries:

.....if the legal system can draw ‘a distinction between punishment as a willed consequence of human behaviour, and contempt as a means of coercing the commission of certain desired acts. This difference of approach in the use of a power like contempt underscores an anomalous difference in the recognition of individual values in the ideology of a system of law’

Thus, the actions of the judiciary and society can result in “*a double life: it constitutes conformity or disobedience to custom at the same time that it becomes part of the social process by which custom is defined*” (Unger, 1976, p49). Livingston (2000, p 346) also believed that the duplicity is problematic as there is also “*a cauldron of confusion, particularly concerning the appropriate procedures to be followed when imposing a contempt sanction*”, the ultimate sanction being that of civil imprisonment.

Civil Imprisonment

Civil imprisonment [17] was historically introduced to tackle issues related to non-payment of debts and fines, which since the 1880s has been used as the ultimate tool for non-payment of child maintenance [18]. The *Prison Act (1877)*, outlines

¹⁶ The Latin conception of the means of enforcement is of a far more mechanical or formalistic character: it is a play with certain rules, traps, catches and loopholes; and the court itself is one of the cogs of the mechanism, a party to the play. It does not occur to the actors that you have to bow to the judge's will, or that you may be punished by him, or, even more absurd, blamed for not having complied with his orders. (Pekelis, 1943, 688)

¹⁷ It is interesting to note that in Scotland according to the Scottish Courts and Tribunal service a breach of an order under section 11 of the Children (Scotland) Act 1995 is normally dealt with as part of the proceedings in the original civil case rather than a criminal prosecution. Where there is a finding of contempt of court in a civil case and a penalty imposed, it would be recorded on the SCTS Criminal Case Management System (COP2) for the purposes of administering any penalty” [FOI].

¹⁸ Notes from a Parliament Select Committee on the 1st of March 1880, indicates concerns about the number of people incarcerated for non-payment of debts during a debate on the Civil Imprisonment (Scotland) Act 1882. Concerns about such civil imprisonment have persisted and have notably been linked to non-payment of child maintenance. However there have always been procedures in place for enforcement action relation to non-payment of child maintenance, which is not contempt, unless the order for maintenance is made by the court. In *Anderson v Douglas* [1998], the court held that, “a

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provision for how civil prisoners are a different class of prisoners and have certain rights. In Scotland, the Prison and Young Offenders Institution (Scotland) Rules 2011 has updated provisions as to how civil prisoners should be treated. This includes treating civil prisoners as untried prisoners who should be held in the remand section of the prison [19]. In contrast, civil prisoners in England and Wales are treated as 'convicted,' unless the sentence is short. In both jurisdictions, civil prisoners can see a GP, wear their own clothes, do not have to work in prison and can have as many visits and letters as they like. They can also vote [20]. However, those incarcerated for civil imprisonment must serve their full sentence, unlike those incarcerated for a criminal offence who traditionally only serve half their sentence in prison [21]. However, this may be changing in Scotland, in a highly unusual step ex-diplomat and blogger Craig Murray was released from prison after serving half his sentence (Herald, 2021).

It is claimed that the only way someone incarcerated for contempt can leave prison early is to '*purge the contempt*', it is unknown if this was the route the Mr Murray took, as he went on to appeal his sentence in 2022 [Craig Murray v HMA [2022]]. In the case of James v James [2018] the court clarified that any person committed to prison for any contempt can make an application to the court to be discharged at any time if the court approves the purge application. Civil contempt prisoners in Scotland are also not included in [22] Scottish Governments, presumption against short prison sentences of less than 12 months [23]. The reason why civil prisoners are not included in the presumption was explained by Sheriff Jamieson in the Scottish case of C.A.F v M.L.H [2014] in so far as he noted that Section 307(1) of the Criminal Procedure (Scotland) Act 1995 makes it clear that "*sentence*" does not include an order for committal to prison for contempt of court.

The nature of incarceration and the use of civil imprisonment suggests that "[i]f extreme consequences cry out for a qualification of [this] standard, this may be

failure to make a payment of a fine could not amount to contempt of court as there was another perfectly adequate remedy for dealing with such a failure" (See JSC BTA Bank v Solodchenko [2010] EWHC 2404 (Comm), [2010] 9 WLUK 371.)

¹⁹ HRM Prison Rule 7 (3) states: Prisoners committed or attached for contempt of court, or failing to do or abstain from doing anything required to be done or left undone:(a)shall be treated as a separate class for the purpose of this rule;(b) notwithstanding anything in this rule, may be permitted

²⁰ Prisoners voting rights

²¹ Scottish Sentencing Council States "People given a short-term sentence normally will be automatically released from prison into the community after serving half the time in prison. For example, offenders sentenced to two years imprisonment will be released to serve the rest of their sentence in the community after one year. The person isn't normally supervised by a social worker unless they are a sex offender convicted on indictment (more serious crime), or is placed on a Supervised Release Order" This does not apply to civil contempt prisoners.

²² The proportion of women serving very short prison sentences has risen sharply. In 1993 only a third of custodial sentences given to women were for less than six months—in 2018 it was double this (62%).

²³In June last year MSPs voted to extend the presumption against sentences of 12 months or less. Scottish government statisticians have now produced a report which shows more than 4,200 sentences of less than one year were handed down in the first six months after the change, compared to about 5,000 for the same period the previous year. The figures also showed that 1,298 people were sentenced to less than three months in prison in the second half of 2019, despite there being a presumption against such sentences since 2011. (Daily Record, 2020)

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because they highlight a deficiency” (Unger, 1976, p29) [24]. Certainly, using contempt of court to address a breach of a civil order, presents innumerable challenges and incalculable risks for those accused of contempt. Dudley (1993, p1027-1029) claims that there are three critical concerns with using the contempt of court jurisdiction:

1. Contempt law is chaotic and confusing, both substantively and procedurally. Common-law development has afforded no stable and satisfactory definition of contumacious conduct and no clear-cut rules govern the adjudication of contempt proceedings.
2. Vindicating the court's dignity and authority is the fundamental purpose of contempt, and the judge is usually actively involved in initiating contempt proceedings. Thus, the roles of victim, prosecutor, and judge are in of danger of co-mingling.
3. The power of courts to impose sanctions for insult or disobedience is not meaningfully constrained.

This suggests that the contempt of court jurisdiction is not an easy jurisdiction to use. And although it is claimed that contempt of court is an essential and critical law courts in “*non-common law countries [do] manage without it*” (Martineau, 1981, p677).

Chapter Summary

This chapter has reviewed the literature of contempt of court and identified that its early roots can be traced to the reign of King Henry III of England. It was used by the monarchy whimsically to protect and enforce his sovereign power as supreme ruler and as a tool for social control. The indiscriminate use of contempt of court by the monarchy persisted throughout the centuries until that power was transferred to the courts. The judiciary thereafter used contempt in an equally unpredictable way and, as such contempt of court in the modern legal system presents innumerable challenges. It remains a legal anomaly and an elusive unsettled law.

Thus, the application of contempt of court sanctions also suggest that it is applied in such a way that it is individuals who would feel the full force of the law and its powerful sanctions, rather than businesses and or government ministers. Yet, the Contempt of Court Act (1981) does not cater for the different treatment of key groups in society. Concerns about inequality in the application of contempt sanctions, are further compounded by the fact that harsh punishments such as imprisonment are used in civil disputes. Given what is understood about contempt of court it could be said to have practically nothing to do with child contact. However, it may be suggested that its function in contact litigation, is to coerce parent[s] to comply with the courts order for contact, to protect the due administration of justice and uphold the rule of law. However, as this chapter has shown, contempt of court is a technical, complex law which is inherently indeterminate (*criminal/ civil, in the face of the court/ outwith the court, judicial discretion, contradictory and conflicting understanding and application of the law, antiquated procedures, purging contempt/ sanctions, coercion/*

²⁴ Unger was referring to points where the law punishes for civil disputes.

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punishment). The next chapter will focus on the child contact dispute and explore how issues in family law may pave the way for non-compliance and thus result in enforcement and trigger the contempt of court jurisdiction.

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CHAPTER THREE

THE CONTESTED CONTACT DISPUTE

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Introduction: The contested child contact dispute

This chapter begins by exploring the social-legal historical roots of family law, which is underpinned by inequality, power, and institutional prejudice. The chapter then moves on to discuss some of the key tensions in family law in relation to the child *'welfare principle'* and the *'indissolubility of parenthood'* (Parkinson, 2013, p99). And as the chapter moves on from these complexities, it then turns to focus on how domestic abuse, impacts on a mother's ability to comply with a child contact order. It is at this point that the literature suggests that how a mother responds to domestic abuse within the context of the family court, can lead to threats of enforcement and judicial coercion. And enforcement then becomes a central tension in the contact dispute, which is reframed and positioned as a direct challenge to the authority of the court. This paves the way for allegations of contempt of court, and the most severe civil punishment of civil incarceration. Thus, the closing section of this chapter discusses the impact of incarceration on both mothers and children.

The chapter draws primarily from feminist literature to explore women's experience of the legal system, and in particular from Marianne Hester's conceptual, 'Three Planets' (2011, p837) model to explore the interwoven issues of *"domestic violence, child protection and safeguarding and child contact"*. Hester's (2011, p.839) work directs attention to the difficulties professionals face when attempting to address *(domestic violence, child protection and safeguarding and child contact)* risks and crimes in, *"a cohesive and [professionally and legally] co-ordinated [way] because they are viewed as separate planets with separate histories, cultures, laws, and are shaped by different professional perspectives"*. Hester (2011) also notes that the domestic abuse 'planet' focuses on risks to adults, and the children protection planet focuses on safeguarding children, while the child contact planet is future focused and does not focus on historical family risks (abuse). Importantly Hester, (2011, p840) argues that the process of gendering within each planet is underpinned by *"the continual replication and reconstruction of gender-based social inequality"*, which may provide some insight into why mothers claiming domestic abuse in the family courts are disbelieved and how this impacts on child contact enforcement. Although Hester (2011) work is important, this thesis will focus more on mothers' perspectives. This chapter is structured around Hester (2011) planets and will begin by exploring family law in relation to the child contact planet before moving onto the domestic abuse planet.

Family Law: Child Contact Planet

Claims of gender inequality have a long history in family law and form an important context for this research. Family law relating to 'Parent and child' and 'Husband and Wife' developed as a branch of the civil justice system towards the end of the nineteenth century (Crow, 2009). Previously, the law held that when a woman married under the common law doctrine of coverture, her legal existence was suspended or was at least, *"incorporated and consolidated into that of [her] husband"* (Blackstone, 2009, p430). This made it particularly difficult for a woman to exercise any legal rights independently from her husband, as both were classed as a single entity (Wright, 2000). The unity of marriage was also viewed as sacrosanct

CHAPTER THREE: THE CONTESTED CONTACT DISPUTE

(Blackstone, 2009) and, as such, divorce was reserved for wealthy men until the passage of the Matrimonial Causes Act in 1857, and effectively beyond. In a 2018 speech, by the then President of the Family Court in England and Wales, Sir James Munby said that the enduring, “*inequality inherent in the marriage relationship [which] was underscored by the notorious ‘double standard’ enshrined in the law of divorce*”, whereby a wife had to prove the reasons for divorcing her husband to a higher standard than a man. A man could divorce his wife based on her adultery and would retain full custody of their children [1]. Smart (1989, p142.) argues that double standards in the “*English common law gave privileges to men which were enshrined in their legal rights*”. In contrast, women had limited legal recourse, including no legal rights to their child even on the death of their husband, unless he specifically stated that the custody be transferred to the mother. Abramowicz (1999) notes that this situation can be traced to the Tenures Abolition Act (1660), which granted fathers the right to appoint guardians of their children in their ‘Last Will & Testament’. Blackstone (2009, p430) suggests that the effect of the Act was to extend the father's wishes ‘*even after his death*’.

Involving courts in inheritance matters, even as enforcers of fathers' rights, paved the way for the courts to become involved in determining matters involving children. This can be found in the case of the, Grand Opinion for the Prerogative Concerning the Royal Family (1717), which involved a dispute between the King and his son over ‘his child’. In this case the court determined that the matter could not involve the judiciary as the King and his son were one legal entity. Wright (2002, p184) claims that following this case, “fathers tried to get their children back after having relinquished temporary custody to third parties”, suggesting an expanding remit of the judiciary in determining matters relating to the welfare of the child and disputes around custody, from 1717 onwards. Wright (2002) indicates that in the main, fathers were unsuccessful during this period mainly because of financial problems which the court held to have an impact on the welfare of the child and the father’s ability to care for their child. Abramowicz (1999) claims that it was this judicial focus on the welfare of the child that eventually undermined fathers’ rights.

It was not until the passage of Caroline Norton’s Custody of Infants Act [1839] that mothers gained custody rights for their children. As previously explained, there was limited scope for inter-parental family disputes (Wright, 2002) to arise [2], as mothers had no rights and fathers had unique legal privilege which were ‘*absolute*’ (Abramowicz,1999). Blackstone (2009, p453) termed this the ‘*empire of the father*’. Scholars (Mason,1994; Gossberg,1996) argue, that the ‘empire of the father’ was legally weakened, by the Custody of Infants Act [1839] as the Act established a route for mothers to petition the court for custody of her child under the age of seven and access rights to children older than seven.

Thereafter, the *Infant Custody Act* (1873), was introduced in England & Wales which made some further notable changes in the law’s approach to custody disputes. It

¹ A failure to meet the legal test for Divorce means that people can be locked in an unhappy marriage unable to divorce, such as is the case of *Owens v Owens* [2018]. UKSC 41.

² Interparental custody disputes emerged at the start of the nineteenth century. In *R v De Manneville* (1804) which is believed to be one of the early interparental custody cases, Lord Eldon refused to give the mother custody of the child as she was “living in a state of actual, unauthorized, separation” from her husband, and the law could not allow her to have the child in those unlawful circumstances.

CHAPTER THREE: THE CONTESTED CONTACT DISPUTE

specified that the standard for deciding custody was the needs of the child rather than the rights of either parent. This concept/ approach had been simmering in the legal system since the cases of *Roach v. Garvan* (Ch. 1748); *Eyre v. Countess of Shaftesbury* 24 Eng. Rep. at 659; *Lord Shipbrook v. Lord Hinchinbrook*, (Ch. 1778) where courts argued that the rights of the child took precedence over those of the parents (Wright, 2002).

The *Guardianship of Infants Act 1925* made further provision asserting the ‘*welfare principle*’ of the child. It stated:

“They [judges] shall regard the welfare of the infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father”.

This passage suggests that there was recognition of the mother’s role in the upbringing of the child. However, the legislation retained the father’s ‘automatic rights’ to his children and failed to provide equal rights for mothers. It was not until the enactment of, section 2(4) of the *Children Act 1989*, in England and Wales and *Children (Scotland) Act 1995* that the ‘absolute’ position of the father was abolished. These legislative changes removed the rule that during his lifetime the father was the sole guardian of his legitimate child and gave automatic parental rights from birth to the mother.

These developments might suggest that the *Children Act 1989* and the *Children (Scotland) Act 1995* brought an end to the inequality in custody law, but these legislative changes did not remove claims of conflicting rights, inequality, or gendered claims about parenthood. Instead, courts were tasked with making decisions on how “*parental rights (i.e., the parents’ right to contact with the child) should be weighed against what [the courts] considered [to be in] ‘the best interests of the child’*” (Ottosen, 2006, p30). As such parents remained pitted against each other as legal adversaries (Foster and Herring, 2005). Herring (2014, p14) notes that this development also gave rise to conflicting claims of a legal system failing to protect the human rights of the child and their parents. Similarly, Mnookin (1976) claims that as a result of the welfare term being ‘*vague and indeterminate*’ parents were, “*bargaining in the shadow of the law*” (Mnookin & Kornhauser, 1979) about a legal ideal that was not a technical legal concept (Law Commission, 1997, p10). Barlett (1988, p301) also remarked that the welfare concept was as much drawn from social and political ideology as from “*neutral or scientific data or from the law*”. As such Ottosen (2006, p31) believes that this situation brings the argument back to the incompatibility of the law which gives rise to “*parallel or mutually competing ideas about what is best for the child*”. Thus, what can be drawn from the introduction of the welfare principle is that rather than clarifying the law it maintained parental relationships and conflict and ignored family’s histories (child contact planet) (Hester, 2011).

Sutherland (2018, p31) also claims that in addition to the ‘*welfare principle*’ being problematic, the way in which courts determine the child’s welfare has a “Janus-like quality, combining the virtue of flexibility with the vice of vagueness”

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(Sutherland, 2018, p2). This indeterminacy according to Sutherland (2018, p3) allows for almost unbridled, judicial discretion and paves the way for, "gender biases and subjective value judgments to replace objective considerations". This subjectivity may also give rise to competing power relationships, whereby the most powerful actors in welfare considerations "*might not be the child or the parties to the case, the parents, but the participating professional experts who make judgements and decisions*" (Ottosen, 2006, p32). As such these powerful relationships operate within a framework which prioritises a dominant ideology of family life and the welfare of the child, irrespective of the people at the centre of the dispute. And any perceived deviation from the dominant ideology draws negative attention upon those who do not conform. Interpretations of the 'welfare principle' are rooted in the popular belief that the child's welfare needs are best served by having contact with both parents, irrespective of the quality of the social relations, and is determined by those who wield the most power (Ottosen, 2006, p32), as such it is important to move beyond Hester (2011) focus on professionals.

Part of the difficulty in determining the welfare of a child may also be explained by changes in family structures. Figures from the Office of National Statistics (2019) suggest that while married or civil partner couples remain the most common family type in the UK, there were 2.9 million lone parent families and, 297,000 households containing multiple families. Munby (2018) points to the speed at which transformations in family life occurred during the twentieth century and the significant challenges for the law that these developments pose. Munby (2018) acknowledges that at times the law has been unable to keep up with and legislate for the array of competing rights, and that, as a result, the law has enforced outdated traditional family values on non-traditional families. Similarly, Bartlett (1984) notes that children lose more "*than they have gained*" from the focus on the traditional family, which had been too narrow, redundant, unattainable or, as Gray (2004) argues, may never have existed. Similarly, Walker (2008, p20) emphasises that, "*families that are not underpinned by a heterosexual, monogamous, lifelong marriage are [still] seen to pose significant dangers for children*". This suggests that marriage and the traditional nuclear family are still viewed as the ideal and protective environment for those concerned, and that inequality continues to permeate throughout family law today with significant implications for women.

Notably, the law has maintained and perpetuated historical family ideals such as the 'nuclear family' via the '*welfare principle*'. As such parents have been forced into a position whereby, they are legally compelled to agree arrangements for how their child maintains relationships with each parent. Baroness Hale in *G (children) (FC)*, [2006][41] notes that:

"[m]aking contact happen and, even more importantly, making contact work is one of the most difficult and contentious challenges in the whole of family law."

Thus, contact can be understood as replacing the notion of the "indissolubility of marriage," with the "notion that parenthood is indissoluble" (Parkinson, 2013, p99). Bound by the indissolubility of parenthood, parents may be forced into long-term negotiations with each other (Smart, 1989; Bainham, 2001; Cantwell, 2004; Kruk, 2012) and conflict arises when parents disagree about such arrangements. According to Polak and Saini (2019) there may be pre-existing reasons why parents

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are unable to resolve their tensions which may include: personality disorders, mental health concerns, insecure attachment, substance abuse, domestic abuse, a parent refusing to accept the relationship is over or financial pressures. Such tensions must also be understood within the context of wider social influences and networks (extended family members, significant others, new partners, campaigners, and professionals) which act almost like some sort of “*tribal warfare [members] and cheerleaders*” taking parental sides (Polak and Saini 2019. p125) and operating from within or outwith different planets (domestic abuse, child safeguarding, child contact) (Hester, 2011).

When parents are unable to resolve these issues personally (or are encouraged by their cheerleaders to remain oppositional) they may seek legal intervention. But when parents do turn to the law, scholars (Bainham, 2001; Smart and Neale 1998; Polak and Saini, 2019) argue that the law sets them up as adversaries in a confrontational fault-based legal system, focused on parental deficiencies. Bainham (2001) claims that the ‘*one-sided nature*’ of litigation may present a “*dishonest and distorted*” picture of the real reasons for the family dispute which are often more complex than what is presented in a legal document (Bainham, 2001; Trinder et al., 2013).

Sexist assumptions relating to the nature of family life and causes for dispute, prevail as child contact disputes in the UK are predominantly linked to dominant narratives of high conflict parents, the implacably hostile mother, parental alienation, and domestic abuse (Hunt and Macleod, 2008; Trinder et al 2013). As discussed in chapter one for over forty years mothers have sought to have domestic abuse crimes against them and their child, considered by courts when determining contact arrangements for their child. And instead mothers have had to defend themselves against the ‘*implacably hostile mother*’ narrative, allegations of parental alienation, the presumption in favour of contact, allegations of non-compliance and disrespecting the authority of the court.

The next section of this chapter will discuss domestic abuse within the context of child contact disputes and how these three planets (domestic abuse, child protection and child contact) provide some insight into how courts view non-compliance and enforcement of child contact orders. And how the difficult intersections between these planets increase the problems for mothers.

Domestic Abuse Planet: An Intimate Partner Crime

Historically, domestic abuse was viewed as a private family matter. It was once considered as an ordinary part of marriage, and family violence was not deemed to be a crime. However domestic abuse in the family began to gain attention in the 1970’s because of the women’s liberation movement, which started to challenge the stigma, embarrassment and shame women felt about intimate partner violence. The 1970’s was also a time of growing recognition that women’s oppression was linked to threats of and violence (Hague, 2021, p45). ‘Women’s Aid’ (1974) was founded during this pivotal period, to enable women and children experiencing violence and fear to leave their home and find a place of safety. Since this time domestic abuse has come to be recognised as a “*major social problem*” with serious and life changing consequences for the individual and society (Law Commission, 1992, p3).

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It was also recognised that the law was could not resolve intimate partner violence alone; widespread changes in public attitudes were also required.

In response to mounting pressure, the UK government introduced the Domestic Violence and Matrimonial Proceedings Act (1976) in England and Wales to provide the police with powers of arrest for a breach of an injunction and to vary the terms of who could live at a property. Further legislation was introduced in the Domestic Proceedings and Magistrates' Courts Act 1978 and the Matrimonial Homes Act 1983. It was claimed these legal provisions gave legal protection for female victims of domestic violence (UK Parliament, 2021). But according to Maidment (1983, p1463) although these legal remedies were available, the ways in which they were interpreted and implemented meant that women were inadequately protected from violence in the home/ family. These legislative developments in England and Wales in 1970's also revealed tensions and weaknesses within the law. A Law Commission report, "*Family law domestic violence and occupation of the family law home*" (1992, p6) noted three key concerns:

1. The constant tension between the need for instant protection to be given to the victim and the need to observe due process in the conduct of proceedings against the alleged perpetrator.
2. That a balance has to be struck between the victim's need and the rights of other people, although there is, of course, room for argument about what the correct balance should be.
3. legal remedies can be undermined by the gap which exists between the letter and spirit of the law and the law in practice.

The report concluded that there was more work to do, stating that it was extremely challenging to resolve violence and tensions within the context of family relations. The commission did propose the Family Homes and Domestic Violence Bill 1995, which was rejected by Conservative MPs as it was believed to, "*undermine traditional family values*" (Murphy, 1996, p845). This again suggests that outdated family values have significantly undermined women and children's safety.

Since the 1970's, a raft of legislation has been introduced to tackle domestic violence. In England and Wales, the Family Law Act (1996) was followed by Protection from Harassment Act (1997) (which also covers Scotland) and then the Domestic Violence and Victims Act 2004. In Wales the Violence Against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 was enacted. Section 76 Serious Crime Act was amended in 2016 to include controlling behaviour. More recently the Domestic Abuse Act (2021) has been introduced.

In Scotland there has also been a range of legislation passed since the 1970's to address domestic abuse: the Matrimonial Home and Interdicts Housing (Scotland) Act 1987, the Children (Scotland) Act 1995, and the Family (Scotland) Act 2006. More recently the Scottish Government has introduced Domestic Abuse Act 2011, Domestic Abuse (Scotland) Act 2018, the Children (Scotland) Act 2020, reinstates provisions contained in the Children (Scotland) Act 1995 for those who experience domestic abuse, and the Domestic Abuse (Protection) (Scotland) Act 2021. These

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legislative developments also formally signify a move away from traditional family values to more contemporary and diverse families.

But despite the introduction of the various legislation to tackle domestic abuse in Scotland, England, and Wales over the last forty years, these have successively failed to tackle or eradicate domestic abuse in the UK.

The need for a Contemporary understanding of Domestic Abuse in the UK

Overall, understandings of domestic abuse have evolved over the last forty years; from a private family matter which should be resolved between partners into a socially unaccepted crime. It has during this time remained a predominantly gender-based crime. Year-on-year female victims account for 73% of all domestic abuse crimes logged in England and Wales (ONS, 2021), and 82% in Scotland (Scottish Government, 2021). However, over recent years there has been a move away from the belief that domestic abuse is limited to physical violence to a broader understanding. Across the UK domestic abuse is characterised as incidents of abuse between a partner (married, cohabiting, civil partnership or otherwise) and ex-partner (Police Scotland, Domestic Abuse Act 2021). In England and Wales, the Domestic Abuse Act 2021 now specifically characterises domestic abuse as those who “*have or there has been a time when they each have had a parental relationship in relation to the same child*”. Domestic abuse in all jurisdictions has moved from the historical understanding of ‘*battered women*’ and ‘*black eyes*’ to focus on a wide range of behaviour which includes physical, verbal, sexual, psychological (including controlling and coercive control) and financial abuse. This demonstrates a greater understanding of the effects of Domestic Abuse on children and of different family relationships.

Domestic Abuse is a Crime but Possibly not in the Family Court System in the UK

A further complexity within the child contact planet (Hester, 2011) is that domestic abuse is predominantly understood as an intimate partner, gender-based crime, and scholars (Smart & Neale 1999, Hunt and Macleod, 2008; Trinder et al, 2013, Barnett, 2020) have for decades stressed that victims of domestic abuse were not getting the support they needed in the family courts as domestic abuse was not treated as a serious criminal offense, which points to Hester (2011) claims that these issues are not viewed as interlinked but are treated as separate issues (planets)

A CAFCASS (2017) report also found that domestic abuse was a common feature/ allegation [within their research sample] in nearly two-thirds (62%) of the 216 cases they reviewed. And according to CAFCASS (2017, p23) other studies “have found that domestic abuse allegations in contact applications varied between 49% and 90% of cases”. This suggests that domestic abuse may be a significant issue in contact disputes. However, there is evidence that it may not be viewed as such by the judiciary (again examples of different perspectives/ planets Hester, 2011). In 2021 a survey conducted by Channel 4’s Dispatches programme found that “*4 out of 5 lawyers who responded said magistrates have a poor or very poor understanding [of domestic abuse and coercive control] and 1 in 3 said District Judges also have a poor or very poor understanding of these issues*”.

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Domestic Abuse and Judicial Attitudes in the Family Court System in England and Wales

As mentioned in *chapter one* of this thesis researchers have since at least the 1990's raised concerns about domestic abuse and child contact arrangements (Smart & Neale 1999, Hunt and Macleod, 2008; Trinder et al, 2013, Barnett, 2020). Despite legislation being introduced to protect victims of domestic abuse it appears that the family courts in England and Wales have continued to put victims at risk. A Ministry of Justice report *Assessing the Risk of Harm to Children and Parents in Private Law Cases* (2020, p4), identified three barriers for victims raising abuse in child contact actions. These were: [1] the presumption in favour of contact, [2] evidencing domestic abuse and [3] courts working in silos (planets) (Hester, 2011).

However, these barriers must also be understood within a wider context of arguably sexist judicial decision making as in the case of *JH V MF* [2020]. In this case on appeal, Judge Tolson's judgement was found to have subjected the mother to outdated and plainly wrong views of sexual abuse (Richards, 2020) and so much so that on appeal Justice Russell noted that Judge Tolson's order required a retrial. Justice Russell was so concerned by the way the mothers' allegations of abuse were addressed by Justice Tolson in this case that she called for:

"judges who may hear cases involving allegations of serious sexual assault in family proceedings to be given training based on that which is already provided to criminal judge".

Outraged by Judge Tolson's treatment of the mother an 'Early Day Motion' was tabled in Parliament which said:

"That this House welcomes the overturning by the High Court of Justice Tolson's ruling in the Central Family Court that a sexual assault did not constitute rape because the woman had taken no physical step to encourage the man to desist; notes with concern the High Court's findings that Justice Tolson failed to apply the definitions of domestic abuse and coercive and controlling behaviour, dismissed or ignored reports from the police, failed to allow the Appellant to make her full submission and repeatedly interrupted her; further notes with concern the High Court's findings on Justice Tolson's judgment that the real risk of the appearance of a partisan approach in that judge's conduct was self-evident and that the fact that the judge preferred the Respondent's case was patent throughout his judgment; highlights the High Court's further findings that Justice Tolson's reasons for dismissing the evidence of the Appellant were wrong, specifically, that he made a finding regarding the Appellant's psychological state of mind without any forensic expert evidence; further highlights that the High Court found that Justice Tolson's approach towards the issue of consent was manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct; notes with concern that Justice Tolson continues to preside over cases involving domestic abuse and rape in the Family Courts; and calls on the Government to take steps with the Judicial College to ensure that training is made mandatory for family court and

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criminal court judges on the legally correct and appropriate approach to take when hearing domestic abuse and sexual assault allegations”.

The Early Day Motion was signed by (only) 46 members of Parliament. However, members of the judiciary responded to the appeal decision suggesting that Justice Tolson was an anomaly (Bellamy, 2021). Then in 2021, in a landmark case of four conjoined appeals *Re H-N and Others (Children)* the court heard these cases involved allegations of domestic abuse. Two of the cases had been determined by Justice Tolson and the two cases involved two other justices (His Honour Judge Richard Scarratt and Her Honour Judge Jane Evans-Gordon). In determining the outcomes of the appeals, the court press summary said:

The court set out as background the statistics in relation to private law cases, explaining that in 2019/2020 over 50,000 private law applications were made. In approximately 40% of those applications allegations of domestic abuse were made. Over 4000 magistrates and Family judges hear cases with issues of this nature.

The court was satisfied that the modern approach to domestic abuse discussed in the judgment is well understood and has, through experience and training, become embedded with the vast majority of judges and magistrates sitting in the Family Court. There is, however, no room for complacency and the Family Court is engaged in a continuing process aimed at developing and improving its procedures. A judge who fails properly to determine the issues before him or her is likely to be held on appeal to have been in error.

His Honour Clifford Bellamy wrote an article some months later for the Judiciary titled ' *Transparency in the Family Court*' (2021) arguing that:

The sobering truth is that but for the appeal against Judge Tolson heard by Ms Justice Russell in December 2019 and the four appeals heard by the Court of Appeal in January 2021, none of the concerns about the attitude and behaviour of these three judges would ever have come into the public domain.

This suggests that despite legislative developments providing protection for victims of domestic abuse in the family courts, the law in action may be very different to the law in books. This case was not an anomaly and there is still a lot to be done to change the culture within the family courts in the UK.

[Domestic Abuse and Judicial Attitudes in the Family Court System in Scotland](#)

Similarly in Scotland researchers (McGurkin and McGurkin, 2004; Morrison, 2015; Mackay, 2018; Whitecross, 2017, 2019) have also identified difficulties in contact disputes where domestic abuse is alleged despite legislation being passed to protect victims. Notably the Scottish Justice committee amended the Children (Scotland) Act 1995, to include section 7(A) to (E) Family Law (Scotland) Act 2006. Section 7(A) to

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(E) to incorporate protections for children from domestic abuse [3]. However, Professor Kenneth Norrie (2016) highlights that:

“There have been very few judicial discussions of the provision and there is certainly no evidence that court practice has changed in any notable way. Therefore, I can understand people who argue that the provision promised more than it delivered. My response to that is that, if we look carefully at the wording, we see it did not actually promise much.”

Whitecross (2017) in his study found that a considerable number of the lawyers he had interviewed claimed that there were “*significant barriers to raising concerns about domestic abuse [was] the attitudes and understanding of some sheriffs*”. As a result of the introduction of the *Domestic Abuse (Scotland) Act 2018*, and in response to concerns about judicial understanding of domestic abuse, all Scottish judges were allocated to one of eight face-to-face domestic abuse courses delivered by the Institute of Judicial Studies (Scottish Government, 2019).

Since 2019, domestic abuse has remained an issue in contact disputes in Scotland. In the case of *RK v AG [2021]* the sheriff made it very clear that contact is enforced despite allegations of domestic abuse:

“There can be little doubt that unfortunately the domestic violence and volatile behaviour which the [respondent] demonstrated, and some of which took place in front of [the child], must have affected her. It is a sad indictment of the [respondent’s] behaviour that at the time the parties were living together he seems to have been utterly unaware of this, or simply did not care about this at the time. However, the parties have separated, and have no contact with each other, and therefore there is no question of [the child] being exposed to further domestic abuse. That was only a factor when the parties were living together. There is, it seems to me, no longer any need, as a matter of fact in the present circumstances, to protect her from domestic abuse or the effects of it at the hand of the [respondent]. Some damage may have been done, and that is greatly to be regretted, but domestic abuse is no longer a factor in relation to [the child], and the historical abuse is not, in my view, sufficient to prevent an award of contact being made”

On appeal Judge Pyle said that the Sheriff was wrong, and that he should have taken into considered the abuse (historical or otherwise). Furthermore, he should have also sought the views of the child as the child would have been affected by the abuse. The appeal was upheld. However, what this case demonstrates is that despite successive legislation being introduced since the *Children (Scotland) Act 1995* and again in the *Family (Scotland) Act 2006*, to highlight the importance of considering domestic Abuse, the judiciary are still not taking these allegations

³ (a) the need to protect the child from—(i) any abuse; or (ii) the risk of any abuse, which affects, or might affect, the child; (b) the effect such abuse, or the risk of such abuse, might have on the child; (c) the ability of a person—(i) who has carried out abuse which affects or might affect the child; or (ii) who might carry out such abuse, to care for, or otherwise meet the needs of, the child; and(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

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seriously in family disputes and are not viewing incidents of domestic abuse as a crime. This again points to how abuse is compartmentalised into different planets (domestic abuse and child protection planets), and child contact decisions are made with abuse largely ignored (child contact planet) (Hester, 2011).

Understanding Domestic Abuse in contested contact disputes

Part of the difficulty for researchers investigating domestic abuse in contested contact disputes may have been the traditional understanding of domestic abuse being physical violence. Even if that initial understanding is set aside, it is often difficult to disturb the idea that both parties are to blame (Arnold, 2017, p26). Furthermore, to many (including professionals and the judiciary) the behaviour complained of may not be understood as abuse. Scholars in this field again argue that domestic abuse is not a single incident or one type of abuse it is a course of conduct which can include: physical violence (Neilson, 2013, 2017), stalking, custody stalking (Elizabeth, 2017), harassment, never ending litigation (Douglas 2018, Miller & Smolter, 2011), denigration (Arnold, 2015; Morrison, 2015 Mocking-smith 2017) and coercive control. Recognition of the devastating impact of coercive control did result in it being classed as a criminal offense in England and Wales in 2015 and in Scotland in 2018. Coercive control is defined by the Home Office (2015) as:

“a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another”.

Official understanding of domestic abuse is still to gain widespread traction, but there is an appreciation that the abuse is often prolonged and multifaceted. What is less understood is that the abuser takes advantage of their intimate knowledge and the personal characteristics of their victim, and they use this to tailor the abuse which can result in devastating consequences for the victim. Neilson (2017, p67) notes that:

“[a] whistle, an eye twitch, a raised eyebrow, a particular word or phrase, an intense look, flexing of a particular muscle can constitute continuing intimidation that causes intense fear if understood in the context of former domestic violence”.

These behaviours may also be understood as signals or threats of violence to come and may not be readily obvious to others (Neilson, 2017, 2013). Neilson (2017, p29), further argues that domestic abuse, does not match up with older views of intimate violence, nor does it match with popular conceptions of abuse or solutions to domestic abuse. In her work Arnold (2013, p29) stresses that domestic abuse is about “*destroying the core of the targets being*”.

The following section will explore some of these issues further, specifically in relation to child contact orders. The next section also highlight that for women experiencing domestic abuse in child contact disputes, the issues are not separate or located in different planets (Hester, 2011), they are interwoven and result in lifechanging consequences for women and children.

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Fear of Physical Violence and Contact Handovers

Hester and Radford (1996) found that contact handovers were particularly difficult for mothers and the site for further risk of or actual violence. And courts were often forcing a victim of domestic abuse to engage in contact handovers which may make women, “*so afraid for their safety that they [may rely on] family and friends when arranging handovers*” (Coy, et al., 2012, p). Certainly Morrison (2015, p278) found in her study that it more than fears of physical violence as mothers were assaulted at contact handovers, which was witnessed by the children. This illustrates how historical abuse is not considered, minimised or rejected in the family courts, increasing the risks for children and their mothers (Hester, 2011, p847)

Stalking

The fear of physical violence (Coy et al, 2012) and actual physical violence (Hester and Radford, 1996; Morrison, 2015) may be compounded by stalking behaviour. Procter (2019) identified that the defining characteristic of stalking is surveillance behaviour which makes it distinct from emotional/psychological abuse. According to Procter (2019) the victim is made aware that they are being stalked and often there is no planned (or foreseeable) end point to a stalker’s behaviour. As such stalking should be understood as a tactic to exert power and control, and to evoke fear and alarm in the victim. Thus stalkers “*create an environment in which they appear omnipresent, leading to constant wariness and anxiety for the victim*” (McEwan, 2021, p210).

In an Australian study, Bendline and Sheridan (2019) found that there was a significant association between child contact and stalking and physical violence. They claimed that stalking may be a way in which the perpetrator exerts control after separation and that it is the child contact which maintains the relationship “*which may be where the true danger and risk lie if the separation and feeling of power loss lead to serious aggression toward the victim*” (Ibid, p7913). English researchers (Monckton-smith et al, 2017, p3) have also found that there is a strong correlation between behaviours which are characterized by fixation and obsession, actions linked to surveillance and control, and escalation and homicide. Given the seriousness of stalking behaviours, Finnish scholars Nikupeteri and Laitinen (2015) indicate that children were directly affected by stalking behaviour and claimed that in cases where mothers are victims of stalking, children should also be viewed as victims of stalking. In Scotland Sec 39 Criminal Justice and Licensing (Scotland) Act 2010 recognises stalking as a criminal offence, and in England and Wales, The Protection of Freedoms Act 2012 has specific sections addressing stalking, but neither include protections for children experiencing stalking.

Coercive Control

Researchers have also identified coercive control as a significant element of domestic abuse. According to Stark (2009, p294) this pattern of behaviour includes:

“forms of intimidation [which] extend from open threats, stalking and harassment via phone or computer, to more subtle warnings only understood by the victim. In addition to chronic name-calling, degradation often involves sexual humiliation or the coerced performance of shameful

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acts. Isolation tactics extend from perpetrator-enforced separation from family, friends, or helping professionals to a victim's voluntary isolation as a way to placate a jealous partner. Control tactics may extend from regulating a victim's access to vital resources (such as money, food, sex, clothing, transportation, or means of communicating) to rules governing self-care (dressing, eating, or even toileting), family maintenance (cooking, cleaning, and the like) and parenting (how children are disciplined, cleaned, schooled, etc.).

However, Stark (2009, p297) claims that family courts do not consider this behaviour as domestic abuse, but instead continue to *“interpret partner violence as an instance of “high conflict” rather than as abuse”*. Indeed, growing recognition of coercive control has continued to point to the family courts as context for legitimising coercive control tactics. Douglas (2018), in her research into coercive control in the legal system, claims that perpetrators who lose the opportunity to continue abuse within the home use child contact negotiations and litigation processes as a substitute. Stark and Hester (2018) also found however, that despite the introduction of legislation recognising coercive control as a crime, it was difficult to prove. Hard data and methods of recording and assessing coercive control were problematic. As a result, there was a *“demonstrable impact that is cumulative over time and across social space on a class of victims whose lives and liberties become severely constrained”* and this also included children. They note (2018, p96) that *“children are exposed to the coercive control of their mother, [and] used as pawns in control strategies, or are “weaponized” as instruments of the coercion and control”*. A study by Katz et al (2020, p310, Callaghan et al. 2017) further found that “[c]hildren and young people can be direct victims/survivors of coercive control and they can experience it in much the same ways as adults do – feeling confused and afraid, living constrained lives, and being entrapped and harmed by the perpetrator”. However, their experiences and the impact of the abuse is not sought. Katz et al (2020, p324) stress that legislatures must recognise children (under the age of 16) are victims of this crime, and laws should include protections for them, as they do for adult victims.

Financial Abuse /Economic Abuse

Another tactic deployed by abusive ex partners is financial or ‘economic’ abuse Sharp-Jeffs (2015, p7). The UK government (2021) describes financial abuse as a means by which to exert power and control over the victim. It may include:

- 1: having sole control of the family income.
- 2: preventing a victim from claiming welfare benefits.
- 3: interfering with a victim’s education, training, or employment.
- 4: not allowing or controlling a victim’s access to mobile phone/transport/utilities/food.
- 5: damage to a victim’s property

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In contact disputes, financial abuse may also include withholding child maintenance payments and prolonging litigation, recognising the impact this may have on their ex-partner (Sharp-Jeffs, 2015). According to Sharp-Jeffs, women face a wide range of financial related issues linked to contact disputes such as: reduced working hours, moving home, time off to attend court hearings, prolonged litigation all which are also detrimental to the child. Furthermore, victims of domestic abuse have also claimed that courts are ordering them to pay for their abuser to have contact with the child. This perverse situation was raised by Dr Charlotte Proudman (also a human rights lawyer) in a Guardian newspaper (2020) article:

“I’m seeing more and more that victims of domestic abuse are being ordered to pay 50% of child contact costs to alleged perpetrators – the vast majority of which are fathers who are not paying any child maintenance. Judges are not always giving due consideration to the parents’ financial means.

There have been cases in which victims of domestic abuse are ordered to pay half of the costs of their former partner’s contact - typically £150 per session. In some instances, women have been forced to pay the costs of contact out of their universal credit”

This suggests that victims of domestic abuse may be under significant financial pressures while both dealing with their abusive ex and having their limited budget stretched during contact negotiations.

Legal abuse:

In reviewing the literature in relation to financial abuse, the issue of prolonged litigation was raised. Douglas (2018) found that:

“survivors may experience the legal process as a form of secondary victimization as a result of inappropriate treatment and responses by legal actors, including judges and lawyers”.

This may also be compounded by what Miller & Smolter (2011, p637) term as ‘*paper abuse*’ which includes:

“a range of behaviours such as filing frivolous lawsuits, making false reports of child abuse, and taking other legal actions as a means of exerting power, forcing contact, and financially burdening their ex-partners. Legal venues, including protection order hearings and divorce and child custody proceedings, are particularly ripe for paper abuse not only because they involve multiple meetings and hearings but also because these types of cases are often heard by multiple judges”

This suggests that abusers find ways in which exploit legal processes to continue the abuse. Morrison (2015, p280) found fathers were hostile, and would denigrate and speak negatively about mothers during contact with their child. While Thiara (2010 cited in Coy, et al 2012) claimed that the rigorous pursuit of contact through the family courts by some perpetrators is followed by failure to turn up for visits or in cases of indirect contact, to send letters/make telephone calls. This calls into question the extent to which genuine interest in a relationship with children is these

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men's motivation for applying for contact. Furthermore Coy, et al (2012, p30), argued that, "*[s]ome men did not stick to arrangements, often to the point of deliberately disrupting women's ability to make plans and carry on with their routines, which in turn compromised [the] children's sense of stability and security*".

Exploiting the legal processes has also been linked to another term 'custody stalking' (Elizabeth, 2017; Mocking-smith, 2017) which "*like stalking in general, is a form of attack on mothers' psychological integrity*" (Elizabeth, 2017, p201). What this suggests is that '*paper abuse*' is part of a wider course of domestic abuse which leaves a mother and child with nowhere to go. Mocking-smith (2017, p186) also claims that stalkers use these tactics to make the victim appear untrustworthy in contact disputes, especially as a witness and may focus on their mental health by instilling "feelings of anxious dread in mothers who are its targets". She continues (2017, p186) "*if fathers are successful, custody stalking puts at risk women's mothering endeavours, causing them and often their children a great deal of possibly life-long psychological distress*".

In some rare instances courts do act, as in the case of G (Children) (Intractable Dispute) [2019]. In this case the court held that the father should be prevented from making any further contact action applications for 3 years as there had been 30 hearings across 40 days and the court held that the mother and children were entitled to protection from incessant litigation. However, such cases are rare, and it does appear that the litigation itself may be used by abusive fathers to continue to exert control over the mother and child.

Recognising Domestic Abuse in the Family Court

In summary domestic abuse is a complex, multifaceted bundle of crimes (Brooks (2013). Within the 'child contact planet' (Hester, 2011), domestic abuse does not appear to be viewed as criminal conduct. And as such Hanman & Holt (2021) suggests a 7-point plan to make contact safe[r] for children:

- 1: The emphasis must be on safe and meaningful contact
- 2: Be aware that DVA Is a specific and deliberate attack on the mother-child bond and interventions need to therefore repair this, not damage it further
- 3: Question parental knowledge of and genuine interest in their children
- 4: Improved processes in the family courts
- 5: Understand that past physical assaults are not a good indicator of future risk
- 6: Making evidence informed decisions
- 7: Recognize that children are active agents in their Lives: Reports should not be written about them without their Input; decisions about contact should be informed by children's voices.

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The Child's Position in Contact Disputes where Domestic Abuse is Alleged

Whitecross (2016) noted that part of the difficulty is that the welfare principle has become synonymous with a child's right to 'contact' which appears to have largely taken precedence over allegations of abuse. UNICEF (2006) also notes that children are often the forgotten victims of violence in the home as they are often not considered or viewed as victims. Callaghan, et al., (2015 and Callaghan, 2017) supports these claims and argue that children should be positioned as '*equal victims*' and should be heard as they experience violence directly. Scholar (Callaghan, et al., 2015; Callaghan, 2017, Hanman & Holt, 2021) argue that children who have experienced domestic abuse should be able to express their wishes about contact arrangement before the court makes an order. Morrison et al, (2021, p403) found that despite legislative changes linked to domestic abuse in Scotland, "the legal construction of the child's views as separate from the parental dispute have unintended and serious consequences for children's participation rights" which supports previous studies (Mackay, 2013 and Morrison, 2015). Morrison, et al, (2021) call for radical changes to how children are viewed in the legal system and seek to find a way in which children can participate and exercise their rights and hear their lived experiences (including abuse) aligned with the Children's act 1995 and UNCRC.

The Child's Voice in Contact Disputes

Case law in the UK relating to the voice of the child in contact disputes, presents a muddled, complex, and unsettled position. In the case of *Fowler v Fowler* [1981], the court held that a 10-year-old child could make up her own mind about contact. This stance was supported in *Mackenzie v Hendry* [1984] where the court also held in favour of a 7-year-old boy. However, in *Henderson v Henderson* [1997] the court argued:

[I]t is difficult to see what advantage a child being listed as a party has in a situation where he child's views are exactly the same as the defender's... As all three parties were on legal aid, it also appears an unnecessary expense.

According to Harrison (2008 p399) allegations of abuse are rejected as a result of perceptions of the mother being "*implacably hostile*". And yet Harrison (2008, p401) found in her study that far from misusing their children, mothers would shield their "*children from the impact of violence, despite serious repercussions for themselves*".

In another case *A (A Child) (Contact: Welfare Evaluation)* [2015] the court reasoned that the issues for determination were of an adult nature and that it was unfair to ask a child to take on the responsibility of deciding if he wanted contact with his father. Similarly, in *AS v TH (False Allegations of Abuse)* [2016] Mr. Justice McDonald claimed that it was "*not appropriate for the children to give evidence*", in a case which involved allegations of physical, emotional abuse of the children and domestic abuse of the mother. The court then rejected the allegations of abuse.

In *CS v SBH & Ors* [2019: at [71]] it was asserted that child had extreme feelings about her father, describing him as abusive, as the cause of her suffering, and cruel.

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However, the court held that it must consider several factors for determining if a child has sufficient understanding to allow the child to participate in the proceedings [4]. The court determined in this case that the child, who was aged 12, did not have the maturity to actively appeal the decision reached by the court, and the position of the mother in this case received criticism. Neilson (2013) points out that without a valid voice, children learn that no one can be trusted and feel powerless.

But it is not just perceptions of mothers which lead to children being disbelieved, children themselves are often not viewed as trustworthy or reliable. According to Proudman cited by (Police life, 2021), the human rights lawyer was quoted as saying:

"Sadly, I have also seen countless cases where children have been vehemently opposed to contact with a parent, and in some cases have reported child abuse, but only for this to be ignored. In one case, a child gave evidence that the father had physically abused her. The father denied this and the Judge accepted the father's evidence. The child was devastated and could not understand why the Judge didn't believe her. The Judge made findings that the mother had alienated the child from the father instead of acknowledging the harm of the physical abuse. The child was then forced by the court to see her father against her wishes, which caused serious mental health problems for the child in the longer-term."

"In another case, a child alleged sexual abuse by one parent. But after hearing the child's allegations were dismissed as they were seen as an unreliable witness without any real reasons being given other than the child was very young when the allegations were made. Years later and the child is still repeating the allegations and requires intense therapeutic input. The court failed to fully assess the risk of abuse and as such left this child at risk of harm. "

This attitude is also found in the case of *K W v ST* [2019] EWHC 3665 (Fam) where Justice Holman said:

"I personally cannot remember any case in which findings of sexual abuse of this kind have been made, fundamentally, simply on the basis of what a child, two days after her third birthday, has said".

Although the young age may be more problematic, the issue is that once an allegation is dismissed by the judiciary, they disappear, and mothers are discouraged from raising these concerns again. This suggests that there are a number of factors which prevent mothers and children's claims of abuse being viewed as credible by courts. It also suggests that professionals are operating from different perspectives (planets) in relation to the interwoven issues of domestic abuse, child protection and child contact (Hester, 2011).

⁴ a) the child's level of intelligence;(b) emotional maturity; c) factors undermining their understanding such as issues arising from their emotional, psychological, psychiatric or emotional state; (d) their reasons for wishing to instruct a solicitor directly or to act without a guardian and the strength of feeling accompanying those wishes; (e) their understanding of the issues in the case, their desired outcome, and whether those views were their own; (f) their understanding of the litigation process; (g) the court's assessment of the risk of harm to the child and the child's appreciation of those rights

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Challenges for Women Who Raise Domestic Abuse in Child Contact Disputes

As a result of these issues, domestic abuse becomes invisible in child contact cases. As Kurk (2013, p70) argues “*a judge must make difficult decisions in the context of allegations and counter-allegations of abuse, alienation, and parental unfitness, but [points out] that rarely is there any sort of criminal or child welfare investigation of the allegations.*” Along with the multifaceted nature of domestic abuse, the prioritisation of the ‘*welfare principle,*’ and the silencing of children’s voices, (Arnold, 2015; Callaghan 2015; Mackay, 2013; Morrison, 2015, Morrison et al, 2021). Arnold (2015) claims that women are put under pressure to ‘*keep families intact*’ (even families that were never together) and often buckle under the ‘*web of expectations*’ place upon them. Arnold (2015) suggests that the pressure on women to remain in a violent relationship and to adhere to an outdated ideology of family life, can at time be “paralysing”. Yet, abuse often exacerbates at the “*point of separation*” (Morrison, 2015; Arnold, 2015, Hester, 2011) which can be understood as being a highly volatile and unpredictable time for mothers.

Additionally, scholars argue that gender inequality is also influential in family law, insofar as it relegates a mother’s rights to secondary status behind the fathers and ‘*the best interests of the child*’ (Arnold, 2015; Rose, 2019; Stahly, 2009). Rose (2019, p165) claims society often views motherhood from the stance that a “*mother must live for her child, a mother is a mother and nothing else*”. Stahly (2009, p) further argues that “[*t]he courts appear to treat the protection of the rights of the accused parent (usually the father) as the first and primary priority which may seem “perverse to those with no experience of the family court to comprehend*”. Prioritisation of the alleged accused rights over the ‘*rights of the child*’ is a common feature in child contact disputes. Similarly, Birchall & Choudhry (2018, p32) found:

“a glaring gender gap in the way rights are used by applicants, with non-abusive parents thinking ‘child first,’ while the focus of perpetrators of abuse remains ‘me first.’ Echoing this disparity, the research found clear examples of family courts prioritising perpetrators of domestic abuse’s rights to family life over survivors’ and children’s rights to life and to be free from degrading treatment. On top of this, the research reveals horrifying and deep-seated discrimination against women and mothers. In the worst cases, this discrimination allows perpetrators to continue their abuse, and judges, magistrates and lawyers to participate in grotesquely unequal treatment.”

Araji (2012, p112) contends that these “*problems [are] allowing abusive partners to gain custody of children, or unsupervised visitations, even when abusers had documented histories of domestic violence and/or child abuse*”. Kaganas & Day Sclater (2004) claim that mothers who oppose contact are regarded as prioritising themselves ahead of their child. As such, they are regarded as ‘bad’ or ‘selfish’ mothers (Wellbank, 1998). Ashe (1992; also see Chesler 1986) also argues that concerns of domestic abuse in contact actions are treated as a positive indicator of the ‘implacably hostile mother’ narrative, leading to self-censorship among mothers

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and their advocates with consequences for the decisions made. The pursuer's legal professional will identify and attack "the stereotype in the prevalent cultural consciousness and unconsciousness" (Ashe 1992, p45) in a bid to validate their client's position. Scholars therefore suggest that the embedded negative stereotype reinforces structural inequality for women and children in child contact disputes where domestic abuse is alleged. It also points to "*the continual replication and reconstruction of gender-based social inequality*" (Hester, 2011, p840) in the family courts.

Furthermore, Rose (2017) claims that women's experiences of abuse are often discounted, rejected, or disbelieved, and that this disbelief may lead to significant harm (Epstein & Goodman, 2019). For Rose (2019, p15), a mother's suffering is positioned as being '*socially acceptable*', but what is unacceptable is her quest to "probe, expose or talk too much" about her experience of abuse and her concerns regarding contact. As such, women argue that they experience discrimination both in the written law and the application of the law (Hunter, et al., 2018). In fact, it seems that in contact disputes, if a mother alleges domestic abuse, she is more likely to lose custody (Meier & Dickson, 2017). Critically, Epstein & Goodman (2019, p12) recognise that judicial rejection of the mother's allegations of domestic abuse based on her trustworthiness "*can have repercussions that will last throughout their own lives and those of their children*". They argue that the oppression and rejection of the mother's experience by professional institutions, mirror her abusive partner's behaviours and attitudes and thus the abuse is replicated at "an institutional level". The institutional abuse may also create further '*psychic injury*' and in feelings of '*institutional betrayal*' (Epstein & Goodman, 2019).

Domestic Abuse Allegations Are Seen as Nothing More Than A Smoke Screen For the Implacably Hostile Mother

Araji (2012, p45) emphasises that "*fathers' rights groups claim men are deprived of parental rights*", and as such have embarked on several high-profile campaigns, vilifying celebrity mothers. Building on gendered assumptions previously discussed, fathers' rights campaigners have positioned allegations of domestic abuse as nothing more than a smoke screen used by mothers who are implacably hostile to contact. These campaigners have termed this smoke screen 'Parental Alienation Syndrome' (PAS) [6] a term coined by Gardner (2002) Gardner (2002, p95) claims that PAS is a *mental condition suffered by children* who are alienated by their mother against their father. The World Health Organisation (WHO) had outlined a plan to recognise PAS in their official list of recognised illnesses (ICD-1) from January 2022 (World Health Organisation, 2019).

Birchall & Choudhry (2018) suggest that fathers claim PAS as a diversion tactic to detract from mothers' allegations of domestic abuse. Similarly, a Cardiff University report found that:

"... parental alienation syndrome (PAS) has been likened to a 'nuclear weapon' that can be exploited within the adversarial legal system in the battle for child residence (Shepard, 2001). Hence, Meier (2009) and

⁶ Re B (change of residence; parental alienation) [2017] EWFC B24 (22 March 2017) the court discussed the PAS terminology.

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others (e.g. Bala, Hunt and McCarney, 2010; Johnston, Walters and Oleson, 2005; Lee and Oleson, 2005; Clarkson and Clarkson, 2006) have emphasised the need to distinguish parental alienation from justifiable estrangement due to abuse, violence or impaired parenting and where parental alienation claims can be far more often used in practice to deny real abuse than to actually reduce psychological harm to children (Meier, 2009: p250)".

Although PAS was removed in 2020 from the ICD-1 list (Réseau International des Mères en Lutte (2020) it remains a central argument in contested contact disputes.

Meier & Dickson (2017, p112) found in their research that, "*fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time*". Barnett (2020) argues that PAS is not equivalent to domestic abuse but can be used to mask it. Furthermore, courts are increasingly considering allegations of PAS, when making welfare determinations in contested disputes. For example, orders transferring the living arrangements (residence) from one parent to the other, have been made either to take immediate effect or suspended as long as the defaulting parent complies with the order see (Re H (Parental Alienation) PA v TT and another [2019], Re D (Children) [2009] EWCA Civ 1551 and Re D (Children) [2010] EWCA Civ 496) In the English case of Re A (Children) (Parental Alienation) [2020] the court transferred the child's residence to the father and also made an indemnity costs order against the mother.

Professional Confusion and Domestic Abuse in the Family Court

A further part of the complexity in addressing allegations of domestic abuse in the family courts is that professionals appear to be working in different planets (Hester, 2011) as they have different understanding of domestic abuse. And from these different planets {Hester, 2011), professionals appear to be confused as to what action to take if any and are confused in terms of their understanding of abuse and the support they should offer families. One case which highlights this is AS v TH (False Allegations of Abuse) [2016] the mother and children claimed domestic abuse. The court concluded that these allegations were false and that professionals had exacerbated issues. The Children's Guardian told the court in that it was as if "a sort of hysteria took over and prevented people from asking certain questions". Mr. Justice Macdonald in his judgement was critical of the handling of abuse allegations by professionals, and he claimed they had "*materially prejudiced the welfare of both children*" as they had failed to critically question the mother, keep detailed and accurate records of the interviews with the children out with the confines of an Achieving Best Evidence (ABE) interview and failed to co-ordinate their interventions. This may suggest that understanding of domestic abuse is problematic throughout professional networks.

Non-Compliance With A Contact Order Where Domestic Abuse is Alleged

So far this chapter has discussed how domestic abuse is largely invisible in the family courts but this invisibility can and does have serious implications on those who as a result of the abuse do not comply with court ordered contact orders

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(Clark, 1987; Stark, 2007). Harmer (1990, p240) explains that some mothers have “*refus[ed] to send their children to court ordered visitations with ex-husbands accused of sexual abuse*” and instead “*have gone underground rather than submit to the court*” taking the child with them. Some mothers have gone to prison rather than risk endangering their children. Harmer (1990, p240) points to a 1980s US case whereby the mother was told she had to:

“either surrender her daughter to a man she was convinced had repeatedly sexually abused the girl or face indefinite imprisonment. Morgan chose the latter. Having abandoned her home, her medical practice, and her freedom, she endured over two years in jail⁷.”

In this case, the mother sent her daughter into hiding in another country with her parents. She did not see her daughter while she was incarcerated. Harmer (1990) claims that most mothers do not want to break the law but are left with no choice and the ongoing problem of trying to keep their child safe. However, the courts may reject abuse and they may also be sceptical as Baroness Hale explained in *Re B* at [29]:

“...there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert Local Authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false, but it does increase the risk of misinterpretation, exaggeration or downright fabrication.”

Neilson (2013) agrees that determining the veracity of domestic abuse allegations is particularly problematic for legal professionals but highlights that the removal of allegations of domestic abuse is equally or more challenging for children (change of residence, increased contact), and for mothers who lose their liberty as: *R v N* (Committal Refusal of Contact) [1997], *Z v Z* [1996] *A.M v M.J.S* [2009], *AG v JB* [2011]. *SM v CM* [2017].

Imprisoning Mothers

In the UK, courts do send mothers to prison for non-compliance with child contact orders, treating this action as civil contempt of court. However as noted in the introduction of this thesis, there is no reliable or transparent data on the scale of mothers losing their liberty linked to a contact order. What is known about mothers in prison, can be drawn from the broader field of criminology and analysis of the criminal justice system. There are problems here too. A Parliament UK report for England and Wales (2019) found that:

⁷ On August 26, 1987, Dr. Morgan was held in contempt of court for defying a District of Columbia Superior Court order to deliver her five-year-old daughter Hilary to Dr. Eric Foretich, her ex-husband, for two weeks of unsupervised visitation.⁶ Morgan had repeatedly accused Foretich of sexually abusing Hilary. Foretich denied any misconduct. Although Morgan's allegations were substantiated by several child psychologists and paediatricians who had examined Hilary, she was unable to prove them in court." Hers was a Hobson's choice: either surrender her daughter to a man she was convinced had repeatedly sexually abused the girl or face indefinite imprisonment. Morgan chose the latter. Having abandoned her home, her medical practice, and her freedom, she endured over two years in jail. Had Congress not acted, she would, in all likelihood, remain there still.'

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“the lack of reliable quantitative data on the number of children whose mothers are in prison and the number of mothers in prison is unacceptable. Without improved data collection, collation and publication it is both impossible to fully understand the scale and nature of this issue and to properly address it. As a matter of urgency, the Government must remedy this situation by: Making it mandatory to ask all woman entering prison whether they have dependent children and what their ages are. This information should then be verified by cross-referencing it with child benefit data”

Similarly in Scotland, data for the prison population records the number of women in prison (Scottish Government, 2020) but the dataset does not include any reference as to the how many of these women are also mothers.

Maternal Incarceration and the Bad Mother Stereotype

Research in the field of criminology does suggests that women sentenced to prison are there largely due to their *“inability or lack of desire to conform to a particular lifestyle.”* Similarly, Carlen & Worrall (2004, p9) argue that woman are sent to prison to be *“made into better women, better wives, better mothers, better daughters”*. Carlen (1983, p79; 2021) claims that a female prisoner is likely *“to be seen as being both a bad citizen and an unnatural woman”*. According to McIvor and Burman (2011), these gender stereotypes exacerbate and reinforce inequality. Certainly, the literature in this chapter does suggest that the judiciary perceive mothers who defy court orders for contact as not acting in their child’s best interests, and thus not a ‘good mother’.

The inequality women experience in the legal system and criminal justice system is further amplified by the findings of the Corston (2006, p17) report which found that “[u]p to 50% of women in prison report[ed] having experienced violence at home”. Similarly, the Prison Reform Trust (2019) report estimates that:

“[o]ver half the women in prison report having suffered domestic violence with 53% of women reporting having experienced emotional, physical or sexual abuse as a child”.

As such, this lived experience appears to be ignored or at least discounted by the courts in broader contexts than incarceration for not allowing contact.

Incarceration for a Civil Wrong

Some previous research has explored the impact of incarcerating a mother for a civil wrong (a civil fine for not having a tv licence, resulting in criminal sanctions for non-payment of the fine, including prison) Carlen (1983, p86. 2021) suggests leads the *“public (erroneously) [to] believe that they must have committed a serious crime”*. Thus, the stigma of prison places a woman as an ‘outsider’ (Becker,1963), for breaching a civil order, with implications for her children too. Fowler et al (2021, p7) found in their study that prison may also be a place for further coercion and punishments as *“[c]ustodial officers and welfare agencies can place contact restrictions on them, leveraging their desire to see their children, as a form of*

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punishment or coercion", which can have a direct impact on the child, mother and their relationship during the time of incarceration.

Maternal Incarceration and the impact on the child

There is some research into the effects on children of mothers' imprisonment (Primrose, 2021) some of which is relevant here but none on the impact of material incarceration on the mother and child, specifically linked to a child contact dispute and alleged non-compliance with a court order. Unsurprisingly maternal incarceration does have a direct impact on the child. Travis et al., (2005) found that separation creates feelings of loss and rejection. Kampfner (1995, p18) found "*that (75%) of children exhibited high levels of PTSD after their mother's imprisonment*". The symptoms identified in the children were: sleep and attention problems, depression, anger, fear, blame and flashbacks of the traumatic episode. (Kampfner, 1995, p. 19).

Furthermore, a report by Parliament UK (2019, p33) suggests that maternal incarceration is "*likely to have a lasting impact on a child's ability to trust in authority*". The report suggests that a child's Article 8 rights must be considered when deciding whether to send a mother to prison and outlines some practical steps the court should take to ensure that arrangements are made for the child before a mother is sent to prison. There is also a requirement for non means tested funding for the child[ren] to visit their mother. While in prison the child's rights to contact with their mother must also be considered under their HRA Article 8 rights. A further concern about the use of civil imprisonment linked to a child contact order is that most contempt of court findings of restrictions of liberty are for less than 12 months. Lord Farmer ([2019, p 5) found that "*short sentences are [damaging] to [women's] their family life and, typically, their well-being*" and as such the judiciary and criminal justice system should do all it can to keep women out of prison.

Livingston (2000, p420) reasons that given the inherent difficulties with civil contempt, alternative approaches could be more appropriate. However, alternative legal approaches and solutions may simply expand the options for the court, rather than curtailing the appetite for judicial intervention via contempt. In England and Wales, there are alternative powers to using the contempt of court jurisdiction to enforce a child contact order. The Children Adoption (2006) Act 11G to 11N [8] gave the courts powers to make an child contact enforcement order imposing the sanctions of unpaid work and or a compensation order, in addition to using contempt of courts provisions of a fine and or imprisonment. Trinder et al (2012, p7) claims that the Government in England and Wales sought a "*tougher approach*" to child contact enforcement almost six years after these new provisions were introduced. The further child contact enforcement powers which were "*under consideration, included curfew orders, the withholding of passports and driving licences, and an automatic warning notice on contact orders about possible transfers of residence*". Trinder, et. al (2012, p8) found no evidence to suggest that these new enhanced contact enforcement powers would be "*more widely used or more effective*", and in fact these new powers were never introduced. In another report, Trinder, et al (2013, p4) also found that courts used "*unpaid work as a threat– whether in the form of assessment or as a suspended order – rather than as a punitive sanction*" and a '*fifth*

⁸ amended the provision in the *Children Act (1989)* so that contact orders with respect to children in family proceeding

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of cases included an application for financial compensation” [9]. They also raised concerns about the use of these sanctions, suggesting that the courts need to understand more about contact problems before moving to punish parents. There are no similar provisions available in Scotland. Courts in both jurisdictions can change the child’s residence but this is not viewed as a sanction. Instead, it is positioned as acting in the child’s best interests.

Chapter Summary

The chapter draws primarily from feminist literature to explore women’s experience of the legal system, in particular family law (child contact). Highlighting that it was not until the Custody of Infants Act [1839] that mothers had a right to a custody of their child[ren]. While the ‘*welfare principle*’ of the child can be traced to the Custody of Infants Act of [1873] which became the central focus of courts in contact disputes in England and Wales and later in Scotland. The welfare principle remains a point of critical argument from scholars for being a vague and indeterminate concept which sets parents up as legal adversaries, and as such it may more aptly be termed the ‘*warfare principle*’

In addition to the welfare principle and the rights of mothers, a central issues in disputed contact actions, is domestic abuse, as noted by Lady Hale in her decision in *Re D (Contact Reasons for Refusal)* [1997]. As such this chapter drew up the conceptual work of Marianne Hester’s ‘Three Planets’ (2011, p837) model in relation to the interwoven issues of “*domestic violence, child protection and safeguarding and child contact* “. Although Hester’s (2011) work focuses primarily on professionals, and my research is much broader, the three planets model is valuable as it helps to highlight the difficulties professionals face when attempting to address (*domestic violence, child protection and safeguarding and child contact*) in a coordinated way. Hester rightly argues that the way in which these issues are framed and approached is underpinned by “*the continual replication and reconstruction of gender-based social inequality*”,(Hester, 2011, p 837) which may provide some insight into how women claiming domestic abuse are perceived and treated by the legal system in child contact disputes. And as this chapter discussed campaigners have sought to have domestic abuse viewed and treated as a criminal offense since the 1970’s and despite various legislative development linked to child contact (Children (Scotland) Act 1995; Children Act (1999); Family (Scotland) Act 2006) these provisions have largely been ignored by the judiciary in the family courts.

A further concern in this chapter was the use of the ‘*implacably hostile mother*’ narrative alongside allegations of ‘Parental Alienation Syndrome’ which appeared to have been used as a smokescreen to detract from allegations of abuse, leading to professional confusion and concurrent investigations and processes. The polarised discourses surrounding child contact do suggest that the contact litigation becomes overwhelming for mothers and children who are put in impossible and dangerous positions.

⁹ Many of these were for the court application fee of £200 although parliament had intended compensation to be targeted on travel and accommodation expenses. Few of the applications appear to have been successful although records are incomplete.

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This chapter draws to a close by discussing the implications of the enforcement sanctions specifically the lack of data on maternal civil incarceration and the impact on the child, which does not appear to accord with the 'welfare principle'. And yet, the decisions made by the courts in relation to contact, often have life changing implications for the voiceless children and their parents. However, extraordinarily little has been written about civil incarceration in the case of non-compliance with a child contact order and even less is known about the impact of enforcement of child contact orders where domestic abuse is alleged.

So far in this thesis, chapter one has contextualised the research problem, and discussed the issues which surround child contact enforcement. Chapter two has explained that contempt of court has practically nothing to do with child contact, which again suggests different planets (Hester, 2011) but instead is a tool to protect the due administration of justice. It is a technical and novel law which is largely misunderstood, but it is a law which is used to enforce court orders (including those in family courts). Given that contempt of court's focus is not on the welfare of the child, it does appear in this early stage of the thesis as disconnected from the parental contact dispute. This is an important point to note as contempt of court to enforce a contact order, strictly speaking is a separate legal process with separate legal process (this will be discussed later in *chapter five* of this thesis). As such it is important to understand this complicated secondary legal process, independently before we move on in the rest of the thesis to explore how the boundaries between these two legal processes become blurred. It is important to understand that the use of contempt of court as an enforcement tool in contact disputes, does feel unnatural and clumsy at times in this thesis. But it is important to emphasise legal contexts (*child contact and domestic abuse*) and how these appear to occupy two different planets (Hester, 2011), rather than being viewed as one issue, as demonstrated in this chapter. Child contact is also extremely complex, multilayers and has highly contested polarised perspectives which also need to be understood. The next chapter '*Exploring the Social within and Outwith the Legal*' will discuss the research design, specifically the theoretical underpinnings for exploring mothers' experiences of child contact enforcement via contempt of court and the various research method and challenges, that further draw on feminist work.

THE WELFARE PRINCIPLE

DOMINANT NARRATIVES

Narratives linked to Mothers

1. Implacably Hostile Mother
2. Dishonest/ Disbelieved
3. Domestic Abuse a tactic to stop contact
4. Child Abuse (false allegations)
5. Non-compliance

Narratives linked to a Child

1. Voiceless
2. Excluded due to age/ capacity/ perceptions of childhood
3. Disbelieved
4. Not considered victims of Domestic Abuse

Narratives linked to a Father

1. Believed
2. Parental Alienation
3. Non-compliance
4. Good enough father
5. Abusive
6. Controlling

PROFESSIONAL FILTER

Allegations of Domestic Abuse

Allegations of PAS

Professional confusion (three planets domestic abuse, child protection and child contact) (Hester, 2011)

IMPLICATIONS

Implications for Mothers

1. Prolonged Litigation
2. Risk of harm and further abuse to both mother and child
3. Relationship between mother and child impacted
4. Change of child's residency
5. Enforcement actions
6. Threats of sanctions and sanctions linked to non compliance

Implications for Children

1. Prolonged Litigation (loss of childhood and roots)
2. Surrounded by conflict
3. Risk of harm
4. Loss of parental and family relationships
5. Change of child's residency
6. Enforcement actions: increased hostility and worry
7. increased number of professionals involved in child's life

Implications for Fathers

1. Prolonged Litigation
2. Relationship with child impacted by litigation
3. Change of child's residency
4. Pursing enforcement increasing costs

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Available at: <https://www.theguardian.com/society/2017/jan/20/uk-judges-change-court-rules-on-child-contact-for-violent-fathers-domestic-abuse>
[Accessed 10th February 2019]

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CHAPTER FOUR
EXPLORING THE SOCIAL
WITHIN AND OUTWITH THE LEGAL

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CHAPTER FOUR

Introduction: Exploring the social within and outwith the legal

This chapter will outline the theoretical framing of this thesis. As noted in the introduction of this thesis socio-legal research is, “*the study of law as a historical and culturally specific mode of social organisation that takes a variety of forms within and across society*” (University of Oxford, 2020). Here the focus is on the law of contempt of court as an enforcement tool in child contact disputes and on mothers’ experience of enforcement. The research sought to answer the following questions:

1. What behaviour is considered contemptuous and how is contempt of court used as an enforcement tool in child contact disputes?
2. How do mothers experience contempt of court in child contact disputes?
3. What are the implications of using contempt of court in child contact disputes against mothers?

These questions were approached by drawing upon two theoretical perspectives (feminism and the indeterminacy debate) which are discussed at the start of this chapter. Before moving on to discuss how these theoretical perspectives influenced my decision to map the legal processes chronologically using several methods (documentary analysis, semi-structured interviews, and an online survey which will be discussed in the first part of this chapter). This chapter then moves on to explore some of the challenges and reflections within the research namely anonymity, research request refusal, interviewing mothers, theoretical conflicts, leaving the field and finally a consideration of who owns the case law. It starts however with an initial consideration of my own positionality.

Researcher’s Positionality

According to Callaghan (2009, p19) a researcher’s positionality is social and political as:

“our feelings, thoughts, capacities and possibilities are not (just) personal choices, but that they are constructed within broader social and political contexts”.

There is an implicit expectation for researchers to acknowledge and explore what influences research choices, drawing from the *personal, social and political contexts* in which our research is situated, while guarding against superficial (Pillow, 2003) self-confessions and disclosure (Sweet, 2020). Here I argue that my positionality in relation to this thesis presented difficult questions but overall should be viewed as a research strength, adding depth and originality to the study.

It was because of my first-hand experience as a mother accused of contempt of court in a child contact dispute that I became aware of the social-legal problem that I have chosen to study. My experience of child contact enforcement via contempt of court was excruciatingly painful, complex, costly, time consuming and life changing.

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It was this harrowing personal experience that alerted me to the lack of research on child contact enforcement and the problems around contempt of court. As a result, I wrestled with how to approach this project as I sought to avoid conducting a study focused on my personal experience. I made the decision early on not to do an autobiographical thesis and considered whether it was necessary to include my personal experience at all.

Instead, I have sought to develop a professional voice drawing upon many influences (*academic, social, and political*) and my personal experience. These influences did lead me to continually reflect and critically appraise my understanding and perspectives throughout the research process. I did continually ask myself, “*who [I] should listen to and why, [and] how to place actors’ ideas in a larger field of power, [which also raised] questions about [my] own relationship to actors’ theories of the world*” (Sweet, 2020, p 924). As such, at times throughout this research, I consciously put the personal to one side and prioritised the professional, at great personal cost. However, this approach empowered me to seek new ways of approaching the research beyond the superficial and the personal. It gave me a vantage point from which to consider various perspectives (*personal, political social and legal*) of the issue. In my view, this was beneficial to the overall development of the study.

Theoretical Standpoint: Indeterminacy and the law of contempt

This study is concerned with how contempt of court is used as an enforcement tool and how mothers experience enforcement. My starting point was the law of contempt of court as an enforcement tool in child contact disputes. *Chapter two* discussed contempt of court and pointed to the indeterminacy associated with its use.

As such the legal ‘*indeterminacy debate*’, and the work of Robert Unger in particular, was identified as a potential theoretical approach for this work. According to Herget (1995) the roots of the indeterminacy debate can be traced back to at least the 1800s and to early European jurisprudence scholars (Jhering, 1852, Adickes, 1872, Bulow, 1885, Ehrich, 1913) and then to the work of American Realists (Holmes, 1881; Pound 1921; Frank 1930; Llewellyn, 1962; Oliphant, 1928). Although European jurisprudence and American realists approached the indeterminacy debate from different legal perspectives, (the common law (America Realists) and the civil law (European Scholars) these sources are broadly and collectively concerned with:

- How social life was represented in the law,
- How legal structures accounted for social life,
- How the judiciary addressed gaps in the law
- How the judiciary used their discretion when gaps were identified in the law.

These issues were also addressed by English Professor H.L.A Hart who referred to the *indeterminacy debate* in ‘The Concept of Law’ (1961) in which he claimed that the (common) law was indeterminate. He argued that “*indeterminacy is inevitable in law as lawmakers craft legal rules without knowing everything about the future and in*

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pursuit of aims that are multifaceted and not perfectly determinate" (Shaw, 2013, p703). Hart believed that this indeterminacy should be reframed as a '*penumbra of uncertainty*' (Kress 1989, p287), and it should be accepted that when gaps in the law arise, "*officials who are holding a responsible public office*", *will exercise their discretion responsibly having regard to their office and "not indulge fancy or mere whim"* (Shaw, 2013, p706).

In contrasting terms, Critical Legal Studies (CLS) scholars, such as Unger, have also argued that the law is indeterminate, that there are no right or single answers to legal disputes and that impartial reasoning does not exist (Unger, 1983). Unger touches upon an issue which troubled me during my personal experience of child contact enforcement via contempt of court. I never felt confident that there was transparency, and certainty in the legal decisions which were made. I recall claiming that I did not need a lawyer I needed a PR agent to represent me in court, as the law always felt secondary and unpredictable; it did not seem to provide a benchmark for decisions made. It felt more political and personal. As such Unger's work on legal indeterminacy appealed to me on both the personal and professional levels as it gave me a framework to move beyond the superficial, and explore the law in a chronological way, to understand the wider influences surrounding legal decisions. Unger (1989) bases his indeterminacy argument around five key points which provide the critical legal framework for this research.

Point One: The legal system and processes seek to mystify and legitimise legal decisions

Unger argues that the "*rule of law*" is deployed to preserve (Hasnas,1995, p.g85) a system whereby the judge cannot "*reject too much of the received understanding of law as mistaken*" (Unger, 1996, p.40). And that legal order to social life is maintained through doctrinal ideologies and legitimisation (Unger, 1976, p 56). Thus, the mystification of the legal system, of its vocabulary (Unger, 2014), rules and processes, acts as an obstacle to widespread scrutiny and accessibility. This argument resonated with my personal experience of child contact enforcement, as I often felt the language and processes were intentional barriers to my engagement in the civil dispute. (*I later found out that part of the problem was that two incompatible procedures had been combined together wrongly*).

Point Two: Judicial decision-making is problematic

According to Unger's second point, one of the most important symbols in the mystification of the legal is the role of the judge, who is positioned as having unfettered discretion to apply the law as they see fit. Unger (1996, p108) highlights that laws are political. And yet governments transfer the '*elaboration of the law*' to the courts and expect it to be applied without fear or favour (Unger, 1976, p53). Again, I felt this was an important point in investigating child contact enforcement, as the data in chapter one of this thesis suggests that governments are aware that enforcement in this area is a problem but have left the problem for the courts to resolve.

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Point Three: Legal doctrine is inherently indeterminate and presents competing and contradictory outcomes, which aid specific groups and institutions.

A further symbol in the mystification of the legal system is legal doctrine, Unger (2017, p3) argues that:

“You could never guess from the discourse of the jurists what their high-flown words really meant in context, or what practical meaning and effect legal doctrine would have once married to the realities of the established order in society. You would, if you did not belong to that society and culture, need independent information about that order. Legal doctrine may seek to redescribe it and even to alter it at the margin. It is nevertheless powerless to remake it from the ground up”.

CLS scholars and in particular Unger claim therefore that legal doctrine is powerful in part because the average person in the street does not understand it. This also struck a personal chord with me, in relation to my experience of child contact enforcement. When I was in the family court, I didn't understand the legal processes which I was involved in, and as such I didn't understand my legal rights (or my child's rights). In some instances, the processes used during my case might be described as being created on the back of an envelope as the 'processes' used didn't exist. One such example can be seen in the case of *LA v JJA* [2016] where the court clarified, “There is no such process as an evidential child welfare hearing provided for in the Ordinary Cause Rules: one may have a child welfare hearing or a proof.” And yet in my case the court did hold an evidential child welfare hearing. And in terms of enforcement, I felt the competing and contractionary powers and perspectives of the laws (contact and contempt) but (again) I couldn't identify what legal framework was being used at any one time, it was confusing and disabling. Ultimately it was held by the Court of Session that the process used in my case did result in substantial injustice.

Point Four: The legal system rejects new conceptualizations of social life and ideals

Unger (2017, p15) draws his concerns of legal Indeterminacy together by claiming that even when the law operates from an idealised version of society it remains indeterminate, and there are always alternative ways of viewing society. Unger (2014) argues that the world is an 'unjust place' and that the law further exacerbates injustice by denying an alternative perspective of the world to be imagined or considered. But he does argue that entrenched legal ideals and norms can be understood by stepping outside authoritative legal sources and viewing social life from a contemporary social legal perspective. For me this was an important perspective when considering how the courts project traditional family values on contemporary parental relationships via the welfare principle. In many ways, I felt at a significant disadvantage as a single mum in the family court system. I was regularly denigrated and lambasted for asking questions or pointing to the failures (which would go on to result in injustice) and abuse in a way to seek to explain my situation and advocate for my children's safety. A legal professional addressing the Sheriff, told him that as a woman, I lacked the intelligence to understand the Latin inscription on the court emblem, and thus did not understand the law.

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Point Five: To explain the judicial process, it is necessary to go outside the authoritative sources to other social phenomena

Unger (1976, 1983, 1999, 2014) argues that to understand and explain the legal system and law, it is necessary to look at it from the outside. In his view, society changes with or without the permission of the law, and that not all acts of non-compliance are acts of criminality. Rather, some are acts of defiance towards laws which may be outdated or are perceived as unjust. And once again this argument resonated with my lived experience of child contact.

In my case, I don't believe that any breaches of any contact order could or should have been characterised as disrespecting the authority of the court (contempt of court). At the heart of the dispute were my concerns and allegations of 'domestic and child abuse'. But the judiciary at that time were not willing to include allegations of child and or domestic abuse in my contact dispute. In fact, the Sheriff (who presided over the contact and contempt hearing) claimed that my log of abuse (advice from the police to create a log of all incidents) which spanned many years, (dating back to before my child was born), could not be considered. The sheriff said, "*the inventory comprised an extensive chronology of alleged harassment of the defender by the pursuer which predated the birth of the child and contained inter alia allegations of blackmail, of the child being hit and of the child returning from contact with xxx injuries*". The Sheriff rejected the log of abuse in its entirety claiming my lawyer had not properly plead the abuse in the court documents. And, because of a procedural issue the Sheriff presided over a case from which she knew she had specifically removed serious issues about the child's welfare. And yet, policies and family law legislation in place at that time placed a duty on the judiciary to consider allegations of child and domestic abuse in child contact disputes. Women's Aid were also campaigning for women and children's experiences of abuse to be recognised in the family court system. Yet these issues continued to be dismissed by the judiciary.

Unknown to me at the time the same lawyer has also failed to lodge formal answers to the allegations of contempt within the court documents, instead leaving it blank. The difficulty in this is that without an explanation as to why the contact did not take place, the court could and indeed did, find me in contempt of court. My lawyer later made representations explaining the missed contact but it was too late.

At the same time, I had a public profile due to appearing on a successful television show. It was asserted by multiple newspapers (and was used by them as a headline for their media coverage of the court action), that the sheriff passed her judgement on me, not in an official tone akin to a member of the judiciary, but resorted to mimicking a famous tv personality's catchphrase, and then pointing her finger at me. This in my opinion further suggests that the sheriff had no regard for the child at the centre of the dispute (and the harm he had experienced), but instead sought to make media headlines. In my opinion this behaviour was so far removed from what can reasonably be classed as appropriate official judicial conduct, that the sheriff should have been reprimanded. Certainly, I believe that this approach had no regard for the welfare of my children who went to school the next day. Their school later commented that they were unable to protect the children from gossip and bullying, due to the extensive media coverage. The same level of coverage did not

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accompany my successful appeal which was critical of the actions of both my lawyer and the presiding sheriff, nor the Law Society of Scotland published findings of professional misconduct against my lawyer in relation to her conduct in my case.

Thus, I believe that Unger's multi point indeterminacy argument provides this research with an important framework for considering contempt of court and getting under the surface of some of the issues which surround enforcement. Unger also argues that it is important to go outside authoritative legal sources to explore social life and the law in action. In this thesis the social position relates to how a mother experiences contempt of court as an enforcement tool in child contact disputes, and as such the research also draws upon the work of feminist jurisprudence scholars to explore women's experiences. As Unger states it is not enough to simply map the law it must be analysed from the perspective of those who are affected by it.

[Linking the legal to the social: A Feminist perspective on mother's experiences of contempt of court](#)

There is no unified body of feminist scholarship and Smart (1989, p163) claims that there is no 'general theory' with which to analyse the law. However, Smart does not assert that theory is inconsequential. Indeed, she argues that theory is important because exposing experience is not enough. It must be theoretically underpinned and critically analysed, as it is only then that the 'power' of the law to relegate, reject or treat women's experiences as "insignificant" becomes visible. But part of the challenge of analysing women's experiences in the law is that women's experiences are often translated into '*legal relevances*,' and much of their experience is removed or shaped by male bias (Baer, 2000, p.3). Other scholars such as (Schafran, 1993; Schumm, 2016) claim that the '*law is male*', as it reflects the male position in society. Thus, feminist scholars (Smart, 1989; MacKinnon, 1983) argue that the law alters women's lived experiences to fit within a male system of knowledge and experience. As such Smart (1989, p144) contends that the inequality in the law cannot be resolved, simply by stating formally that everyone is equal, as such a view dismisses the power of the law to misrecognise and sanitise women's experiences. In recognition of these difficulties, Smart (1989, p138) claims that scholars often shift to rights-based discourses. Again Smart (1989, p138) issues caution, arguing that a rights-based debate is a hazardous endeavour as it suggests that there is a legal solution or a 'truth' that can be resolved through the law (p.144). Instead, Smart (1989, p161) insists that the inequality in the law endures and "remains a site of struggle" for women as "*legal processes create [their] own harms; [and] creates its own order of damage*" and as such it does not come without risks. Smart (1983, p23) suggests that instead of a rights-based approach, feminist scholars should deconstruct and illuminate how the power of the law disqualifies women's experiences through empirical research. Smart also claimed that using non legal strategies such as scholarship can show how the law influences women's lives and what happens to women when they turn to the law and it doesn't solve their problems (Auchmuty and Marle, 2012). These issues were important for this thesis, to understand mothers' experiences of enforcement and to highlight that there was an alternative to the predominant narrative within family law and judicial practice that women were '*implacably hostile*' or were '*disrespecting the authority of the court*'.

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Both Smart (1989) and Unger (1983) argue that to understand the legal phenomenon it is important to step outside the law (and not to rely upon the rights-based arguments) and find a new way of expressing the problem. This was a point which resonated with my quest for another way of thinking, but one which would be inclusive. In many ways Smart (1989) and Unger (1983) were a point of difference, as they were neither arguing for militant action, or polarised perspective, they were arguing for a rational intelligent way of making meaningful change. Smart (1989) is also unwavering in her position that the law should be challenged as it is a powerful enterprise, she does however remain focused on women experiences in her work. As such Smart (1989) work resonated with me more than the work of other feminist scholars such as Mackinnon (1983) whom I felt took a more divisive approach, which could detract from the women's experiences, I sought to reveal in this study. Smart (1989) also argued that there are many ways in which to challenge the law, and she claimed that academic scholarship was

This thesis thus draws upon these theoretical assumptions and adopts a social constructivist approach which is "*principally concerned with explicating the processes by which people come to describe, explain or otherwise account for the world (including themselves) in which they live*" (Gergen & Gergen, 2003, p. 16) and will refer to these combined theoretical perspectives in future chapters as the '*Critical Feminist-Indeterminist perspective*'. Thus, Critical Feminist-Indeterminist perspective is a combination of Unger (1989) indeterminate framework which provides key points for critical analysis of contempt of court from exploring how the social phenomenon is positioned as a legal issue and how the legal system seeks to mystify and legitimise legal decision making in relation to that phenomenon. And then how judicial decision making is problematic as it creates competing and contradictory outcomes which aid specific groups and institutions, while rejecting new conceptualisations of social life. While Smart (1983 p165) work is important to understanding women's experiences in the law as she argues that it is important to challenge the law and its power, and to insist on '*the legitimacy of feminist knowledge [and experiences] and feminism's ability to redefine the wrongs of women which law too often confines to insignificant*'. As such, Smart's work seeks to empower researchers to amplify women's experiences of the law and to have their experiences seen and treated as important and significant.

Research Strategy: Chronological Mapping

As discussed, drawing upon the work of both Unger (1989) and Smart (1989) this thesis developed a chronological mapping approach, which sought to identify the individual and collective issues in contempt of court in a chronological order and to also explore how mothers experience the law in action at each stage of enforcement. Unger (1989) argues that social ideologies are institutionalised to become the embodiment of the law and to comprehend how people experience the law, the legal system needs to be unpicked, deconstructed, mapped out and laid bare. Unger (1989) and Smart (1983) both accept that deconstructing the law in itself is not enough as it does not create the opportunity for '*critical legal analysis*'. As such (Unger, 1989; Smart, 1983) suggest that experience should be mapped alongside the law, to see how the law and experience influence each other. In doing so Unger (1989) claims that the '*incorrigible indeterminacy*' in the law is revealed, as are the

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lived experiences of women (Smart, 1983) and the implications thereof (Smart, 1983; Unger 1989).

Although Unger (1989) and Smart (1983) claim that 'mapping' the law and experience is a means to link the legal to the social, neither suggest how to operationalise legal mapping and analysis. However, Unger's five points of indeterminacy provide a framework to map the various legal stages for critical analysis. But as both Unger (1989) and Smart (1983) identified mapping the law in of itself does not immediately reveal (mothers') experiences. It is therefore important to also map mothers' experiences alongside the law. But again, mapping experience alongside the law is arguably one dimensional, and it is only when the analysis explores how the law and experience interact with each other can scholars attempt to critically engage with the social legal issues.

Therefore, feminist scholarship was an essential element in the research design as it created a way in which to bridge the legal and social together within this context. Feminist scholarship also created a mechanism in which to explore how mothers experience the legal process. Smart (1989) work on '*Feminism and the power of the law*' was important as it was explicit about how the law's 'power' defines and disqualifies women's experiences. Smart (1989, p165) also emphasises that critical scholarship should challenge "*the power of the law and insist on the legitimacy of feminist knowledge and feminism's ability to redefine the wrongs of women which the law often confines to insignificance*". As such Smart (1989, p164) proposes that feminist jurisprudence research should be strategically and politically approached by focusing on the laws power to disqualify women's experiences and seek to '*redefine the truth of events*', with women's experiences included.

Research Design: Operationalising a Chronological Map

Unger's five points of indeterminacy (*civil-criminal, in the face of the court-outwith the court, blurring of boundaries, beyond all reasonable doubt*) provide a clear framework with which to investigate contempt of court as an enforcement tool. Therefore, a chronological map was developed to provide a linear staged framework incorporating the social context of contact and domestic abuse prior to recourse to the legal system. The chronological stages also capture the accumulation of issues and provide insight into how issues result in enforcement. The five stages are discussed below:

STAGE 1: The Social Context: the breakdown of the relationship, and the initial issues and challenges linked to contact post separation.

STAGE 2: The Legal Context: how these social issues become legal problems and how they are articulated in contact disputes.

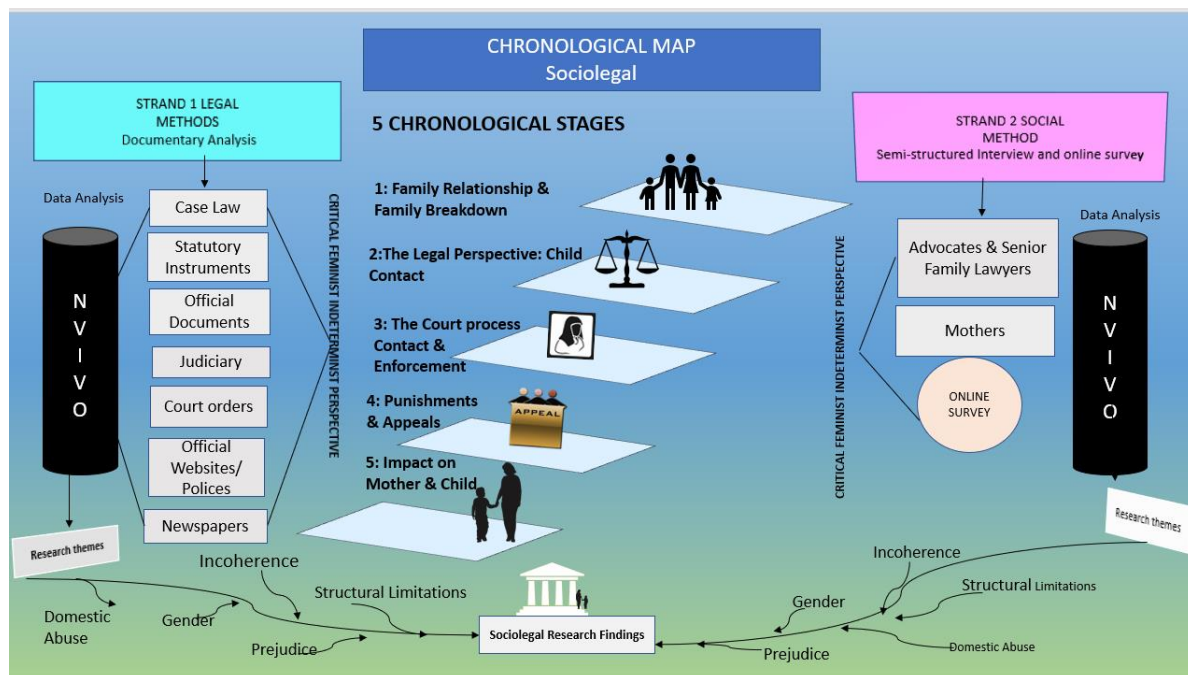
STAGE 3: Court Processes surrounding contact and its enforcement.

STAGE 4: Sanctions and Appeal (*Drawing upon Feminist scholarship and Unger*)

STAGE 5: The Impact of Enforcement and of the contact dispute on mothers and children

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Several research methods (Interviews, online survey with mothers, and documentary analysis) were used to explore the dual social and legal context to the research problem. Once the data was collected, two chronological strands were created (Legal and Social) to initially separate data relating to the legal from that relating to the social context (see image below of chronological mapping process). Each strand was analysed independently following the five chronological stages as shown in the diagram below, after which a thematic analysis was undertaken. The research findings are presented in the following chapters using the chronological map stages as a framework.



Operationalising The Research: Methods

The research epistemology is primarily an interpretivist one which “*emphasises the sense people make of their own lives and experiences*” (Mason, 2017, p8). In this thesis the focus was on how mothers experience, understand and make sense of child contact enforcement including the processes used. As such the research was designed to be a qualitative study using qualitative methods of documentary analysis and semi-structured interviews and an online survey. The online survey was implemented after the research began (this will be discussed later in the chapter) and qualitative questions from the semi-structured interviews were used in the survey.

Documentary search and analysis.

Statutory Instruments (SIs) linked to contempt of court and child contact from both jurisdictions were the first documents sought via the Legislation.Gov website and were used to provide a chronological timeline for other documents. The search terms used were *contempt of court, child contact enforcement, child contact, civil contempt, non-compliance, civil imprisonment, family court, child arrangement orders and then the specific legislation mentioned in the literature review: Act of Adjournal rules (2009), Act of Sederunt (2011) Contempt of Court Act (1981), Human Rights Act*

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(1989) Matrimonial and Family Proceedings Act 1984, The Family Court (Contempt of Court Powers Regulations 2014, Children Act 1989, The Children (Scotland) Act (1995). Civil Imprisonment Act 1882, Family (Scotland) Act 2006, Child Contact (Adoption) Bill 2005. The SIs were first analysed in terms of a chronological timeline. They were then analysed for themes which were *contempt of court, contempt of court processes, child contact (child arrangement orders) enforcement, enforcement processes and domestic abuse*. The aim was to understand the legislative position on child contact enforcement and contempt of court.

Thereafter case law was searched using two legal databases (Lexus Nexus and Westlaw). The case law was identified as important for three purposes, a) to gain insight into how the judiciary apply contempt broadly, b) to identify processes employed in contempt actions and c) to explore how the judiciary use contempt in child contact disputes. The search terms used were *contempt of court, child contact, child contact enforcement, non-compliance with court order, and child arrangement orders*. From the search, 42 cases were identified as relevant to this thesis as they related to contempt of court processes broadly and to contempt of court as an enforcement tool in child contact disputes. These cases were also initially sorted into a chronological timeline and then were analyzed for the following themes: *contempt of court, contempt of court processes, child contact (child arrangement orders) enforcement, enforcement processes and domestic abuse*.

Once SIs and case law had been identified, further searches were undertaken via Hansard online to locate official Bills which became law, linked to the SIs previously identified to gain a greater insight into the debates which surrounded the development of the SI. Official websites such as the Scottish Courts and Tribunal website, the Scottish Parliament website, the Scottish Legal Aid Board website, the UK Parliament website, and Ministry of Justice websites were also searched for documents related to child contact enforcement and enforcement via contempt of court. Finally, a wider search was carried out using google to search for newspapers and or websites which contained content on contempt of court. The limitation of this approach is that only publicly available data is available or if the data is categorised under the search headings used. As noted in chapter one some contact issues are included in the principal legal dispute such as divorce and may not be categorised as child contact. Furthermore, not all contact and enforcement decisions are published and as such there is a body of data which is not publicly available to researchers. I also personally had a number of court orders from my personal contact case, which I reviewed as part of this study. After some of the interviews I had with mothers (which I will discuss later) some mothers sent me some court orders linked to their cases, which were also considered. Below is a list of the case law, SIs, official documents, and newspaper articles which were identified from the search.

1: Documental Data:

Case Law: 42 Judicial Judgements:

Scotland: AG v JB [2011], M v S [2011]; NJDB v Mrs JEG v Noel James Andrew Solicitor [2010]; A.M v M.J.S [2009]; T B v S B [2017] J.D.E v S.D.W [2014], CEF v MLH [2014] SM v CM [2017], Blance v Blance [1978]; Bryan v Ross [1992] Cosh v Cosh [1979]; Brannigan v Brannigan [1979]; Robb v Caledonian Newspaper [1995]

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England and Wales: Carcus Wilson (1845); Attorney General v Newspaper Publishing [1988]; Button v Salama [2013], Dad application to commit [2015] Cambra v Jones [2014]; Engeneonu v Engeneonu [2015]; Hammond v Al Zawawi [2018]; Hadkinson v Hadkinson [1952]; Helmore v Smooth (1886); Hammerton v Hammerton [2007]; Harris v Harris [2002]; H (Contact Enforcement) [1996]; H v T [2018]; James v James [2018]; Re Jones (No 2) [2013] ;L-W (Children) [2010]; Liverpool Victoria Insurance Co Ltd v Khan [2016]; L (A Child) [2016]; O (Committal: Legal Representation) Re [2019]; PR v JS [2019], R (on the application of Adams) (FC) (Appellant) v Secretary of Justice (Respondent); Re Bramblevale Ltd [1970]; Re B (JA) (an infant) 1965; Re Nasrullah Mursalin [2019] ; Suckling v Suckling [2019]; Tuvalu v Philatelic Distribution Corporation [1990], Temper v R [1952]; Swapsonics LTD [1990];
European Court of Justice: O’Neil and Lauchlan v United Kingdom 41516/10

Statutory Instruments: Bills and Rules

Scotland: Act of Adjournal rules (2009), Act of Sederunt (2011), The Children (Scotland) Act (1995), Family (Scotland) Act 2006.

England and Wales: The Family Court (Contempt of Court Powers Regulations 2014, Children Act 1989, Child Contact (Adoption) Bill 2005, Matrimonial and Family Proceedings Act 1984

Both Jurisdictions:

Contempt of Court Act (1981), Human Rights Act (1989) Civil Imprisonment Act 1882.

Ministry of Justice Official Documents

Ministry of Justice CB7(Guide for separated parents in the family courts)
Ministry of Justice, CB5, Ministry of Justice C79

Newspaper Articles

“Outrage after church minister jailed for a year for refusing to give kids to killer ex” (2016) Daily Record, and “Race row sheriff remarks to woman sparks demand for changes” (2009), Scotsman Newspaper

Court Orders:

10 court orders reviewed were sent from mothers who participated in the interviews for this study, and I also reviewed 15 personal court orders.

Semi-structured interviews

In addition to documentary analysis of the content listed above, semi-structured interviews were also included in the research design to investigate how mothers experience enforcement and to hear from them in their own words. Further interviews with legal professionals were also carried out to better understand the legal processes.

In-depth, semi-structured, one-to-one interviews were employed to maximise, “*discovery and description*” (Reinharz, p18), and to allow the participants some

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control and agency in answering the research questions. The semi-structured interviews were designed using topic guides to provide a consistency within the data (Ritchie, et al., 2014). The interview questions included in these topic guides were identified from the literature reviewed in *chapter one, two and three* and were presented in the topic guide in a chronological order which could be replicated for future analysis (Appendix 9).

Conduct of the interviews:

As discussed, the interviews aimed to gather multiple perspectives on the use of child enforcement procedures, reflecting Unger's and Smart's concern to incorporate social and legal processes and lay experiences of the workings of power into socio-legal research.

Interviews with Mothers

As discussed in the introduction to this thesis, mothers' voices are absent from or diluted in much of the debate around enforcement (Stahly 2009; Arnold, 2015; Rose, 2019). As such, it was important to give a voice to the "voiceless" (Sampson, et al., 2008, p. 924), and to hear from mothers' first-hand what issues gave rise to enforcement in their own words. As such, this was the **first group** to be identified for this study.

I recognised early on that it would be difficult to identify and contact mothers, due to the (private) nature of child contact disputes and enforcement, and that other scholars had used online tools to recruit participants for child and family studies (Hokke, et al., 2018) in recognition of the changing nature of family and social life. As such in April 2019 a Facebook page was created for the research entitled 'Child Contact Enforcement', and a small budget of \$70 was used to promote a Facebook advert for the project. The Facebook advert was also shared via a Twitter page also created for this research and sent directly to third party groups which had a public profile on Facebook asking them if they could share the advert with their groups. One Facebook group, 'Thecourtsaid' posted the research request for participants on their Twitter and Facebook pages.

The Facebook advert (Appendix 7) asked mothers who had been threatened or experienced child contact enforcement procedures to get in touch with me via my University of Stirling email if they would like further information. The Facebook post generated a sizeable number of responses from potential participants from all parts of the UK and internationally (Malta, US, Australia, New Zealand). The interest in the research resulted in adjustments being made to the project following a conversation with my PhD supervisors as I had designed the research at the outset to focus only on Scotland. Because of the appetite to take part in the research we agreed I should extend the scope of the research to other parts of the UK.

The inclusion criteria for mothers to take part in the research was that they had to have personal experience of child contact and in particular of child contact enforcement. Mothers also had to have had contemporary experience (post 2000) of the family court and ideally of contempt of court and to live in the UK. Some mothers

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were therefore excluded from the research, as they lived abroad, and some mothers decided not to take part in the research after some initial email exchanges. Interviews with 29 mothers were carried out between April 2019 and October 2019. All had either been threatened with enforcement or had experienced enforcement processes in Scotland England and Wales. (Two mothers from Northern Ireland did engage initially but changed their minds during the interview process as they believed it could have an impact on their contact case).

Fathers were excluded because enforcement appears to focus predominantly on mothers (Trinder, et al, 2013) and to reflect highly gendered attitudes in decision-making. Children were also not included in this study, as there are several illuminating studies which have focused on children's voices in contact disputes including some involving domestic abuse (Mackay 2013; Morrison, 2014; Holt, 2018). As such it is recognised that alternative perspectives do exist which are not included in this study.

Initially I planned to use face-to-face interviews with the mothers who agreed to participate and had identified rooms in the University which I could book for the interviews as well as various quiet cafés. However, none of the women wanted to meet in person and given that the geographical scope had widened, telephone interviews were preferred. All interviews were arranged around the mothers' commitments and as such some interviews took place in the evening after they had put their child(ren) to bed; others were carried out during school hours or at the weekend.

At the outset of the interview, I checked that they were happy to participate. I also explained that they were under no obligation to answer any questions, and that we could move on to the next question at any time: I wanted the mothers to have agency in the interview. Each interview lasted between 60 minutes to 90 minutes in length. In many ways I would have preferred to have met the mothers in person but conducting the interviews over the phone may have provided depth and details which I may not have been able to get in person. The audio interview was then professionally transcribed and emailed back to each mother to check for accuracy and approval. All the transcriptions were approved by the participants themselves.

In total 29 mothers were interviewed: (10) were from Scotland, (6) were from Wales and (13) from across England. The age range of participants was 25-45 years of age. Comments about family group and religious beliefs were touched briefly by some research participants but they were not questions posed by the researcher as I wanted the research participants to tell me about their experiences and to feel comfortable telling me what they felt shaped their experiences. None of the women at the time of the research had been imprisoned.

The lack of demographic data about the women, may be a weakness in this research. However, not asking specific questions in terms of income, employment, religion, social class was intentional as all the participants were extremely concerned about their ex-partners, their lawyers and the courts finding out they had taken part in research about the family courts. They feared the risks were so high, and that they could be imprisoned or lose their child. As such I took significant steps to be taken to protect their anonymity and respect their wishes. I recognise that my thesis does lose something as a result, in terms of being able to draw conclusions about the

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potential impact on women from specific social classes, ethnic groups or discussions on the implications of not being able to access legal aid. These are all important considerations, but they were not the primary focus of the research as such I felt it was important that the women felt able to share their experiences.

Legal Professionals

Whitecross (2017) found that legal professionals faced several challenges in presenting mothers' cases in the family courts, especially where domestic abuse was a factor. Some research (Hunt and MacLeod 2008, p207) also noted that legal professionals believed the powers the courts had to deal with noncompliance were either *"impractical, [c]ounter-productive or likely to have adverse effects on the child"*. It was therefore important to hear from legal professionals what the issues were and what, if any, impact these had on enforcement.

Legal professionals were initially approached via an advert in the Scottish Faculty of Advocates newsletter. The advert did not return any responses. Thereafter I identified Advocates in Scotland and Solicitor Advocates in England, and Wales, from case law and legal commentary online linked to child contact, and child contact enforcement via online searches and sent an email to their legal offices.

I interviewed 5 Advocates in total (4 practiced in Scottish and 1 in England and Wales) between May and October 2019. This was a small sample, but they all had significant experience and were classed on legal databases and opinion pieces as being experts in child contact law. All the legal professionals I interviewed were passionate about the law (specifically family law) and justice and were keen to see change take place. This group could be classed as a self-selecting sample who want to see change in the family courts across both jurisdictions.

All legal professionals were offered face-to-face or telephone interviews. Two legal professionals were interviewed via telephone, and I met the other legal professionals in their offices. I used the prepared topic guide (Appendix 9) to frame the discussion and after the interview I had each one professionally transcribed verbatim. I thereafter sent the transcription back to each legal professional for approval. Some legal professionals asked for some data to be removed from the transcripts. I agreed and sent the transcriptions back for further approval once the changes had been made.

Members of the Judiciary

The final group identified from case law were members of the judiciary. Scholars who have successfully conducted qualitative interviews with the Judiciary (Ashworth, Tombs, Brown, Whitecross, MacKay) have shown the value of hearing directly from the voices from behind the bench. Michael Kirby, former Justice of the High Court of Australia, notes that there is little research on judicial reasoning and decision making that goes beyond that contained in the reasons of the courts in formal published judgments (1999 cited in Brown 2017, p). He continues:

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“Judges are reticent because bound by convention to leave their inner thoughts to the words written in their published opinions. Yet it is impossible to give all of one’s reasons in the manageable space available for published reports”.

Research provides a forum for a deeper analysis of the pressing social legal issues of the time. However, despite identifying members of the judiciary as important to this thesis, research access to the Judiciary in Scotland was rejected by the Scottish Courts and Tribunal Service (SCTS) research and as such a similar request was not made in England & Wales. (This issue is discussed further at the end of this chapter). A request was also made to the UK Supreme court as the case of *B v G* [2012] UKSC 21 focused on child contact and enforcement. In this case the Supreme Court argued that Child Contact actions required radical changes in the procedures used in determining contact arrangements. I contacted the Supreme Court at the same time as I contacted SCTS. The research access request was accepted, and I interviewed Supreme Court Justice Lord Wilson, in May 2019 at the Supreme Court in London.

The Interviews

I recognised that interviewing members of the Judiciary, and in particular a Supreme Court Justice, was likely to be challenging. Literature on interviewing ‘*elite*’ and ‘*powerful*’ groups, emphasises that such interviews require careful planning. Williams (1989) highlights that elite interviewees have certain expectations of researchers; that they be knowledgeable, articulate and to recognise the value of their time. Elite interviewees do not expect to be asked a question when the answer could have been found by an alternative means (Hunter, 1993). The powerful are also familiar with people simply listening to what they say, rather than ensuring they answer the questions posed. This suggests that researchers need to be confident in their ability to manage the interview process and the interviewee. Williams (1989) also notes that elite interviewees expect the researcher to respect and understand the world in which they inhabit. I also developed a contingency plan to assist with keeping the interview on track and sought advice from professors who had first-hand experience of interviewing members of the Judiciary, including one who had interviewed all Supreme Court Justices. The most important advice he gave me was to keep to time. The second piece of advice was that the Justice might not wish to sign a consent form, but that it is important to have a record of his/her consent. As such, I verbally recorded consent in this interview and used two recorders, in case one broke or did not pick up the audio. The final piece of advice was that Supreme Court Justices might not want to have their contribution anonymised, and, as such, whatever their position is it must be respected.

The interview with Lord Wilson, took place in his private chambers in the Supreme Court in London. Lord Wilson granted his consent to the interview and signed the consent form. When the 30 minutes were up, I pointed this out, but he was keen to talk for a little bit longer before heading into court. The interview was transcribed and sent to Lord Wilson for approval, and the approved transcription returned one month later. Lord Wilson advised that he could see no reason why his contribution to the research would need to be anonymised and as such gave permission to have his contribution attributed to him.

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Online survey

Finally, an online qualitative survey was designed using the semi-structured interview questions and the online 'Survey Monkey' tool as an online resource. The survey was designed by extracting questions from the topic guide, to provide a consistency across the data. The survey was available for a limited time period of two weeks. Within that period, it attracted 127 responses from Mothers and it was agreed (by my supervisors) that this would be sufficient for the purpose of this research.

All participants were sent the link to the survey by two methods, by contacting myself directly or via the online group #the court said. All surveys were completed by mothers, who said they were involved or had recently been involved in a child contact dispute. 90% of those who completed the survey said they were the residential parent, the other 10% explained that their child was no longer living with them (*change of residence, social work involvement*) but that they had been or still were involved in a contact dispute. Other than confirmation that they were a mother, who had experience of child contact in either Scotland, England, and Wales, no other data was collected in terms of age to remain consistent with the qualitative interviews.

The online survey was analysed first using the survey monkey tool which categorises answers. This data was then transferred into Nvivo and once again put into key chronological stages. This data was less dependable than the previous datasets as there was limited information obtained but the data was helpful in triangulating the issues raised by both the mothers who were interviewed and the legal professionals.

The research dataset for this thesis consisted of case law (42), SIs, 3 Ministry of Justice Official Documents, 2 Newspaper Articles, 25 Court Orders, 35 Interviews and 127 online survey respondents

Data Analysis: Blending Chronological Mapping with Thematic Analysis

The first stage in the documentary analysis was to analyse each document. Statutory instruments linked to contempt of court and child contact were first to be reviewed and plotted to provide a timeline chronological framework. Thereafter judicial judgements were analyzed and coded into timeline chronological stages. The next stage of analysis included Ministry of Justice and Scottish Courts and Tribunal Service documents which mentioned child contact enforcement and or contempt of court in Scotland, England, and Wales. These documents were analyzed and were once again plotted into the timeline chronological stages of the chronological map. Two newspaper articles were identified via online searches for contempt of court case, and these were analyzed and plotted on the chronological map. The final stage of analysis were child contact court orders, and these were reviewed.

Once the chronological map was populated, the documents were reviewed in terms of the processes involved in each jurisdiction. This process revealed gaps in procedures and processes and gaps in case law, and broad issues which spanned

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across Scotland, England, and Wales. Although this was not a comparative study, but it did seek it to identify the processes involved in contempt actions more broadly (across both jurisdictions, looking for a dominant process). Once this exercise was complete, an inductive thematic coding process took place with each document in Nvivo. The themes which emerged were *the incoherence of contempt of court, structural limitations of contempt of court, gender inequality, prejudice, and domestic abuse*. The analysis also revealed issues of power and how power was used to reject women's experiences. There were also links to the dominant ideology of the traditional family which took precedence over mother's experiences, which aligned with Smart's (1983) work. This process of analysis also confirmed Unger's (1989) argument that to understand the law one needs to step outside of authoritative sources.

The approach was repeated with the interview transcriptions which were uploaded to Nvivo and were coded into the five chronological stages. Once the data was coded into a chronological order, an inductive thematic coding process once again took place for each chronological stage. Some of the themes which emerged aligned with the literature in *chapters one, two and three* notably *the incoherence of contempt of court, structural limitations of contempt of court, gender inequality, prejudice, and domestic abuse*. The interviews were also reviewed for any effects of power on their [women's] experiences and for gendered biases. Once the coding of the data was completed in NVivo, the data was printed out in the chronological stages with the codes. The document was then reviewed for duplication, dominant voices *i.e.*, presenting more of one participant than others

A similar approach to the interviews was taken with the data from the online qualitative survey responses (*i.e.*, *comments were left in the survey boxes*). The data was placed into a chronological stage, and then inductive thematic coding was undertaken. This dataset was limited but it did triangulate some of the points raised in the qualitative interviews.

Once the data analysis process was complete the themes were transferred onto a summary chronological table shown below. The table provided a summary of the themes within each stage and over time. The mapping process also revealed the effect of power, prejudices, inequality and misogynistic attitudes and behaviours had on the legal dispute at each stage and how these accumulated over the course of the legal procedures and affected the contact dispute.

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CHRONOLOGICAL DATA ANALYSIS TABLE					
Map Strand 1: Social : Interviews & Online Survey (chapter 6 &7)			Map strand 2: Legal : Documentary Analysis (Chapter 5)		
Chronological stages	Data	Themes from the data	Themes from the data	Data	Chronological stages
Step 1: Social					Step 1: Social
Step 2: Legal				Article 6 HRA	Step 2: Legal
Step 3: The Court process					Step 3: The Court process
Step 4: Appeals and Punishments					Step 4: Appeals and Punishments
Step 5: Impact					Step 5: Impact
DATA NOT ALREADY INCLUDED					

Ethics

Ethical approval for the research was sought from the University of Stirling's ethics committee. In addition to the University's ethical framework, Cameron & Price (2009) suggest four distinct types of ethical obligations a researcher should consider: Legal, Professional, Cultural and Personal.

Legal: General Data Protection Regulation (2018). In the planning and implementation of this study, the information sheets sent to participants all included a section which explained what would happen to research participants with their data and how to make a request for the information held about them (see Appendix 8)

Professional: This thesis is a socio-legal study and as such the Socio Legal Studies Association ethical guidance (2004) for socio-legal research was followed. And as the research was undertaken from the University of Stirling, the institutions ethical guidelines which adopt a risk-based approach to research were also followed. There are six areas which research must follow which are: research participants must participate voluntarily, the research should not cause harm, research participants should be given information, anonymity should be respected, research should be carried out with integrity and quality and the independence of research should be clear; any conflicts of interest or partiality should be explicit. As indicated above, research participants self-selected to take part prior to the start of the interviews, and participants were asked if they were still happy to take part in the research. Research participants were also advised that the interview could be terminated by them at any time and that they did not need to answer any questions they did not feel comfortable answering. A transcription of the interview was also sent to the research participants for their approval, and it was explained to them that at any point they could remove any sections of the interview.

A particular issue in this research was anonymity. During the analysis stage anonymity became a significant concern as I had agreed that all participants would

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be anonymised in the research and had included this in my '*research participation form*'. During the interviews, research participants, both Mothers and Legal Professionals, sought reassurance that their participation would remain confidential, and their contributions anonymised. Mothers felt that their words could be used against them if they were identified. This was also an issue which affected mothers who wanted to take part in the #courtsaid protest in 2019 about the Family Court in England and Wales. (In that context, mothers wore masks to prevent them from being identified for fear of punishment or retaliations in the court at a later date.) Professionals were also concerned about professional repercussions but also wanted to talk freely and could only do this with anonymity.

During the final process of analysis, it became clear that by identifying a research participant by the group and number for example Mother 44 (M44), a research participant might be identified via a jigsaw identification process. Given the concerns raised by the participants in relation to identification, I decided that I would remove the random numerical value and would present the data indicating only the group such as [M] for Mothers [LP]for Legal Professionals. I did explore other ways to differentiating between voices in each category (Mothers and Legal Professionals), using a category and a pseudonym (M: Sharon), or changing pseudonyms in each chapter. However, each approach appeared to complicate matters and become somewhat tokenistic.

I also spent time reviewing Legal Professionals' interviews as they had mentioned specific cases they had worked on and removed all references to their cases. I recognise that my final approach of only distinguishing between categories is not perfect, but this approach is indicative of the high stakes at play in the family courts in Scotland, England, and Wales and of the fear prevailing in the family courts at this particular time.

Cultural: The research was carried out across the UK, and it was important to recognise regional variations in terms of legal terminology and legal processes and procedures. The research also planned for cultural differences within all research participant categories, acknowledging that difficulties within family law may also arise as a result of religious, social or citizenship differences. Comments about family group and religious beliefs were touched briefly by the research participants but they were not questions posed by the researcher as I wanted the research participants to tell me about their experiences and to feel comfortable telling me what they felt shaped their experiences.

Personal: In planning the research, I recognised that the position of the interviewer was important to the success of the interview. I wanted to be trusted (Bernard, 1982) and I wanted to do all I could to protect the anonymity of the participants. I also felt it was important to go into the field, '*[b]elieving the interviewee*' (Able, 1981) and this was an important and overt position which I took in terms of conducting the interviews. I wrestled with the issue of self-disclosure (Bristow & Esper, 1988) which remained an internal conflict, during the research process. In some cases, but not all, I did disclose that I had experienced 'enforcement for alleged non-compliance' but only to those who asked me the direct question and after the interview had concluded. Bombyk, et al., (1985) claim that disclosure should reflect an interviewee's desire to know about the researcher's motivation rather than being an

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automatic procedure. This approach reflected my concern to distinguish between my professional position as a researcher and my private life as a mother.

RESEARCH CHALLENGES

Throughout the research process I experienced a number of complex challenges especially in relation to how people with power can influence and prevent research taking place, and the emotional cost of research both to the participants but also to the researcher. As such the following section seeks to explore some of these in more depth.

1: Research Access Denial:

As noted earlier in this chapter, early on in planning of this research I identified the Judiciary as an important group in my research. Like all researchers who wish to interview members of the judiciary in Scotland, I followed the steps in the SCTS research information sheet to request access to the Judiciary (Appendix 2). The information form highlights the importance of the researcher's credentials insofar as it states:

'The researchers should have the necessary qualifications and experience to conduct the research, although research assistants may be employed under proper supervision'. The information sheet does not specify what qualifications are desirable or essential to conduct the research, nor what type of experience is necessary.

There are no disclaimers nor any mention of excluded groups on the form (I suspect to do so would be a breach of the ECHR). The form, as it stands, suggests that anyone with the formal qualifications and research experience can apply for access. The information sheet states that researchers should contact and engage with the Head of Research at SCTS who will assist in giving feedback on the proposed research request letters. I did so and he kindly offered invaluable feedback.

The research access letter was sent by recorded delivery on the 7th May 2019. In the letter, I explained:

The study is designed to provide a better understanding of decision making around child contact orders and the enforcement process.

I further confirmed that:

The research is designed to provide information about child contact enforcement and the processes used to address any failures to obtemper a child contact order. The proposed interviews with members of the Judiciary will provide an insight into the subtleties and complexities of addressing allegations of failures to obtemper the terms of the contact order.

Furthermore, I advised that all participants who took part in the research would be anonymised during transcription, and that transcriptions would be sent to the participant to check for accuracy. I also prepared a research consent form and a detailed information sheet.

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The SCTS process stated that I must write to the Lord President, Scotland's most senior Justice, for research access at the same time as writing to the Sheriff Principals for approval to speak with Sheriffs in their jurisdictions. Along with the letter I sent to the Lord President, I sent a letter to five Sheriff Principals. On the advice of the Head of Research, I highlighted that I had made contact with the Head of Research at SCTS and had followed the detailed protocol. I received replies from two Sheriff Principals to my request for research access. In one letter the Sheriff Principal stated:

"I understand that the Lord President's Private Secretary xxxxxx has been in contact with you in relation to access to a Sheriff. I can confirm that I have no object to that."

The second letter stated:

"I have no objection to being interviewed however I suggest that this is deferred until the end of June."

The letter further advises:

"Obviously one of the family sheriffs would have to agree to be interviewed for this purpose. There is currently a lot of pressure on the time available to Family Court sheriffs and they are frequently targeted for research. I will, however, approach one of the sheriffs to ascertain whether they are prepared to participate."

In contrast, I then received a letter (email) from the Lord President's Private Secretary on the 11th of June 2019. The letter (Appendix 3) stated:

....."it has been drawn to my attention that you were a party in a case in Perth Sheriff Court in xxxx. The outcome of that case at the first instance (though overturned on appeal) bears directly on the subject matter of your research and I regard this as a potential conflict of interest.

It would assist my consideration of your research access request if the Chair of the University of Stirling Ethics board was able to confirm to me, in writing, that the board had been made aware of your involvement in court proceedings before it approved your proposed research. I should also like to know why you did not mention your involvement in prior related court proceedings in your letter to me."

I am unsure as to what or how information relating to my personal circumstances came before the Lord President. I am also unsure if any checks were carried out by the Lord Presidents office in advance of the letter being emailed to me, to ensure the Lord President was contacting the correct person or that the information in the letter he was sending was accurate. My supervisor, as Deputy Chair of the Ethics board, responded on the 18th of June in the following terms (Appendix 4):

"I was aware of the case in Perth Sheriff Court in xx and did not advise her to disclose it as it had been overturned on appeal and I therefore felt that there was no necessity in doing so. On reading your letter, and in

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hindsight, I was wrong about the matter of disclosure, and we should have mentioned the case both as a matter of courtesy to you as well as being relevant background information to the research. This should have been done in her letter to you and in the information sheets to the Sheriffs. For this oversight I apologise, and I can assure you that there was no deception intended and that in no way did Ms McAllister attempt to exploit her role as a researcher for personal or political benefit by neglecting to disclose it. Ms McAllister is interested only in what the Sheriffs' views of contempt are and in how they frame their decision-making processes. As such she considers their views as important and necessary to her research, particularly as a balance to the views of the other respondents in the research. In that respect the views of the Sheriffs will be represented fairly and honestly throughout the research process, and, as she has made clear, those interviewed in the research will have the opportunity to review the transcripts of the interviews before analysis.

Although I did not consider disclosure as an ethical issue, I did consider it a significant methodological issue that would be central to the methodological discussion on value within the research process in the PhD itself. In other words, while it was Ms McAllister's experience that led her to explore contempt and to the design of her study, the research itself will be carried out in the context of a social scientific and critical investigation that will adhere to the methodological norms and standards of scientific research that will circumvent any distortions that personal experience might introduce into her work. In that respect, her relation to her work is no different from other studies where personal experience or values might influence the design and questions of a research project. The relationship between value and research has a wide and historically rich literature that would support the general approach of Ms McAllister's research. As such, I do not consider there to be a conflict of interest with regards to this research project."

The Lord President responded on the 2nd of July (Appendix 5):

I refer to your email of 18 June 2019 and its enclosed letter from Dr xxx to me. I have taken some time to consider your request to access members of the judiciary in connection with your research into the use of contempt proceedings in family cases.

I have read the case, which is reported as xxxxxxxxxxxx, in which the Opinion of the Court was delivered by xxxxxxxx. From this, it appears that you were involved in protracted litigation concerning contact proceedings from xxxxxxxx. On xxxxxxxx the sheriff found that you were in contempt of court on five separate occasions. This resulted in a sentence of 3 months imprisonment which was only imposed on xxxxxxxx. Ultimately, the contempt finding was quashed by the Court of Session on xxxxxxxx, on the basis that the sheriff should not have heard the contempt proceedings at the same time as the substantive contact action. The court did not seek to re-evaluate the evidence of contempt, having quashed the finding (xxxxxxxxxxxxxx). Following upon the decision you were reported by the Daily Record as referring to the "system" being "in pieces" or "broken".

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I have considered Dr xxx letter carefully. Nevertheless, I have come to the conclusion that, against the background which I have set out, it is not likely that you would conduct your proposed research in an objective manner. For that reason, I must decline your request.

I have redacted the personal information from the extracts from Lord President's letter as the case reference he cited was incorrect. It may be correct that the Daily Record has written an article, but I did not speak to the Daily Record at any time in connection with the case nor have I engaged with the Daily Record to discuss any aspect of the family justice system. What the full quote in the Daily Record says is:

"People like me get caught up in a system that's broken. Everyone wanted to make an example of me because I'd been on television and the system is in pieces. My lawyers' failures left me wide open."

Although the quote attributed to me notes that I make observations of a broken system, criticisms of the civil justice system as outdated and inadequate have also been made by Lord Gill (2009) and in numerous policy documents, research studies and case law. Most notably the Supreme Court judgement NJDB (Appellant) v JEG and another (Respondents) (Scotland) [2012] notes a wide range of concerns about child contact.

I was left despondent by what I perceived as a personal attack. I also felt a profound sense of injustice given my appeal had been successful. Mistakes had been made by the Sheriff and my Legal Firm in my case, and yet I was still being held responsible for other people's errors. I was still stigmatised. Until that point, I had assumed the slate was clean as the appeal court had quashed all findings. I was left perplexed by the position of the Lord President which I felt also came into conflict with the '*the rule of law*', and with the Scottish Governments policies on restorative justice (albeit I had never committed a crime). Personally, I reflected long and hard on this issue over the course of the research and it chimed with arguments made by both Unger (1983) and Smart (1989) about a system which does not want to be accountable, or to recognise the consequences of its mistakes for families (especially children). It felt those administering the law perceived themselves above the law and humanity.

In contrast, Lady Hale (2011) has often advocated for the inclusion of wider - including gendered- perspectives and analysis of the law and has referred to socio-legal research in her judicial judgements. She argues (2013) that:

"Personal background and experience. This covers a wide range of factors, including race, gender, disability, and the other characteristics protected under the Equality Act. Our experiences of life are quite simply different from those of our white male able-bodied colleagues. The important questions of law which affect us all should not be decided only by people whose experience of life is so very similar. A woman litigant should be able to go into the Court and see more than one person who shares at least some of her experience. I should not stick out like a bad tooth, as I do at present."

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Lady Hale advocates for a more inclusive and representative judiciary and for the value of legal scholarship. Similarly, O'Callaghan (2013) also argues that "*personal values influence judicial decision making; therefore, it is important that the values which represent society as a whole are reflected on the bench*". I would extend this argument to also include academics who conduct socio-legal research.

Interestingly, since my request was rejected the 'Research Access to Courts and Judicial Office Holders' information sheet dated July 2019 now includes an additional bullet point under the heading '*General Principles*' that states:

Any prior personal involvement in court proceedings by any member of the research team should be disclosed in the research access request letter.

2: Interviewing Mothers and Leaving the Field

I personally found it difficult to terminate contact with the mothers who took part in the research. They shared personal and emotional experiences. Often it was the first time they were able to share their full journey, uninterrupted and without judgement. The interviews appeared to be a key moment for them, charting their journey and the hurtful and emotionally charged experiences they had faced. In some ways, they were akin to a personal diary, peppered with questions from myself. I felt there was a therapeutic and powerful element for mothers, as they were reading their own journey, they had a voice which many had said was missing throughout their experience in the family court. I also recognised, that taking part in the research overall may have been an emotional *experience* for the women, as they were recounting events which would have been psychologically and emotionally difficult for them.

Given my personal experiences of the family court, I felt a deep sense of empathy for the mothers. I could hear the despair in their voices, despair I once also felt. Sampson, et al. (2008, p926) highlights that research can be a tricky business as there are "*emotional risks associated with undertaking research which stimulates memories or causes researchers to re-evaluate past events*". I felt psychologically and emotionally drained when conducting the interviews.

Although I had explained that I was a researcher and could not offer advice, some mothers subsequently emailed me asking for advice even six months later about their court action. I found this particularly challenging. I wanted to help, but knew I could only email them back with signposts to other agencies or organisations that could offer specific advice and or assistance. I really struggled with this, as ethically I was doing the right thing in directing the mothers to official agencies, but morally I felt challenged as I had listened to the mothers, and from personal experience I felt the signposting them on would not provide them with the support and assistance they truly needed.

I felt overwhelmed by helplessness, referring the women onto other agencies in the full knowledge that they had probably already contacted these agencies to no avail. One participant made contact in a distressed state, as her child had been taken out of the country and she did not know if they would ever return. Emotionally and

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psychologically each email and each request for help, support and advice played on my mind.

On reflection I did feel that it was critical, especially when conducting sensitive research, that the researcher retains their 'researcher status' and however hard, retreat from the 'field' as soon as possible in a kind and professional manner. Reflecting months later on my own exit from the field, I feel that remaining relatively neutral was the right thing to do. I hope that I have left positive impressions on my research participants. Certainly, I did receive some encouraging feedback about my work. One Legal Professional emailed: "I maintain my position on it being vital work, we need this research urgently." One Mother emailed saying "*Your research is so necessary.*" Being able to see the bigger picture and the potential importance of the work also helped me to remain motivated. I was contacted by journalists and TV producers to take part in media about my research while I was writing up this thesis. I declined the offers but was grateful for the incentive they provided to keep going when I was mentally and physical exhausted. According to Steier (1991, p237) reflection can be understood as the individual capacity to think, evaluate, and reconstruct, social processes in a quest to make meaning. Baumeister (1997), argues that self-reflection can provide an opportunity for a researcher to take a stock take of where they are, where they have been and how this is reflected in the data produced. And certainly, each obstacle, each challenge and each interview provided the opportunity for self-reflection and appraisal of the research, and of me as a researcher.

3: Theoretical Conflicts: My Difficulties Accepting Feminism

Another moment of self-reflection occurred when I was conflicted about the theoretical influences of this thesis. There was one significant point in the research where my supervisors and I were debating Critical Legal Scholarship, Feminist theories and others. I was rigid in my exclusive attachment to Unger's Indeterminacy thesis. I refused point blank to draw on the work of feminist scholarship, something I resisted irrationally for almost two years of this thesis. During the debate, one of my supervisors said, '*you are anti-feminist, you need a reason for such rigid stance*'. I said I am not and diverted the conversation to other theories. My supervisor was wrong I am not anti-feminist, but she did hit a nerve, one of soul searching and reflection. I sat with the conversation for a few weeks, and then engaged with the work of Carol Smart.

It was at that point that I recognized that I was not anti-feminist but was worried that if I included feminist influences in this thesis it would be tossed aside and I would be viewed as 'just another woman, making the same old arguments'. My ambition was to have women's experiences heard and recognized both as a fundamental legal issue but also as a human issue. I therefore felt that I had to draw on male scholarship to be heard. I know now that it is ridiculous position to take as how else could I explain mothers' experience in my thesis? My thesis has been so much more enjoyable since I have engaged with feminist scholarship. But my experience is a further example of the long-term impact of the law's power, as Hale points out, to dismiss women's experiences and how serious scholarship (and 'neutrality') remains associated with the work of men.

4: Who Owns the Case Law?

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The final area I wrestled consistently with was the use of case law. Each case is a concentrated, legally packaged, summary of often years of pain and anguish, with life changing consequences. I personally understand the impact of reading about one's private life in an academic journal. Notably, one academic wrote some commentary about my contempt of court case and unlike a journalist- who would be obliged by relevant codes of practice to contact the relevant person for comment, did not contact me. As a result, she repeated some of the outstanding misrepresentations in the judicial case. As such, I felt that my voice and experiences had been condensed into a legal argument that did not reflect them. I was angry, frustrated, and disappointed. I felt that my family had become academic fodder, and had lost all control of our painful, traumatic experiences.

In analysing some of the case law in this thesis I was acutely aware that the same criticisms could be levelled against me, in that I was drawing from judicial judgements are selecting passages in this thesis. However, there is a difference. I recognise that this is a challenge in academic scholarship, and it is something I feel should be explored further. I believe that there is something fundamental which needs to be explored both in relation to how judicial decisions are written, and how academics use the case law in their scholarship which I believe should be considered further at the ethical stage of research design. My Supervisors and I spent many hours discussing how I could refer to the case law, in a way that would align with my values and ethics. In the end, what I have done is not ideal, but I have rationalised that I was seeking to amplify mothers' voices and I recognised that their voices in the case law were legally translated and condensed but that they were still there in part. This is a part of the research that I still feel conflicted about.

Chapter Summary

This chapter has discussed how the research problem was approached including how two theoretical perspectives (feminism and Indeterminacy debate) were employed to provide the theoretical underpinnings for the research. Unger's (1983) work on indeterminacy was important to the research design as it provided the mechanism upon which to critically analyse contempt of court, at several different stages in the contact dispute. Unger's work also asked important questions which helped to guide and frame the questions posed, and the analysis thereafter. Central to this was his argument that there is a different way of understanding the phenomenon and the law by stepping outside authoritative sources. It's at that point that Smart's (1989) work on feminist jurisprudence lifted the research from a one-dimensional mapping exercise to pose the questions as to how women experience this and how their lived experiences are disqualified. I have called this theoretical blend of Unger and Smart as the Critical Feminist-Indeterminist perspective as both elements are of equal importance. The Chapter has also explored how I as a researcher made decisions, and how these theories linked to some of my own personal experiences of child contact. The work of Unger and Smart and the interviews with legal professionals and mothers also helped me to understand some of the challenged I faced during my research (and my personal experience of contact enforcement). This research was undertaken at a time when women were fearful of the family court, the stakes were and remain high for them. I appreciate as I have noted that my desire to ensure their safety and cases were not compromised has resulted in some areas of my research being weaker than I had hoped. But all

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researchers are faced with these decisions, we do not conduct socio-legal research in a sterile, stable environment and as such this study aligns with the values of socio-legal research practice. The next chapter will now focus on the finding from the research undertaken.

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CHAPTER FIVE

DEMYSTIFYING

CONTEMPT OF COURT

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CHAPTER FIVE

Demystifying Contempt of Court

This chapter is the first of the three findings' chapters. It focuses on contempt of court, its complexity and indeterminacy in relation to child contact enforcement. The literature in chapter *two* identified that civil contempt of court is fraught with difficulties and with each step the court takes to coerce and punish for what it perceives as civil disobedience raises questions as to what constitutes contempt. This chapter seeks to explore these issues by mapping and analysing case law to reveal how the judiciary constructs non-compliance of a child contact orders as a confrontational challenge to the authority of the court. The way in which allegations of non-compliance are viewed by the courts also highlights the implications for mothers who are viewed as '*manipulative, vengeful, deceitful, and dishonest women*'.

Awareness of Contempt an Alleged Contemnor's Rights to A Fair Hearing

It is often claimed that everyone in the eyes of the law is entitled to a fair hearing, and as such in all litigation it is important that a person is aware of their legal rights in an accessible format. And yet, as noted by Sutherland (2006) in relation to family law, accessibility can result in unequal access to the law and its protections. As discussed in chapter two, contempt of court is a particularly complex, Indeterminate, and technical law. Thus, in reviewing official documentation in relation to enforcement, accessibility also appears to be a problem.

In England and Wales, three MOJ child contact documents targeted at separating or separated parents were identified for analysis during the research period (2019). The first document is the CB7 (A Guide for Separated Parents: children and the family courts) which provides an overview of child contact litigation. Within the 17 pages of this booklet there is no mention of contempt of court, nor is there anything in this document about a breach of an order. Another document CB5 is a booklet related to an enforcement application. This booklet mentions contempt in the last sentence of the first page, and there is no further mention in its 15 pages. A further document, the C79, which is the application form to apply to the court to have the terms of a contact order enforced, does not mention contempt of court in its 13 pages. Thus, with the exception of one line in CB5, none of the MOJ documentation, identified for parents involved in child contact disputes, explains what contempt of court is, nor does it clearly outlined the test or process for sending a parent to prison. Yet child contact orders in England and Wales carry a penal notice which states:

"prominently displayed on the front of the copy of the judgment or order..... a warning to the person required to do or not do the act in question that disobediencewould be a contempt of court punishable by imprisonment, a fine or sequestration of assets".

Given that child contact orders state that a parent can be found in contempt of court and lose their liberty, it is striking that the MOJ documents do not explain the purpose of contempt, nor what the penal notice means in terms of contempt of court

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or that without a penal notice enforcement cannot be pursued (see Dad application FRP commit [205] and Rule 37.9 2010).

Certainly, the lack of information in the MOJ documentation reviewed suggest that at the outset there is a glaring gap in awareness and accessibility in terms of what contempt of court means for people who have a court order issued in respect to contact arrangements. In addition, The *Children Act (1989)*, the primary legislation for child contact in England and Wales, contains a section on enforcement at s11 J 1-12(b) but there is no mention of contempt of court, nor the use of prison as a means by which to enforce the contact order. It is only a report on the draft Children (Contact) and Adoption Bill (2005) that states that contempt of court was used for a breach of a contact order under section 8 of the 1989 Act (Government, 2005 p29). Further confusion arises as The Family Court (Contempt of Court) (Powers) Regulations 2014, cite other legislation- the *Matrimonial and Family Proceedings Act 1984*:

The Lord Chancellor makes the following Regulations having consulted the President of the Family Division, as nominee of the Lord Chief Justice in accordance with section 31H of the Matrimonial and Family Proceedings Act 1984.

This suggests that in order to identify contempt of court and its sanctions, one must be aware of the various legislation and regulations, and know how to cross reference them, and even then, these legal instruments are not accessible nor clear on the matter. The issue of clarity may be further exacerbated, as enforcement under c79 can include more than one enforcement order at any one time and can use the contempt jurisdiction which appears to be derived from the inherent jurisdictions and powers of the court or the provision contained in the *Children Act (1989)*. Furthermore, in theory there can be multiple enforcement orders running concurrently, with no clarity as to what tool (contempt of court or the provision in the Children (Act) 1989) the court is using.

In Scotland, there is also an absence of a procedure for raising allegations of a breach of a child contact order. The practice is that legal professionals make representations in a child welfare hearing, or they document the issues in child contact pleadings or raise a minute for contempt of court. Unlike in England and Wales, Scottish contact orders do not carry a penal warning, nor do they mention contempt of court, and as such there is no information for parents as to what would happen if a contact order was breached. What can be drawn from this analysis is that contempt of court's inclusion in child contact enforcement is not apparent nor noticeable. It is hidden and concealed as an invisible power inherent in the courts, and yet the stakes are high for parents, who could lose their liberty, and for children who could have a parent incarcerated. The issues also present substantial challenges for Litigants in persons (LIPs)

[The Complexity Of Separating A Contempt Action From A Child Contact Action: Alleged Contemnor's Right to A Fair Hearing](#)

As contempt of court is not mentioned in official child contact documentation, nor in the *Children Act (1989)* in England and Wales, nor in the *Children (Scotland) Act*

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1995, it might be assumed that it has nothing to do with child contact enforcement. However, contempt of court is a feature of child contact case law, as discussed in *chapter one*.

Procedurally contempt of court is complex as discussed in chapter two it is difficult to separate contempt of court from the principal court action which may have different standards of proof. In this case child contact is determined to the civil standards of “*on the balance of probabilities*”, while contempt (irrespective if it is civil or criminal), must be determined to the criminal standards of beyond all reasonable doubt. In the English case of *Hammerton v Hammerton* [2007] Justice Ryder in the Appeal Court addressed this complexity and outlines that the father was in an impossible position:

He could not make good his case for contact without in effect defending himself on the contempt allegation (paragraph 16). HHJ Collins never explained why the two applications had to be heard together; and it was not shown that was necessary (paragraph 17 and 18) even an experienced judge like Judge Collins does not address his mind to ECHR Article 6 and to the correct procedure required to ensure that the issues he is being invited to hear are properly and fairly decided.

In this case Justice Ryder, clarified that the court must address the ECHR in both actions and ensure that anyone accused of contempt of court has the right to a ‘*fair hearing*’. This case also highlights the blurring of boundaries and the potential for prejudice in one action to spill over and infect the other. This was also an issue in a Scottish Case, *NJDB v Mrs JEG V Joel Noel James Andrew Solicitor* [2010]. In this case contempt of court became an issue at a proof on the issue of contact. By way of explanation, Sheriff David Mackie at Alloa Sheriff court conjoined a minute for contempt of court to the contact action. This resulted in two separate actions (contact and contempt of court) dealing with two different matters, the welfare of the child and the alleged breach of the contact order, being heard simultaneously as in the case above. In this case, the hearing was transferred from Alloa to Stirling and called before another Judge Sheriff Robertson. In his judgement Sheriff Robertson noted that, the proof had commenced and then the issue of contempt of court became a barrier when the mother gave evidence. Sheriff Robertson claimed the mother’s evidence was hampered by opposing counsels’ claims of contempt of court. Sheriff Robertson further noted that contempt of court is not helpful in child contact actions:

.. it is common for there to be averments that one party, or both, will have acted contrary to orders of court in relation to the question of contact. It would, in my view, be contrary to the interests of justice, contrary to the interests of the child and perhaps also contrary to the interests of parties having regard to their right to a fair trial in terms of their article 6, and perhaps also article 8, rights, if the court was disabled from inquiring into circumstances in which, for instance, a contact interlocutor had not been adhered to when those circumstances might be relevant, and indeed perhaps even fundamental, to considerations of the child’s welfare and whether contact should be allowed, withdrawn or varied.

That is, however, the potentially repercussive effect if, because of the spectre of possible contempt of court proceedings, a party was not obliged to answer questions on these material issues, or even might be held, logically, not to be a compellable

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witness. It would be absurd that a party could ignore, disobey or defy a court order for contact and not be compelled, in proceedings such as the present, to explain why he or she had done so.

Sheriff Robertson dismissed the contempt proceeding and argued that the parents and the court had to focus on the welfare of the child and contempt of court was a distraction. In another Scottish case *S.M v C.M* [2017], Sheriff Mackie again informally conjoined the contempt and contact actions to be heard simultaneously, Lord Glennie in the Court of Session said:

“There is in our view an undoubted difficulty in allowing the two very different types of proceeding to be heard together. We have identified the main problems earlier in this Opinion: the issues are different, there are different standards of proof, there are different rules as to compellability (or, perhaps more accurately, as to the power to draw inferences adverse to a party if he or she does not give evidence), and there are different outcomes, both extremely serious. In a purely technical sense, the solution adopted by the sheriff appears to protect the defender’s position. But in reality, anyone in the position of the defender will be anxious about giving evidence on matters which though relevant to one set of proceedings are irrelevant to the other. There might well, we suspect, be a concern that it will be almost impossible for the sheriff to make some findings according to one standard of proof and some according to the other, and very difficult for the sheriff not to allow her impressions of the witnesses and evidence on some matters to infect her thinking on others.”

Furthermore, Lord Glennie stated that: “*the procedure (of running a conjoined proof in the contempt and contact action) afforded the opportunity for substantial injustice to be done.*” The case law thus confirms that contempt of court is a separate action from the child contact action, but it does not explain why members of the judiciary conjoined the issues in the first place. These cases also raise concerns about a parent’s ‘*right to a fair hearing*’ and the blurring of legal boundaries which was also raised in *chapter two*.

Court Order for Contact: Alleged Contemnor’s Right to A Fair Hearing

In line with the principles of a ‘*fair hearing*,’ it is important that anyone accused of contempt of court is aware of and knows the details of the court order they have been accused of breaching. In the case of *H (Contact Enforcement)* [1996] the court claimed that the mother could not be held in contempt as the court order for the court order had not defined a precise place for handing over the child and anyone accused of contempt had the same protections of those accused of a criminal offense (see *Re Nasrullah Mursalin* [2019]). In another case *L-W (Children)* [2010] the Court of Appeal held:

“The father’s obligations under each of the contact orders were to allow contact and make the boy available for contact. To allow was to concede or to permit; to make available was to put at one’s disposal or within one’s reach. That was the father’s obligation no more and no less. However, that was not how the judge treated the orders. Running through all his judgements was the assumption that the father’s obligations was to make

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sure or ensure that the boy went with his mother and that contact took place. Whilst the father may have been under a parental or moral obligation to do those things, on the wording of the relevant orders he was not under any legal obligation to take such steps in the exercise of parental discipline, guidance and encouragement as were reasonable in all circumstances to ensure that contact took place”.

This suggests that the court order needs to be precise, to allow the court to determine if there has been “*a factual breach of an order*” (Miller, 2000, p635). As Sir James Munby said in Jones [2013]:

.... the order here was not so phrased as to allow committal for its breach: ‘What the order required the mother to do was to: ‘deliver up the children into the care of the father at Cardiff Railway Station at no later than 4pm on 12 October 2012.

Suppose that for some reason she failed to do that. What then did the order require her to do? Deliver the children to the father at Cardiff Railway Station or at some other (and if so what) place? And assuming it was to be at Cardiff Railway Station by what time and on what day? Or was she (to adopt the language of a subsequent proposed order) to return, or cause the return of, the children to the jurisdiction of the Kingdom of Spain by no later than a specified date and time? It is simply impossible to say. Speculation founded on uncertainty is no basis upon which anyone can be committed for contempt.

These cases illustrate the impact of poorly framed court orders and how judicial assumptions can present additional difficulties for parents. In this thesis, 25 court orders were analysed to identify potential issues with contact orders. All court orders reviewed incorporated legalese such as *Promulgates, Procurators, ex proprio moto, quam primum, obtemper, interlocutor* which would be difficult for non-legally trained parents to understand. The court orders also did not provide a standard of clarity which would ensure compliance, and some referred to a previous court order, without reinstating what was in the previous order. This suggests that irrespective of contempt of court, parents involved in contact disputes, may not always be clear what the court is instructing and expecting of them, and this may not be readily clear to appeal court justices either. The poor framing of alternative expectations, reasonings and understandings may be illuminated by analysing one legal document. A document in which a parent’s liberty may be lost and a child may be separated from a parent.

Allegations of Contempt of Court: Alleged Contemnor’s Right to A Fair Hearing

In both jurisdictions, as in the court order for contact, allegations of contempt must be stated precisely in a legal document known as a *minute*. Lord Woolf in Cross J in *Re B (JA) (an infant) (1965)*) said that the precision of the allegations is a minute are critical as “*the application notice and cannot be supplemented by reference to another document such as an affidavit*”. Woolf re-emphasized this point in *Tuvalu v Philatelic Distribution Corporation [1990]* stating that anyone accused of contempt, needs to know “*with sufficient particularity to enable him to defend himself, what*

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exactly he is said to have done or omitted to do which constitutes contempt of court". Similarly, in *Bryne v Ross* [1992] the court held that if an allegation was not contained in the contempt minute, then a finding cannot be found, and no penalty will follow.

In a Scottish Case, *J.D.E v S.D.W.*, the court held that the statement of facts and evidence must be given to the person alleged of contempt in advance of the enforcement hearing taking place and that it is also important that the minute for contempt be closed prior to a contempt hearing. In another case, *Liverpool Victoria Insurance Co Ltd v Khan* [2016] the court held that new allegations or allegations which were not properly argued and tested in a hearing cannot be added to the minute. To allow the minute to be updated at the last minute would constitute an abuse of the process. With regards to a person's right to a fair hearing, anyone accused of contempt of court is entitled to legal representation (Article 6(3)). In, *H v T* [2018] the High Court held that a suspended committal order made against a mother who had failed to comply with a child arrangements order was set aside due to serious procedural irregularities. The mother had had no proper notice of the application, and she had not been given the opportunity to obtain legal advice. This was also an issue in the case of *O (Committal: Legal Representation), Re* [2019] whereby the court of Appeal confirmed that anyone facing allegations of contempt is entitled to be provided with legal representation "*if they want it*", and that they qualify for non-means-tested legal aid, as contempt of court is quasi criminal.

Timeframe: Alleged Contemnor's Right to A Fair Hearing

In a Scottish case of *Robb v Caledonian Newspapers* [1995] the court recognised that there was no fixed time limit for a contempt action but that it should be brought to the court's attention speedily. In the Scottish case of *HMA v Craig Murray* [2021] HCJ: the court explained that

"...there may be cases in which a delay in bringing the case to court can be justified; (iii) although it was desirable for alleged contempt to be dealt with expeditiously there was no fixed time limit for bringing such proceedings (*Robb*); (iv) that where there was a threat of further publication the court could take this into account (*Robb*) and the case was one where there was a risk that the respondent may publish similar articles in the future.

We reject these submissions. In *Robb* the court, whilst recognising that there was no fixed time limit for the bringing of proceedings of this kind, nevertheless pointed out that the whole emphasis in this branch of the law has been upon the summary nature of the proceedings, to enable the alleged contempt to be dealt with in the interests of the administration of justice in as speedy and effectual a manner as possible"

However, the court did not clarify what was considered a "speedy and effectual manner". In reviewing legislation relating to contempt of court in Scotland more broadly, the Act of Adjournal rules (2009) and the Act of Sederunt (2011) rules, stipulate that contempt of court directed at a member of the judiciary, should be heard no later than seven days after it had been alleged. However, these Acts are

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limited to contempt directed at members of the judiciary and as such the timeframe for a contempt in contact disputes is still unknown.

In England and Wales, Part 81- Applications and Proceedings in Relation to Contempt of Court, does not state the timeframe for raising a contempt action. Section: 21.2 of The Practice Direction 12B- Child Arrangements Programme at states: “*The Gatekeepers shall list any application for enforcement of a child arrangements order for a hearing, before the previously allocated judge if possible, within 20 working days of issue*”. However, it is unclear if this would also apply to contempt of court. The practice direction also states that “[e]nforcement cases should be concluded without delay,” but again it is unclear if this relates to contempt of court or what without delay would mean in days, weeks, or months. Article 6 (ECHR) states that “*everyone has the right to a public hearing within a reasonable time*”, but does not define, ‘reasonable time’. According to Roagna (2018, p15) the right to trial within reasonable time under Article 6 ECHR in civil proceedings is that the:

“...time normally begins to run from the moment the action was instituted before the competent court. In practical terms, the period begins when a case is referred to a court through service of process.”

Roagna (2018, p25) further highlights procedural complexity, can be exacerbated and may, “*count against the respondent Government (especially if the complexity increases the risk of infringement of other rights guaranteed by the Convention)*”. Thus, courts may face challenge under Article 6 in relation to the lack of clarity in relation to contempt of court arising from a child contact order. Certainly, delays in child contact actions and related contempt of court actions are a matter of judicial concern. Justice Roberts in PR v JS [2019] claimed that prolonged periods of delay “*only serve to exacerbate tensions between parties*”, and certainly would raise questions as they did in the Scottish Court of Session in SM v CM [2017] on the impact of the prolonged litigation on the child.(Also see *O’Neill and Lauchlan v united Kingdom* 41516/10 and 75702/13)

Thus prior to a contempt hearing taking place, there are several issues to address, and each one presents a wide range of issues in terms of the parallel proceedings and ECHR.

The Contempt Hearing: Alleged Contemnor’s Right to A Fair Hearing

As explained in *chapter two* a contempt of court hearing “*makes use of a particular summary procedure which is unknown to any other branch of the law*” (Phillimore, 1977, p4). As such, the hearing procedure is a further anomaly in the contempt jurisdiction, which places wide “*powers of investigation and punishment in the hands of the judges who exercise it*” (Phillimore, 1977, p4). Furthermore, although contempt of court must be proven to the criminal standards of ‘*beyond all reasonable doubt*’ (*Re Bramble Ltd [1970]*), there is no jury. The decision rests with the judge/ sheriff, *who may also be the judge/ sheriff who made the order*. This creates room for questions about how impartial the judge would be when determining if the order has been breached. Furthermore, in England and Wales, Sir James Munby in *Cambra v Jones [2014]* determined that the fact that contact did not take place, is not in itself sufficient to prove contempt. This suggests that contempt is

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more complex, that courts cannot surmise that something is contempt, and that contempt must be proven beyond all reasonable doubt. Anyone accused of contempt also has a right not to self-incriminate and the alleged contemnor is not a compellable witness (see *AB and CD v AT* [2015], in line with Article 6 (1) (see *Comet Product (UK) Ltd v Hawkex Plastics Ltd* [1971]). The case of *Engeneonu v Engeneonu* [2017] further explains how these complexities are bundled together:

"Contempt of court involves a contumelious that is to say a deliberate, disobedience to the order. If it be the case that the accused cannot comply with the order then he is not in contempt of court. It is not enough to suspect recalcitrance. It is for the applicant to establish that it was within the power of the defendant to do what the order required. It is not for the defendant to establish that it was not within his power to do it. That burden remains on the applicant throughout, but it does not require the applicant to adduce evidence of a particular means of compliance which was available to the accused provided the applicant can satisfy the judge so that he is sure that compliance was possible".

The judge also must take care to see whether any of the evidence reveals any other circumstances which may be of sufficient reliability, and which strengthen or destroy the allegations of contempt as confirmed by the Appeal court in *Temper v R* [1952].

Test for Contempt of Court: Alleged Contemnor's Right to A Fair Hearing

The test for contempt of court is that a person accused of contempt must have acted wilfully [1], inexcusably [2] and intentionally [3] to interfere with the administration of justice (*Helmore v Smith* (1886)). This suggests that there is a mental element to contempt of court. However, in the case of the *Attorney-General v Newspaper Publishing PLC* [1988] the court claimed that the mental element (*Mens Rea*) in the law of contempt is something of a minefield. The reason is that it is wholly a creature of the common law and has developed on a case-by-case basis. The Contempt of Court Act (1981) states that '*the rule of law whereby the conduct may be treated as a contempt of court tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so*', this suggests that the mental element may not always be present in contempt cases if a person's conduct is not deliberate.

Just as the *Mens Rea* of contempt of court has been regarded as a minefield, actions which can be considered as contempt have also been described as "manifold" (*Moskovitz* 1943). In terms of child contact, as outlined earlier in this chapter, the courts have confirmed that just because contact did not take place

¹ : WILLFUL: Warrington LJ expressed the opinion that wilful was only intended to excuse casual, accidental and un-intentional acts. While in *Sectorguard PLC v Dienne plc* [2009] Briggs J held that there was no contempt because contempt involved some element of choice. See *Steiner Products Ltd v Willy Steiner Ltd* [1966], *Knight v Clifton* [1971], *Anderson v Hirnch* [1985], *Australian Meat Industry Employers Union v Mudginberri Station Pty Ltd* [1986]

² *INEXCUSABLE: Inexcusable in relation to contempt of court is Re F (or se A) (a Minor) (Publication of Information)* [1977] Fam 58, [1976] 3 WLR 813, CA. While in *Masri v Contractors International Co SARL* [2011]

³ 5:2: INTENTIONALLY : Contempt had to be deliberate and proved to be so, *A (A Child) (Abduction: Contempt)*, Re [2008] EWCA Civ 1138, [2009] 1 W.L.R. 1482, [2008] 8 WLUK 228 and *DB and CB (Minors)*, Re [1993] 2 F.L.R. 559, [1993] 5 WLUK 144

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(*Cambra v Jones* [2015]), is not contempt. The court also cannot infer or surmise (*Bramblevale Lt* [1970]) actions are contemptuous. It must be proven to beyond all reasonable doubts that they are, which leaves a breach of a contact order leading to a finding of contempt of court vague and confusing. The defences to allegations of contempt of court are reasonable excuse, responsibility, apology, remorse (See *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748 (Comm), [2015] 12 WLUK 598 and *Crystal Mews Ltd (In Liquidation) v Metterick* [2006] EWHC 2653 (Ch), [2006] 10 WLUK 635). And this aspect of the law is a little clearer. Furthermore, if the court determines that there is no finding of contempt of court, then the court cannot entertain a second motion upon further evidence in respect of the same (alleged) contempt (See *Badische Anslan and Soda Fabrik v Thompson* (1904)).

Sanctions Arising from a Finding of Contempt of Court: Alleged Contemnor's Right to A Fair Hearing

If a finding of contempt of court is made, the court does not need to make an order for a sanction as stated in the *Contempt of Court Act (1981)*. In a Scottish Sheriff Court case, *T.B v S.B* [2017] the Sheriff made a finding of contempt of court relating to allegations that the mother had breached a child contact order. On making a finding of contempt of court, the Sheriff made no further order and deferred matters to await the appeal decision in another case *S.M v C.M* [2017]. The decision of *S.M v C.M* [2017] made criticisms of the procedure used by the same sheriff, and she believed that she was precluded from sentencing the mother to prison. As such, she made no further order in relation to the contempt of court. The father then asked the court to consider if he had locus to lodge an appeal against the fact that the sheriff did not sentence the mother to prison. The court determined the father did have a locus and allowed his appeal to proceed. In the appeal judgement, Sheriff Principal Stephen said:

“In this appeal it is contended that the sheriff failed in her duty to determine the matter of punishment which was live before her and failed to adequately consider the facts and circumstances of the case. As we have observed, the sheriff may have been unduly concerned about following the same or similar procedure which attracted criticism in *C.M. v S.M*. However, in the following paragraph it is plain to us that the sheriff had regard not only to other sentencing options but in particular the respondent's personal circumstances and mental health problems which she had been informed of on 20 January 2017. The sheriff considered the child's circumstances and the effect of the separation of the mother and 'T' which imprisonment would bring about. That has been described as a special consideration and relevant factor in determining sentence or penalty (*M. v S.* 2011 SLT 918).

This case suggests that the courts can take into consideration the impact a finding of contempt of court can have on the welfare of the child.

If a sanction is to follow a finding of contempt of court, then it should happen swiftly as explained in a Scottish Court of Session case *SM v CM* (2017) where Lord Glennie said:

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“.....of concern is the fact that the sheriff appears to have taken into account in fixing her sentence events other than the five instances of contempt of court which she had found established. As appears from the fact that she deferred sentence on more than one occasion to see what happened in the contact action, the sheriff seems to have thought it appropriate to hold the deferred sentence over the defender as a kind of “sword of Damocles,” to encourage future compliance.

“As a result of these repeated adjournments or deferments, the defender was not in fact sentenced until 20 May 2015, over a year and a half after the findings of contempt were made. Such delay is inimical to the interests of justice. If a sentence of imprisonment is to be imposed, it should be imposed without undue delay, since the period running up to the imposition of that sentence will inevitably be fraught and stressful. For the defender to have to endure such delay only to find that she was then sentenced to the maximum sentence of imprisonment of three months is, to our minds, wholly inappropriate”.

This suggests that contempt of court had been used by the Sheriff in an inappropriate to delay punishment as way to seek future compliance with a new court order (*See Shurrock v Lillie (1888)*), which does not align with the Contempt of Court Act 1981. This also raises fundamental questions as to how a contempt and contempt findings may impact on future welfare determinations in the child contact action.

Civil Imprisonment: The Punishment

In Scotland, court orders for contact do not carry penal notices but in England and Wales they do. In a Scottish case, *CEF v MLH [2014]*, the mother raised allegations of domestic abuse and stressed that the father had not always exercised the contact the court had awarded him. Sheriff Jamieson set out a detailed note of the procedure he personally followed, in relation to the mother’s alleged failure to comply with the contact order and he sentenced the mother to 4 weeks in prison.

Sheriff Jamieson presided over another case *JDE v SDW [2014]* relating to a breach of a child contact order. In this case, the mother raised concerns about her son’s safety. The court rejected her concerns and stated that she had not done enough to encourage the child to enjoy contact with his father. In finding the mother in contempt of court Sheriff Jamieson noted that:

This case of contempt of court invokes one of the most common defences- the child will not go for contact. A resident parent’s duties are set out in *Blance v Blance 1978 SLT 74*, approved in *Brannigan v Brannigan 1979 SLT (Notes) 73*; and in *Cosh v Cosh 1979 SLT (Notes) 72*. The defender’s duty in accordance with that case law was to “tell the child, if necessarily firmly, to go”; to “create a climate of opinion in which they view their father in a reasonable and well-disposed light”; not to leave it to the child to make the decision “without positive guidance and genuine encouragement” from the resident parent.

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This suggests a duty on the mother, which is more than facilitating contact. The court expected her, even in the presence of her concerns about the child's safety, to encourage the child to go to contact. This finding is in stark contrast to opinion of the court in the English case of *L-W (Children)* [2010]. Sheriff Jamieson went on to say:

It is clear from these passages of the defender's evidence she did not comply with her duties set out in *Blance v Blance* 1978 SLT 74, *Brannigan v Brannigan* 1979 SLT (Notes) 73 and *Cosh v Cosh* 1979 SLT (Notes) 72. Firstly, she had "discussions" with J after the court hearing on 19 September 2013, in October 2013 and February 2014. She did not tell him in these discussions that a sheriff was a Judge and J had to go for contact with his father. The contact order was more than a "good idea;" it was a judicial determination, obliging the defender to permit J's father to have contact with him. It is not difficult to explain these things to a seven-year-old child of ordinary understanding.

She ought not to have drawn her seven-year-old son into the decision-making process, referring to how do "we" get daddy to do certain things, asking for his "feelings" on the subject." She put proposals to him, such as a "supervised visit." All of this was highly improper. If J was "distressed" by anything it is likely to have been by being put into a position too important and beyond his level of maturity to understand. He is not likely to have had the maturity to enter these discussions and entertain these proposals.

In this instance, the sheriff is relying upon judgments with significant vintage (1978 & 1979). He is also, on the one hand scathing towards the mother for what he perceives as her inability to explain to seven-year-old with an 'ordinary' understanding that he must comply with the order of a Sheriff. On the other hand, chastises her for seeking the child's view on how to improve contact with his father, saying that the child does not have the maturity to understand his relationship and contact with his father. In this extract, the Sheriff seems to be mocking what he perceives as her inability to get her son to follow a court order. In this case Sheriff Jamieson ordered that the mother be committed to prison for 21 days, which he suspended on condition that contact was restored.

However, for those who continue to fail to comply with a court order, and have successive terms of imprisonment pronounced, the period of incarceration is limited to 2 years as a result of the Contempt of Court Act 1981 as Justice Holman explains in *Button v Salama* [2013] the court concluded that:

A father who had been sentenced to successive terms of imprisonment for contempt of court for refusing to reveal the whereabouts of his child and secure her return to the jurisdiction could not be subjected to any further terms of imprisonment, despite his continued refusal to comply with the court orders, because of the two-year maximum period for such sentences pursuant to the Contempt of Court Act 1981 s.14.

Justice Holman also explained that this was because, "*the court had to be cautious not to subvert the will and intention of Parliament by contemplating sentencing for aggregate periods that were more than double that term*" prescribed in the 1981 Act.

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And that he further explained that a further “*term of imprisonment would not serve the purpose of coercing F to comply with the orders, as he had evinced an absolute determination while detained not to obey them. Thus, the sole realistic purpose of any further term of imprisonment would be punishment, which would be unlawful*” This case points once again to the limitation in the power of Contempt of Court against strong opposition.

Procedural Rules For Committal Proceedings

A regular feature in Committal proceedings arising from contempt of court is that strict procedural rules should be implemented (see *L (A Child), Re [2016] EWCA Civ 173, [2017] 1 F.L.R. 1135, [2016] 3 WLUK 628 applied*). In Vos LJ in *Re L (a Child)* the court held that:

‘The process of committal for contempt is a highly technical one....it is highly technical for a very good reason, namely the importance of protecting the rights of those charged with a contempt of court.’

Mrs Justice Theis in *L (A Child) [2016]* set out a ‘*useful checklist*’ for contempt procedures

1. There should be complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.
2. Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.
3. If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.
4. Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.
5. Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.
6. Whether the person accused of contempt has been advised of the right to remain silent.
7. If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.
8. The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.

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9. Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order

This process stressed the importance of due process. In *Hammoud v Al Zawawi* [2019] the court explained that Committal applications involving the liberty of the subject had to be taken very seriously and failures to comply with the process which might lead to an injustice should not be waived.

A further unique aspect to contempt of court, which dates to the *Carus Wilson Case* (1845), is that a person found in contempt of court, can ask to be pardoned by the court. It is a commonly held belief that the contemnor holds the keys to their own incarceration and as such contempt findings can be purged. In England and Wales, the process for purging is detailed in the the HM Prison Service guidance (2003) which states:

A prisoner may write to the court to purge his/her contempt. This may be done either in person, with or without the help of a solicitor or the prisoner may seek the assistance of the Official Solicitor, at public expense. The latter is not usually willing to help those who are able to take action themselves. Any prisoner wishing to purge his/her contempt should seek assistance from the Legal Services Officer. If a court requests the production of a prisoner to purge his/her contempt (e.g. if they are in prison for non-payment of a debt), the prisoner should be produced at public expense

In the case of *James v James* [2018] Lord Justice Bean, was surprised that a woman did not apply to the court to purge her contempt, he said:

“The appellant did not apply to the court to purge her contempt. For my part, I find that startling, particularly if, as I am told is the case, a representation order was made or notice of acting was given by her present solicitors by 18 July. At any rate it was not until 3 August, 21 days from the hearing of 12 July, that a notice of appeal, which of course is right was lodged in this court. An application to purge the contempt would no doubt have come on much quicker and it is not clear why the notice of appeal took three weeks to draft”.

The court also noted that:

“A contemnor has an unqualified right to apply to the court to purge his/her contempt and seek an order for immediate release. This is not a ‘once only’ right rather it is a continuing right running throughout the duration of the sentence”.

The court also noted that this right has roots in the quasi-religious concepts of purification, expiation, and atonement (see *Harris v Harris* [2002]). The court in *Suckling v Suckling* [2019] also suggest that “*If X purged her contempt by complying, the sentence would be reduced to two months*”. This reflects a view that the court's order could be obeyed. It may however be difficult to understand how a mother can purge past non-compliance and what constitutes purging in child contact disputes.

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As can be seen from the previous section, courts have misused their powers to send a parent to prison without a hearing, on the basis that they had previously made a finding of contempt. The case law has also highlighted that a mother making an undertaking whilst incarcerated, could be held to have breached that undertaking if the terms of the undertaking are not complied with which could then be viewed as another contempt. It seems that a mother would be in a precarious position and one which may undermine her legal rights if the '*purging*' of contempt of court could be revisited later. Keeping a mother in a legal bind such as this does not accord with Article 6 nor Article 7 of EHCR, and it is, without question, wholly inappropriate.

Appealing Contempt of Court

Case law relating to contempt of court has illustrated thus far the precarious path in using contempt to enforce a child contact order. These difficulties are illuminated in appeals against civil incarceration. In a Scottish Case T.A.M v M.J.S [2009] the mother refused to comply with the court's order for contact as she believed her child was at risk of abuse; and she alleged that she had a history of domestic abuse. The Sheriff rejected her concerns and found her to be in contempt of court. In making his finding Sheriff Davidson said:

"If you want an illustration of what happens when the rule of law is undermined by government, you need look no further than what is currently going on in Zimbabwe, where the president, who is scarcely still entitled to be so described, has by brute force and threats of violence completely undermined the democratic process (Scotsman Newspaper, 2009)".

He went on to allege

"You may find the analogy with Robert Mugabe to be distressing and uncomfortable, but if I let you away with continuing to defy the order of the court, then someone else will defy the order of the court citing you as a precedent and, before long we will have anarchy, if you want to live subject to an anarchic dictatorship then you can go to Zimbabwe. I will not allow anarchy to rule here' (Scotsman Newspaper, 2009)".

It may be argued that the Sheriff's extreme analogy between a mixed-race mother in a child contact dispute in a Scottish sheriff court with a dictator in Zimbabwe, reveals his misogynistic attitude towards women who he perceives are challenging and or defying his order. The mother in this quote is presented as having both the power and the platform in which to incite national anarchy and undermine the 'rule of law' in Scotland. It may be further suggested that the Sheriff developed this shocking narrative to deter other women from defying a court order and to justify his punishment of the mother in this case, who was sent to Scotland's all female prison, Cornton Vale Prison, in Stirling. Her lawyers immediately lodged an appeal with the *nobile officium* advising that she would comply with the contact order. The mother was advised to write to the court. The letter she sent is reproduced here:

"I, TAM, c/o HMP Cornton Vale, by Stirling, hereby undertake to obtemper the interlocutor dated 24 April 2008 in the Dundee sheriff court case of MS -v- TM (court ref: a868/05) by making the child LEAMS (born

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22 December 2001) available for contact with the pursuer at the times, and under the conditions, of that interlocutor or any other interlocutor pronounced in said case, whichever is the later dated”.

The *nobile officium* [4] did grant the mother interim liberation pending the appeal. Once released from Cornton Vale however, it was alleged by her ex-partner that she had failed to comply with the court order for contact. At her appeal hearing her lawyer claimed that this was because she had concerns for her child’s safety. The court responded to her allegations of abuse by stating:

The worst aspect of this case, in my opinion, is that in order to deprive the respondent of contact the petitioner has made grave allegations against him. Although the social worker who submitted a social enquiry report to the sheriff seems to have taken the petitioner's word for them, those allegations are not supported by any evidence.

This suggests that the mother had to prove allegations of abuse with evidence before the court would accept her claims. In this case, the court rejected her concerns and went on to state:

When this petition came before us, the petitioner gave us a signed undertaking in the terms that I have quoted. That being an undertaking *in foro*, it was a material factor that led us to grant interim liberation. As we now know, the undertaking was false. Having heard the petitioner and counsel for the respondent, I conclude that the petitioner's deceit constitutes a contempt of this court.

I propose to your Lordships that we should refuse the prayer of the petition and that we should make a finding that the petitioner is in contempt of this court. If we were to pass sentence for that contempt now, the sentence might be severe. I think that we should give the petitioner the opportunity to reflect on the gravity of her conduct and to desist from it. I therefore propose that we should defer sentence for the petitioner's contempt of this court for six months.

This case illustrates how the issue of the welfare of the child, turned to become focused on protecting the authority of the court. It also demonstrates how issues are inflated when the court seeks to punish for its perceived lack of compliance with its own orders. The mother in this case was returned to Cornton Vale for the initial finding and the further finding of contempt of court of the *nobile officium* was deferred.

In another Scottish case AG v JB [2011] , the mother claimed that she did not comply with the contact order as the child’s father had “*molested her on several occasion.*” she said she was fearful of attending court and being in his presence. Her allegations of abuse had not been included in the child contact pleadings and as

⁴ The *nobile officium* is the extraordinary equitable jurisdiction of the Court of Session and the High Court of Justiciary. It is a power of the court to give a remedy in two situations. First, where there is no legal rule adequately covering a given situation. Secondly, where there is a legal rule governing a situation, but its application would be unduly excessive, oppressive or burdensome. The court can use the *nobile officium* to grant any remedy or make any order. (Thompson, 2015)

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such the sheriff concluded that the mother was “*trying to manipulate the court into finding in her favour and had no intention of complying with whatever order the court made.*” The sheriff went on to say that the mother’s “*opposition was so vehement that she would be willing to lie in furtherance of it.*” The mother did not turn up to various hearings and as the court made orders in her absence; the mother did not comply with the orders. The court issued multiple warrants for her arrest, and she was found in contempt of court in her absence. She was later apprehended by sheriff officers and brought to court whereby she was sent to prison for two months. The mother appealed the finding and wrote to *the nobile officium* in the same terms as *T.A.M v M.J.S* [2009] stating:

“I, [AG] born Edinburgh 2 January 1967 and currently incarcerated at HMP Cornton Vale hereby undertakes to obtemper the court's order of 16 November 2007.

I do this on the understanding that the pursuer's parents will collect and return [ARG] from my home at times stated and that the pursuer will not also be present at collection and return as I wish no direct contact with him.”

The nobile officium granted the mother interim liberation. However, once she was released contact was not resumed and the mother wrote to the court stating:

“...that she had signed the undertaking under severe duress and on the “ill advice” of a solicitor whom she had never met before. She described the undertaking as void.”

The mother further submitted a letter from her GP practice to the court confirming that she was “*suffering from anxiety and depression*” and asked the court to take this into consideration. The court ordered her GP to appear in court and produce relevant medical records to the court to support her claims of her mental ill-health. The court rejected the mother claims and said:

“This case exemplifies yet another attempt by a custodial parent to sever the bond between the other parent and their child by means of delaying tactics and in due course by protracted defiance of an order of the court. This court has already made clear its disapproval of such conduct (*TAM, Petr* [2009] *CSIH 44*). The petitioner presented a confrontational challenge to the authority of the sheriff by wilfully defying his interlocutor of 16 November 2007. Her defiance not only thwarted the respondent's rights but undermined the rule of law. Conduct of this kind constitutes a grave contempt of court. It cannot be said that the sentence imposed was excessive.”

The court also said:

“There remains the question whether the petitioner is also in contempt of this court in respect of her breach of the undertaking dated 13 November 2009 that she granted *in foro*. We shall appoint a hearing to be held on 4 October 2011 at which we shall hear submissions on that question and on the question of sentence, if it should arise”

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The mother was returned to Cornton Vale Prison for the initial finding of contempt with further punishment left hanging in the air. This case suggests that making claims of abuse without proof, can result in the mother being viewed as challenging the authority of the court, dishonest, and as a manipulative mother.

A further Scottish case (2014) involving a Church of Scotland Minister, was covered in the Scottish Press, when she was sent to prison for 12 months by Sheriff Murray. The Sheriff said she was guilty of “*flagrant, premeditated and sustained breaches of child contact orders.*” The Minister’s position was that she had been trying to keep her children safe from her ex-partner, a convicted murderer. After successfully winning her appeal, her local MSP Neil Findlay said, “*Convicting Rev Hart was wrong, and we need to know how our system is allowed to make such decisions. It’s time we put this subject under the microscope.*” The Church of Scotland supported Mr Findlay, arguing that:

“This minister is of the highest integrity and has our full support. “She has suffered harmful speculation and unjustified criticism without being in a position to defend herself due to the nature of the court process. This has added to the injustice.”

The appeal was successful as Sheriff Murray had exceeded his authority in sentencing her to 12 months in prison. (*The maximum sentencing provision is three months in prison*) In another family case, SM v CM [2017] Lord Glennie said:

“Ultimately, the court must enforce its orders, but in many cases the contempt proceedings themselves will provide a salutary reminder to the defaulting party of the need to comply. A custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort. The sheriff recognised this but, in our view, moved too far too fast in imposing it. It may be that this was because she allowed herself to take into account the defender’s failure to cooperate in the period between judgment and sentencing. She refers to “repeated warnings” having been given to the defender of the consequences of her conduct. She refers to the Court having done “everything in its power” to allow the defender to cooperate and mitigate the potential punishment for contempt. It appears from this that in coming to the conclusion that there was no alternative to a custodial sentence the sheriff has taken account of subsequent conduct. This was wrong. Without such conduct being taken into account, we are satisfied that it was excessive to impose a custodial sentence of any length on the defender.”

In this case, the court refers to the defender’s alleged subsequent conduct being the reason why she was sent to prison, and not the conduct that the court initially claimed to constitute s a contempt. Thus, the defender was sent to prison without a hearing on the alleged subsequent conduct. In fact, in this case the sheriff had unilaterally determined the conduct was contempt, without a hearing on evidence or

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any witnesses. The Court of Session confirmed that this resulted in substantial injustice [5] and breached the [Mothers] Article 6 rights to a '*Fair Hearing*'.

These appeal cases raise significant issues in relation to the processes used in incarcerating mothers, but also the views of members of the judiciary towards mothers. They suggest that the judiciary may not have had due regard for the rule of law, the very issue for which they seek to punish mothers. Instead, they appear to have treated the law as a device for venting personal and professional frustration. Jenkins (2013, p119) notes another difficulty from erroneously sending a mother to prison is the impact on the children, who are viewed as secondary victims of the injustice:

“ most secondary victims continue to suffer from their traumatic experiences and that the children of appellants suffer particularly from the injustice of learning to cope with the wrongful conviction and imprisonment of a parent”

This suggests that the injustice may have negative and detrimental life-long implications for the child and mother. Both of whom were only in the court system as a result of the courts remit to determine the '*child's best interests*'.

Compensation

Despite contempt of court appeals, there is little case law on compensation. In the case of *Hammerton v United Kingdom* (2016) ECHR the applicant complained that his rights under civil contempt afforded him the right to financial compensation. At section [154] of the judgement the Court, found a violation of Article 6 & Article 1, taken in conjunction with Article 6 & 3 (c), *by reason of the applicant's lack of representation during his civil-contempt-of-court hearing and a violation of Article 13, by reason of the inability of the domestic courts to award financial compensation to the applicant for the prejudice caused by that violation of Article 6.* The applicant sought just satisfaction for non-pecuniary damage and costs and expenses under Article 41 of the Convention, which provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

In this case, Hammerton's appeal was upheld, and he was awarded financial compensation for the loss of liberty in a civil contempt of court action. This case should bring civil contempt into line with the criminal route to damages because of its quasi-criminal characteristics but again there is no clear procedure for applying for damages.

⁵ I asked the Scottish Government in an FOI (2018) “Would the government give a public apology to all the mothers and children and who were wrongly sent to prison as civil prisoners under the contempt of court in contact actions and who went on to successfully appeal the findings? The response stated, “The Scottish Government has no plans to do this”. The FOI also asked the Scottish Government “Should Sheriffs who have made significant errors to the detriment to children and their families still hear these types of cases? The Scottish Government responded stating “This is not a matter for the Scottish Government as the judiciary is entirely independent of Government”

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Part of the difficulty maybe in Scotland that the *Criminal Justice (Scotland) Act 2010*, does not provide any provision for damages for a miscarriage of justice and imprisonment arising in the civil courts. There are no clear route for damages in other legislation linked to Contempt. Yet in the Supreme Court case of *R (on the application of Adams) (FC) (Appellant) v Secretary of State for Justice (Respondent)*, references article 14(6) of the International Covenant on Civil and Political Rights 1966, which the UK ratified in May 1976 (“article 14(6)” of the “ICCPR”) and Lord Philips explained that:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law...”

Given that contempt of court is quasi criminal there is a persuasive argument that this also applies to contempt of court cases. Lady Hale also notes in *R (on the application of Adams) (FC) (Appellant) v Secretary of State for Justice (Respondent)* that:

“If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.”

However, in Scotland, there is a barrier to obtaining damages in relation to judicial errors:

“A case where there was an error by a judge will not be eligible for compensation unless there are exceptional circumstances that would justify the payment of compensation” (Scottish Government, n.d).

This is another area where the law is unclear in relation to contempt of court and is also an area whereby there is no research, and no commentary was identified nor any judicial decisions.

The Influence of A Contempt Finding on Future Litigation

If a finding of contempt of court is made and is not appealable, it may also have significant consequences for the party found in contempt. Miller (2000, p699) notes that courts have historically taken the view that a party found in contempt is disentitled to take further steps in the same action. This standpoint was articulated in the case of *Hadkinson v Hadkinson* [1952] which was a family law case involving removing a child from the jurisdiction. However, Miller (2000, p699) also highlights that *Laddie J in Swapsonics LTD* [1990] formed the view that a previous finding of contempt of court would be prejudicial in other litigation, may breach a party’s Article (6.1) rights, in particular their ‘*right to a fair hearing*’.

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Chapter Discussion

This chapter has through detailed analysis of contempt of court case law, (A(G v JB [2011], Attorney General v Newspaper Publishing [1988]; Blance v Blance [1978]; Brannigan v Brannigan [1979]; Bryan v Ross [1992]; Button v Salama [2013]; Carcus Wilson (1845); Cosh v Cosh [1979]; Cambra v Jones [2014]; CEF v MLH [2014]; Dad application to commit [2015]; Engeneonu v Engeneonu [2015]; Hammond v Al Zawawi [2018]; Hadkinson v Hadkinson [1952]; Helmore v Smooth (1886); Hammerton v Hammerton [2007]; Harris v Harris [2002]; H (Contact Enforcement) [1996]; H v T [2018]; James v James [2018]; Jones [2013]; J.D.E v S.D.W [2014]; L-W (Children) [2010]; Liverpool Victoria Insurance Co Ltd v Khan [2016]; L (A Child) [2016]; M v S [2011]; NJDB v Mrs JEG v Noel James Andrew Solicitor [2010]; O'Neil and Lauchlan v United Kingdom 41516/10; O (Committal: Legal Representation) Re [2019]; PR v JS [2019]; R (on the application of Adams) (FC) (Appellant) v Secretary of Justice (Respondent); Re Bramblevale Ltd [1970]; Re B (JA) (an infant) 1965; Robb v Caledonian Newspaper [1995]; Re Nasrullah Mursalin [2019]; Suckling v Suckling [2019]; SM v CM [2017]; Swapsonics LTD [1990]; Temper v R [1952]; Tuvalu v Philatelic Distribution Corporation [1990]; T.A.M v M.J.S [2009]; T B v S B [2017]) established that non-compliance with child contact orders made according to the '*welfare principle*' and '*best interests of the child*', may give rise to a contempt of court action. Contempt of court is used in contact disputes in such a way as to coerce and punish parents (usually mothers) who do not comply with court orders regulating parent-child post separation relationships. Drawing upon Unger's five points of indeterminacy, and the work of feminist jurisprudence scholars these findings will now be discussed in chronological stages.

LEGAL PERSPECTIVE: CONTEMPT OF COURT AN INVISIBLE LEGAL ISSUE IN CONTACT DISPUTES

The documents reviewed in this chapter suggest that there are human rights (Article 6) concerns in relation to parents' ability to make informed decisions (*lack of information, procedures, and reference to multiple other documents*) about enforcement as (HRA) implies that the law must be accessible. MOJ documents (forms CB7, CB5, C79) reviewed in this chapter focused on emphasising the consequences of non-compliance but they do not explain how contempt of court would be used as an enforcement tool (contempt in one sentence in one form, CB5). The lack of clarity also suggests that it is open to the party seeking to enforce an order, their legal representatives, and the court to determine which enforcement process would be used (*Contempt of court route or via the C79 application form*), and only contempt of court has the sanction of prison. According to Unger determination of "*which rules to apply and how to apply them*" (Hasnas, 1995, p7) is influenced by socio-political and institutional power at any given time. And as seen in *chapter one* of this thesis political and public opinion has largely supported the inclusion of sanctions including prison for non-compliance with a court order (specifically in relation to mothers) (Scottish Government, 2020, Scottish Mail, 2018, Telegraph, 2004). Legislative discretion also allows judges to pick and choose how to enforce their orders which may "*invariably serve the interests of a politically dominant group [fathers] at the expense of the rest of society [women and children]*" (Hasnas, 1995, p98). In Scotland no official documentation was identified in relation

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to enforcement, contempt of courts function as an enforcement tool was identified from analysing Scottish case law. The lack of official clarity about contempt of court (in Scotland, England and Wales) does raise concerns about parents' awareness of their legal rights when accessing the legal system in terms of foreseeability and accessibility (Article 6). Unger (1976, p56) argues that accessibility issues are deliberate to prevent, "*non judicial understanding as to how the law operates and prevails*". It is unknown from this dataset if the lack of information is deliberate, but it may be argued that inaccessibility may add to legal confusion (Sutherland, 2017) resulting in injustice (See O (Committal: Legal Representation), Re [2019]).

A further difficulty with applying contempt of court in a child contact dispute is that it is impossible to identify what is considered contemptuous conduct (Miller v Knox (1878); Oswald, 1911; J.H.T., 1946; Moskovitz, 1943) from the case law (see L-W (Children) [2010] (missed contact) Cambra v Jones [2014] (more than missed contact) and this raises questions about the extent to which the law is prescribed with sufficient precision and guidance (Article 6) to enable a parent to regulate their behaviour and not be held to be in contempt of court. These difficulties are compounded by the lack of clarity as to what processes and procedures (see L (A Child [2016]; Hammerton v Hammerton [2007]) should be used, due to judicial dissent and competing and contradictory contempt findings (see L-W (Children) [2010], Cambra v Jones [2014]). Certainly, these findings broadly accord with the Phillimore committee's report (1977) (*lack of clarity as to what contempt of court is, no agreed definition, purpose, and procedures*). And despite the passage of the Contempt of Court Act (1981) forty years ago to cure some of these issues and bring contempt in line with the Human Rights Act (1998) it remains an unpredictable law which lacks certainty and raised concerns about a '*fair hearing*' (Article 6). As each move to locate the meaning of contempt of court and identify what is contemptuous conduct (see L-W (Children) [2010] missed contact, Cambra v Jones [2014]) leads back to indeterminacy (*irrationality, inconsistent legal procedures and a lack of transparency*) and social issues (*family relations, domestic abuse, welfare concerns and problematic court orders*) (Unger, 1976). This also suggests that contempt of court's inherent and enduring indeterminacy operates in such a way as to conceal and detract from the fact that "*legal decision making does not provide concrete [or] real answers to particular legal or social problems*" (Fried, 1989).

COURT PROCESSES: DECISION MAKING, CASE LAW AND PROCEDURES

According to case law reviewed in this chapter, issues with contempt of court do not appear to be resolved by judicial decision making, which according to Unger (1976) does not offer '*predictability or certainty*'. Judicial unpredictability in child contact disputes is exacerbated when the judge/ sheriff moves from an impartial judicator (contact action) to an interested party in the contempt action (See JDB v Mrs JEG v Joel Noel James Andrew Solicitor [2010]; SM v CM [2017] which blurs the boundaries between two separate legal issues. The change in judicial focus also leads to a change in the law from the '*best interest of the child*' to allegations of "*disrespecting the authority of the court*" with different *legal processes, standards of proof and sanctions* which are not always obvious to parents.

Judicial justification for contempt of court decisions (in child contact disputes) also do not appear to be constrained by legal precedent, case law or the evidence presented

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to court. Instead, judicial decisions appear to be influenced by judicial ideological preferences and prejudices (Hasnas, 1995; Unger, 1976). This can be seen in the case of *T.A.M v M.J.S* [2009] whereby Sheriff Davidson accused one mixed raced mother of '*inciting anarchy, undermining the rule of law, and causing their child distress*'. This suggests that this mother was powerful, so powerful in fact that she alone presented a confrontational and real challenge to the authority of the court. In his judicial diatribe Sheriff Davidson, consciously or unconsciously provides an insight into his professional ideologies which can be understood as being misogynistic and imperialistic (comparing the mixed-race mother to Robert Mugabe). In another case *JDE v SDW* [2014] Sheriff Jamieson reveals professional frustration and misogyny in the way in which he ridicules the mother for what he perceived as her inability to explain a judicial determination to her seven-year-old son. In both cases Sheriff Jamieson reveals that judicial decisions are not impersonally and objectively decided according to define legal criteria with standards of sense and fairness (Bix, 1995, p79) but are the value laden ideological views of the Sheriff/Judge. But legal rulings are pronounced in such a way (technical legalese, cross referencing an array of case law and legislations) to make the decision look inevitable or to have decided the 'truth' (Smart, 1989) or 'single right answer' (Hansard, 1995, Unger, 1976) through indeterminacy and judicial theatre.

MOTHERS IN THE LAW

Just as Smart (1989) claimed that women's lived experiences in the law are routinely rejected, discounted, or translated into legal relevance's. This chapter found that mothers' allegations of domestic abuse and child abuse were frequently rejected by the judiciary (child abuse *T.A.M v M.J.S* [2009]; *JDE v SDW* [2014]). And were instead repositioned by the judiciary as posing a confrontational challenge to the '*rule of law*', '*being deceitful*' or causing '*anarchy*' to justify their rejection of allegations of abuse (Birchall & Choudhry, 2018; Neilson, 2017; Radford & Hester, 2006; Smart, 1989) and to validate their legal decision making (*T.A.M v M.J.S* [2009]; *JDE v SDW* [2014]). Mother's experiences in the family courts are surrounded by *inequality, power struggles, coercion, acts of criminality, and of domestic and child abuse*. In the case of *AG v JB* [2011] the mother made claims of molestation, and her GP confirmed she was suffering from anxiety and depression. Yet the Appeal Court rejected the (*personal and professional*) evidence and instead the mother's non-compliance with the court order was presented by the judiciary as a '*grave*' confrontational challenge to the authority of the court. This example suggests that there are clear (evidenced) alternatives (Unger 1976, Smart 1989) to allegations of non-compliance (*the test of which is intentionally, wilfully and inexcusably posing a confrontational challenge to the authority of the court*) which include domestic violence a criminal offence and mental ill-health. But as in this case, mothers who claim abuse are often punished (Birchall & Choudhry, 2018; Neilson, 2017; Radford & Hester, 2006; Smart, 1989).

None of the cases reviewed in this chapter establish determinacy of legal reasoning (Unger, 1976) they do challenge the view of H.L.A Hart who claimed that "*officials who are holding a responsible public office, will exercise their discretion responsibly having regard to their office and "not indulge fancy or mere whim"*" (Shaw, 2013, p706). And point to the indeterminate use of contempt of court by the judiciary to enforce child contact orders and it appears from the case law that this does presents

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competing and contradictory outcomes for mothers and children which arguably aids fathers (contact) and the judiciary (power).

PUNISHMENT & APPEALS: CIVIL IMPRISONMENT

The punitive aspect of contempt of court is hidden in plain sight through ambiguous, complex, and intertwined legal processes and procedures. Within the case law members of the judiciary claim that they had no alternative but to punish the mother (SM v CM [2017]). But the appeal case law reveals the impossible position some mothers argue they are in as they raise child welfare concerns (see CEF v MLH [2014], TDE v SDW [2014]) or seek to protect their children from harm (case ref unknow Church of Scotland Minister) or allege domestic abuse (see T.A.M v M.J. [2009, AG v JB [2011]). However, claims of child and domestic abuse, (crimes) in the appeal courts are also met with hostility and rejected (once again). It appears that in the most senior courts, domestic and child abuse allegations are treated with contempt by the judiciary. This accords with (Whitecross, 2016) who claimed that judicial attitudes and understanding of domestic abuse was a barrier for women and children in Scotland (see also RK v AG [2021]). Similarly in England and Wales judicial attitudes were also identified as a barrier for women and children. As was demonstrated in *chapter three*, by Justice Russel in JH v MF [2020] who found that mothers were being subjected to outdated and plainly wrong views sexual abuse in the family courts and in Re H-N Others (Children) [2021] the court found that judges had failed to properly determine the legal issues before them (by removing allegations of abuse).

Removing allegations of abuse from the dispute and then resorting to the extreme and harsh punishment of civil imprisonment (T.A.M v M.J.S [2019]; AG v JB [2011]; SM v CM [2017]) in respect to non-compliance with child contact orders, highlights the life changing implications of misogyny and inequality in the family courts. The way in which women are punished and sent to prison in these disputes also supports the observations made in *chapter two* that individuals are more likely to be sent to prison than for example, editors, journalists, government ministers, business leaders/ executives, and prison governors. And as Unger (1976, p29) argues “[i]f extreme consequences cry out for a qualification of [this] standard, this may be because they highlight a deficiency”. Surely incarcerating a mother (experiencing abuse) for a civil wrong highlight a deficiency in the law.

CONCLUSION

In conclusion by drawing upon Unger’s (1976) five points of indeterminacy, the case law reviewed in this chapter reveals contempt of courts indeterminacy obscures the real justifications for enforcement (prejudice, bias, misogyny), and substitutes a false justification (due administration of the law), which is made to appear intelligible, defensible, and comprehensive as a result of the legitimization of the law (judicial decision making, legal processes and procedures, dominant social ideologies). The implications of this are that mothers’ experiences are routinely rejected or treated as insignificant, irrelevant (Smart 1989) and are constrained by judicial (political and personal) ideologies of women and motherhood which maintains inequality (MacKinnon, 1983; Smart, 1989; Unger, 1983, 2014, 2017).

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Chapter Summary

In summary contempt of court is a technical, complicated, and indeterminate law. The case law in this chapter illustrates both the impact of its indeterminate characteristic and the application of the law on women and child in family contact dispute. There are serious concerns linked to contempt of court as an enforcement tool which can be summarised as arising from the incoherence of contempt of court as a law, gender inequality, judicial prejudice, the treatment of domestic abuse and rejection of claims of criminality. The case law also highlights the structural limitations of the law. The next chapter will focus on the interviews with mothers and will discuss their experiences of child contact from the breakdown of the relationship to the cusp of enforcement. These interviews are punctuated with opinions from legal professionals and Supreme Court Justice Lord Wilson.

CHRONOLOGICAL MAP (SOCIAL-LEGAL)

5 CHRONOLOGICAL STAGES

CRITICAL FEMINIST INDETERMINST PERSPECTIVE

1: Family Relationship & Family Breakdown



Family Relationships, Parental Relationship Breakdown, Welfare Principle (The Child)

2: The Legal Perspective: Child Contact



The Indissolubility of Parenthood, Child Contact Enforcement, CB7, C79, CB5, Penal Notices

3: The Court process Contact & Enforcement



Civil / Criminal (blurring boundaries), what constitutes contempt, Court orders problematic (ambiguous, vague) accessibility issues in court orders, Right to a Fair Hearing, Test for contempt, Contempt process

4: Punishments & Appeals



Sanctions for contempt: Contempt sanction process Domestic Abuse/ Child Abuse, Childs understanding of parental dispute/ contact, prolonged litigation, Incarceration, purging contempt, judicial hysteria, breach of Human Rights Act

5: Impact on Mother & Child



Loss of Liberty, voiceless mother and child, structural limitations in the law, prejudice, inequality, ongoing relational impact of a finding of contempt. Implications for the child

Change in focus from welfare of the child to protecting the due administration of justice

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CHAPTER FIVE: DEMYSTIFYING CONTEMPT OF COURT



CHAPTER SIX

CENSORING ABUSE IN THE FAMILY COURT

CHAPTER SIX: CENSORING ABUSE IN THE FAMILY COURT

CHAPTER SIX

Censoring Abuse in the Family Court

This is the second of three findings' chapters and the first of two that will present the voices of Mothers [M] who had experienced domestic abuse in child contact proceedings. These experiences are mapped chronologically from the breakdown of the parental relationship, through various stages in the contact litigation, to the cusp of enforcement. The [Mothers'] experiences are interspersed with the opinions of legal professionals [LP] in Scotland, England and Wales, and Lord Wilson, Supreme Court Justice. Throughout this chapter [Mothers] discuss how their concerns and allegations of abuse were handled by [LPs], the Judiciary and Non-legal Professionals, revealing unrelenting and insidious struggles underpinned with inequality, prejudice, fear, and shame. [Mothers] claim that they were silenced, ridiculed, and marginalised in child contact proceedings designed to determine '*what is in the best interests of the child*'. This chapter provides a foundation for enforcement to be discussed in chapter seven.

Parental Relationship

In this thesis, all [Mothers] had been in a heterosexual relationship with their child's father and were the residential parent after the relationship had ended [as were 90% of online survey respondents]. All [Mothers] interviewed indicated that domestic abuse was the reason for the relationship ending:

M: I was married from 2005 onwards and my marriage started to break down around 2010. I separated in 2014 and my ex-husband had become ...He had been abusive psychologically and then physically towards my daughter and he told me that if I separated from him, even though he wanted to separate and told me he didn't love me, that he would destroy me and take my daughter away from me.

M: My solicitor sent x a letter asking him to leave the house as our marriage had broken down. For 5 weeks he refused to leave, although he did take many belongings to his mother's house. He left for work at 7 each morning and came home at 10.30pm. My dad spent every night on the playroom floor to make sure we were safe.

These quotes reveal the difficulty [Mothers] experienced in ending the parental relationship, and how the family court may be used as a threat which may also be indicative of a pattern of abuse. This supports previous research by (Neilson, 2017, Douglas, 2018) who found that at the point of separation domestic abuse may escalate and become volatile and unpredictable.

All [Mothers] interviewed indicated that they had tried to reach an informal parenting arrangement with their ex-partners regarding the child(ren) prior to and after the ending of the relationship. In all [29] cases the child(ren) initially lived with their [Mother] but facilitating contact was challenging:

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M: Always, it was control, yeah. If it was offered, and if I pushed, and pushed, and I was like, please come and see her, please come and see her, he would back off. And if I withheld her in any way, that's when he would come forward, it was like a game for him.

M: Well there wasn't really an agreement. When he got in touch and asked to see my son I would agree, but then it got to the point where he was sort of not contacting me for like six to eight weeks and then contacting me to say that he wanted to take him like away back up to XXX...

M: Well, it was supposed to be that he would see X every Saturday, but he wasn't reliable. He wanted to do his own thing and I was just to change my plans to suit him.

These quotes suggest that fathers were using contact arrangements as a form of control, which accords with evidence from (Arnold, 2015; Radford & Hester, 2006; Neilson, 2017). Most [Mother] explained that they had concerns about their child(ren)'s welfare and their own safety:

M: I was still very scared of him, so I facilitated contact. In hindsight, I wish I had stopped contact then because I had a very good case to have stopped it, but I was still very scared of him, so I allowed contact to continue. And then over the next year, the children came back. They were, at the time, ages four to five and two, and they came back reporting incidents that their dad had hit them. At one point, he'd put them out on the fire escape of his home and shut the door on them, and generally calling them names, not putting them to bed, not having beds for them at all. So I wrote him a letter, explaining that these are all the things that the children had been reporting and that I was really concerned, and I asked him to not do those things anymore. He refused, and so I stopped contact and he took me to Family Court.

What can be drawn from these quotes is that maintaining contact once the relationship has ended can be fraught with difficulties. In this thesis some [Mothers [9] were also facilitating multiple simultaneous parenting arrangements. One [Mother] felt that this was extremely challenging as she was trying to manage the dynamics in the different relationships:

M: I've got four kids, three to one dad, and one to another. The first set of kids that I've got three to, we've been separated for over ten years. He got with a new partner, and within about two years the relationship between them totally broke down. She wasn't allowing him to come and see the kids, and things like that...with the other child, that I had to another man. She was about a year old when we separated. I was through Women's Aid, and things like that. And I had gave him contact at the weekends, but there was no response, and my lawyer said, they couldn't force anybody to see a child, and I said, that's fine.

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[Mothers] who were facilitating multiple contact arrangements claimed that [LPs] tended to compartmentalize relationships, without fully appreciating the overlapping difficulties for [Mothers] complying with multiple contact orders. Despite the difficulties, all [Mothers] suggested that they felt social pressure to ensure their child maintained a relationship with their father but wanted to do so with protective measures in place. However, as a result of concerns for their child, the continuation of abuse, the unreliability of the father, and threats from the father of taking the child away, all [Mothers] in this thesis sought legal advice.

Pre-Court Legal Advice

The pre-court legal advice [Mothers] were initially given can be categorised into four key themes: Presumption in favour of contact, Removal of Domestic Abuse, Mediation, and Compliance. These themes did not vary between jurisdictions.

1: Presumption in favour of contact'

In relation to the '*Presumption in favour of contact*,' all [Mothers] in this thesis, claimed that LPs initially suggested that [Mothers] should consider a shared parenting arrangement. One Scottish [LP] explained:

LP: I know there is no presumption that an order should be made and there is no presumption that child should have contact with their parent. But that's not how it feels when you're in court I have to say. There does seem to be a let's start a 50/50 and eek that out a wee bit. That does seem to be... And a lot of lawyers I've spoken to say that as well. There is no presumption in law. But there seems to be almost like a factual presumption that it is better for a child to have contact with a parent

Some [Mothers] indicated that they found this advice frustrating as this advice to offer contact, did not take the difficulties they had experienced prior to seeking legal advice into consideration. The initial legal advice seemed to be influenced by a desire to appease the courts' expectations of parents:

M: Before we got to court, I was told that I must offer contact and I was told that I could offer different points of contact such as at the Family Centre. But I was told that I must offer contact from the very outset from my own lawyer.

M: I was told the court would not look favourably on me if I hadn't offered contact. I said I had but it wasn't working. He [solicitor] told me I had to make it work.

M: She said you don't want to be the kind of mother who doesn't encourage contact, you must make it work.

These quotes reveal that the court has a negative perception of [Mothers] who do not support contact.

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2: Removal of Domestic Abuse

These perceptions also had an impact on the advice [Mothers] were given about domestic abuse, as [LPs] told [Mothers] not to mention domestic abuse while negotiating contact arrangements:

M: And I said, well what about the fact that there's domestic abuse? And she didn't seem...she seemed to want to put a lid on that. But I...looking now, knowing lots of cases, I think she wanted to put a lid on it because she knew it wouldn't get anywhere. And perhaps it would deteriorate quite quickly. But at the time, I didn't understand that. She didn't want to represent me saying there was any domestic abuse

M: I was told don't be emotional, don't raise this because it will look badly on you. Don't bring it up because they don't care, and you'll just look like you're doing this wrong. I was scared, then, to bring it up.

These are striking comments which reveal [LPs'] views of the judiciary, portraying them as uncaring and repelled by [Mothers] who were emotional or who made allegations of domestic abuse in contact disputes. One [Mother] explained that her [LP] felt the courts would not consider domestic abuse:

M: he asked me if he had been charged with abuse, he wanted a conviction. He said without a conviction, the court would be furious, if there was no contact. He said even if he had a conviction, the court still expected contact to be encouraged.

M: I asked him, to protect us, he said the law isn't interested, all they want to know is are you stopping him from seeing his kids or not. He said you need to be sensible and not a hysterical woman

From the quotes above it appears from the data that domestic abuse is only considered as an important fact if there is a conviction. And even then, it appears that the court still expects [Mothers] to encourage contact. It also appears that it is the [Mother's] LP who is using the term 'hysterical' and it is not clear from the quote whether it a trivialization of abuse or advice in terms of how the [Mother] would be perceived by the court. In this instance the [Mother] believed it was the trivialisation of the abuse. Another [Mother] claimed:

M: so there's obviously loads of police records, loads of stuff had gone in. But they seemed to completely dismiss domestic abuse. You know like, don't care what happened between you, that doesn't mean it affects the children. Well of course it does. My children were directly affected.

In this quote the [Mother's] assessment of her situation is that [LPs] perceive domestic abuse as an adult issue which does not affect the child. This accords with research by Callaghan et al. (2015). Another [Mother] explained:

M: They tried to minimise it so, I mean, the domestic violence got worse after the separation.....but their barrister at the time, he listened to a couple of recordings and he said that he wasn't, he minimised it so that

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they tried to reduce the domestic violence..... I mean I was paying one of them a thousand pounds an hour including VAT, and they took all the details and spent a couple of hours recording my domestic violence and then they turned around and said no, we won't mention it, or they would minimise it, or they wouldn't add it in.

This quote in particular highlights how legal firms can profit from [Mothers] desperation to keep their child[ren] and themselves safe. Throughout these quotes [Mothers] articulate their desperation to have their experiences and concerns considered by the courts when making contact arrangements. However, removing domestic abuse at the pre-court stage can create significant challenges for [Mothers] later in the litigation. One [LP] in this study explained that if an [LP] attempts to raise domestic abuse later, this gives the impression that the [Mother] is being disingenuous, and the court is more likely to dismiss her claims as being untrue:

LP: Well, that's the thing, you have to amend. If it's not in the pleadings you have to amend them in, or adjust them in, depending on where we are further down the line. And it is my experience certainly that having done so, there are suspicions by the sheriff, suspicion by the judge, suspicion by the other side, why wasn't this pled earlier? So I've had that on a few occasions where I've been brought in later on and I've had to say well, this is clearly a huge issue here? Why's that not been raised? And I mean one solicitor said we wanted to be the good guy here. We didn't want to say that he was abusive even though we've got evidence that he was. It's like well, that's not helpful because now we've got to put it in because the child's picking it up at contact, how do we deal with that?

It was also highlighted by another [LP] in this study that:

LP: It seems to me that solicitors are not brave enough at the moment to make those averments (abuse) because you can get an absolute kicking from the bench. You really, really can. And I recently had a kicking in a case that was actually a domestic abuse case. A decision of X and ... I got an absolute booting from him.

The quote above, illustrates the difficulty for LPs who raise domestic abuse in the family courts, and that [LPs] view this as a risky action to take. It appears that this public lambasting of an [LP] from the bench acts as a deterrent and is a critical factor in their decision to remove domestic abuse from the pleadings. Which may suggest that the court is divided on the issues of domestic abuse. The quote above also reveals that [Mothers] must be believed before a [LP] will raise abuse in litigation. One [LP] also noted that legal professionals with expertise in domestic abuse were limited and "fewer and fewer legal professionals [were] operating in this area" since legal aid had been withdrawn from family cases in England and Wales. Thus, [LPs] are making decisions about abuse, with no experience of handling these issues in civil litigation.

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3: Mediation

This inexperience may in part explain why all [Mothers] are encouraged by their [LPs] to attend mediation [1] as an alternative to court action. It may be argued that legal scepticism about domestic abuse may influence [LPs] advice for [Mothers] to attend mediation. Two Scottish family [LP] explained:

LP: I think the mediation people know it and they've been busy saying, no, no, it's not that they'll never touch domestic abuse; but it's if one of the parties wants to get out of any thought of mediation, they just raise this domestic abuse thing. And we've now of course exacerbated it since the 1st of April with the new domestic violence legislation, and so broadening the definition of domestic abuse pulls more people out of mediation.

LP: it's really hard to know where it's real and where it's not. I mean obviously you don't want to put people in a difficult position, obviously if there's a real domestic abuse issue – and there are horrible domestic abuse issues – you don't want to do that. But equally you don't want to allow somebody to prevent the relationship developing by raising something which is really pretty spurious.

What these [LPs] reveal is the perilous position [Mothers] are in; abuse is not readily accepted and thus [Mothers] are encouraged to attend mediation or (otherwise) run the risk of being positioned as a 'manipulative and dishonest' [Mother]. These issues also mean that mediators are unaware of abuse allegations, and, as such, are ill prepared to support the parties. In recent research 'mediators report[ed] having too little knowledge of particular problems and sources of conflict such as violence [and] child abuse' (Nylund, 2018) to be supportive to parents in high conflict cases or in instances where domestic abuse is alleged [2]. As such, mediation provides little or no support for [Mothers] experiencing domestic abuse. One [LP] did suggested that the benefit of mediation early on, filters out the types of parents that can work things out:

LP: I mean the parents should be sorting these things out. And I think one of the great successes of the last 20 years is persuading parents – more and more parents – to sort these things out for themselves; okay, with help, and that the success of mediation, and so courts are just dealing with the bottom end of things where parents haven't managed to sort it out.

The idea of the 'bottom end of things' may suggest that [LPs] may be judgemental about parents in contested contact cases. This may also be indicative of the perception the judiciary may have about families in the Family Court.

¹ In England and Wales, as part of the pre-court protocol, parents are directed to mediation. In Scotland, mediation is also encouraged prior to court and if the LP has removed allegations of domestic abuse then the.

² It is also worth noting at this junction that, despite awareness of the complexities of the issues outlined above, a Judiciary UK report for England and Wales suggests that if a court orders mediation, a failure to comply with that may attract enforcement procedures and sanctions.

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4: Compliance

In terms of [LPs] practice and the clarity of information they give to clients in relation to compliance. One [LP] suggested that given litigation is so precarious and unpredictable it is imperative that [Mothers] understand at the pre-court stage, that if mediation is unsuccessful and the contact dispute proceeds to court, any contact order would be a binding order and that compliance was non-negotiable and in effect [Mothers] lose all control:

LP: So if you know that is what you have to do and you have to obey those orders, and you refuse to do so, and you know what you're doing is deliberately trying to get round the order, then you may be in quite a lot of trouble with court. And in order for that to happen then the court will...a contempt of court might be launched by the other side, or the sheriff or judge might do it themselves. And they'll say well, you have deliberately gone against my order of court. That's in the child's best interests. Your actions are not in the child's best interests, you are deliberately going against it. And punishment may ensue as a result.

While [Mothers] gave varying accounts of the pre-court information they were initially given by LPs about compliance and enforcement, all were aware that the child's residency could be changed, and only a very few believed that they could be sent to prison:

M: He said that if I didn't do what the court said, then I could go to jail

M: She said that I could go to prison or that I could lose X, they could change X's residency

All [Mothers] interviewed agreed that they did not know how the compliance would be sought if they did not comply. Scottish [Mothers] did not know they could be sent to prison and were vague about the information they were given about the legal process. Some felt that their [LPs] were trying to coerce them into adopting a false position and they felt compromised. Others felt that their [LPs] responses reflected a lack of confidence in the judicial process. According to [LPs] data it is important at the pre-court stage that [LPs] do everything in their power to avoid family issues proceeding to court as one [LP] highlighted that there was so much variation in the court:

LP: ..there's also a huge variation between how Sheriffs deal with cases. Some of them will be very sympathetic to both parties. Some of them will be, there is a gender bias and all it does is just perpetuate this horrible, polarised situation where one person is seen as being, holding the power because they've got the child, the other person has the power of an order and they just clash.

Another, [LP] believed that the litigation was so uncertain that it is impossible to predict outcomes with any certainty. It is the judiciary who are in control and as such:

LP: Really you might as well toss a coin sometimes.

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These quotes expose the risks and indeterminacy in the law and reveal that the pre-court legal advice [LPs] provide to [Mothers] is often based on experience of varied and unpredictable judicial decision making rather than on the legislation.

The Courts' Perceptions of Mothers

As a result of difficulties with their post-relationship contact arrangements and domestic abuse, all [Mothers] in this study became parties to a contact action in the courts. They were embarrassed, apprehensive, and frightened by the prospect of going to court:

M: I was mortified walking into the court, I always thought courts were really from people who had broken the law. I was terrified, I thought I was in trouble.

M: My mum came with me; we were both shaking. I don't think we slept for weeks before. No one in my family had ever been to court before. I was petrified.

M: The thing that I fear is that first court case that I ever went to where that judge was horrendous, really horrendous. And that's what I fear is if I was to walk back in a courtroom... You know that first one was just horrific. It was horrific.

Some [Mothers], raised an interesting point in terms of how they believed the court viewed parents who bring these issues to court:

M: If you're a couple, in their view, warring, which has never...I've never argued with him, I was too afraid. You know, it wasn't that kind of relationship. He definitely had all the control. And they view you as this warring couple out to get each other. Well actually in domestic abuse circles, you...if you look at the people who end up in family court, most of them have got issues like...you know, perhaps they've been in jail, there's drugs or domestic abuse. You know, everybody else sorts it out amicably.

M: They treat you like criminals as if you have done something wrong, rather than listening to your concerns.

These [Mothers] believe that the Family Court is a place of prejudice, stigma and where the judiciary view civil disputes through a criminal justice lens. This perception was shared by one Scottish [LP] who explained:

LP: Well, the trouble is that you've got how many sheriffs across Scotland? Some of them specialists in family law, some of them criminal practitioners in small courts, who are the only people there. And it really calls for a high level of skill.

This suggests that the judiciary may approach family matters inappropriately. Some [Mothers] also felt that the judiciary had an opinion about the legal firm and [LP]

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representing them and believed that the relationship the [LP] had with the judiciary had a direct impact on their case:

M: The sheriff didn't want to know. My solicitors were always interrupted and stopped when they attempted to explain the situation. She didn't want to hear what I had to say.

M: She didn't particularly like him, he was a rambling wreck, I couldn't understand him either.

Other [Mothers] were unable to afford legal advice in England and Wales as a result of legal aid cuts, and had no choice but to be Litigants in Person (LIP) from the outset:

M: They told me the case was going to cost £10,000. There's no... I was on benefits and working 11 hours a week. There was no way I could afford it.

LP: for people to sort of access justice in family law it's really hard because it's so expensive

LIPs believed that they were vulnerable as they did not have the funding, expertise or knowledge to present their cases effectively. They also claimed that the judiciary viewed them negatively, and were dismissive and disrespectful:

M: I think, in the first instance, it was overwhelming, but then, obviously, as it progressed, it was more, as I learned about other people's experiences and it was almost told, don't be emotional, don't raise this because it will look badly on you, don't bring it up because they don't care, and you'll just look like you're doing this wrong. I was scared, then, to bring it up.

M: The court do not like people voicing their opinion and when you do, they take the hump with you. Before you know it, they are rolling their eyes when you walk into court as if to say what she is coming away with now. It is not child focused at all.

M: The more I go through the system, the more I'm learning about the court. But, you know, you don't know about the court. You know, that very first one, I learned a hell of a lot. I got railroaded, it was a vicious courtroom. And I learned a hell of a lot within that first instant. But I knew...I didn't know the lion's den that I was going in to and dealt with it completely wrong.

What [Mothers] are expressing are the relentless demands of navigating Family Court processes while combatting negative judicial attitudes towards them, none of which appear to be child focused. The analogy to the 'lions' den' highlights that they are struggling to survive, by trying not to say the wrong thing and to hold back their emotions. They are also financially constrained in preparing and presenting their cases. As Trinder et al. (2014) also found, all the LIPs felt vulnerable, even lost in

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court without the support of trained [LPs]. LIPs felt marginalised and dismissed by the judiciary when contact decisions were being made:

M: I was actively threatened if I made any suggestions

M: She spoke to his lawyer, asked him what he wanted, turned to me, and asked me if I understood the terms of the contact which she agreed should take place. I didn't get a chance to say a word.

At the same time, when they reflected on the initial stages of the litigation, it is clear that they had regrets about being unable to stand firm and avoid being browbeaten:

M: I didn't have representation, and I feel like, looking back, knowing what I know now, I could have done things so differently. And I just felt like, looking back, I feel sorry for me at that point. I was like, completely bulldozed, and completely, yeah, I didn't have any opinion, and nothing was, there were no subtleties to the agreement, it was just, you do this, you do this, that's it, done, yeah. It was so...if that makes sense. I wished I'd had more courage to speak up about things.

The feelings of helplessness are exacerbated for LIPs who have mental ill-health as they feel the added burden of navigating technically complex and incoherent processes.

M: And if I mention that my ex-partner is a violent person, then I'm the one who's reprimanded for that because I'm not supposed to bring it up, and yet no one else is taking notice of that, so that sort of freedom of speech is gone. And without having all the notes in front of me, the human right...or adjustments, because of my PTSD, and they've just denied them

All [Mothers] felt that they had a dual role: one of advancing their child's position and a second role of defending themselves from unsubstantiated attacks. They felt that they had become one and both had been marginalized:

M: I didn't know what was happening, was I my child's representative or was my lawyer? I had no idea what was going on?

M: I tried to explain that I worked on the days they wanted to arrange contact, but I was told it wasn't about me it was about my child. It was so, so, so vague and confusing.

Overall, all [Mothers] in this study felt that neither their child's voices nor their own were included in the making of the contact order.

The Court Order

The court order for contact is a critical point in the litigation, as it becomes the basis for enforcement as discussed in *chapter five*. All [Mothers] reported that they did not feel that contact issues were properly dealt with, and many of the challenges they were facing had been erased from the litigation. All [Mothers] interviewed and 99% of

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those who participated in the online survey disagreed with the terms of the court order made, seeing the order as coercive:

M: I was forced to sign a consent order as if I didn't, I was told it would be worse for me.

M: You have no choice.

M: We had no choice as the judge said if we didn't come to an agreement the alternative would be harsher

The lack of inclusivity and agreement in the process led some [Mothers] to believe that the contact order was made entirely for the father's benefit. They felt a real sense of inequality that they were targeted by the court order:

M: It was purely for me because I was the one that had to make her available. And then, I very quickly learned that he didn't have to have contact if he didn't want to. So, it was purely for me, yeah.

M: I understood it was for me. Because I was the one that had to provide the children for contact. And I was the one that had the concerns, you know, that it wasn't safe

Only one [Mother] believed that the order was made for both parties:

M: He has come out with the understanding that that court order is in place against me. I understand that a court order is...you know, I write contracts within my job, I understand that is a contract ordered by the court for the two of us and we're both to comply to it.

Lord Wilson confirmed that the order is made for the father's benefit:

Lord Wilson: Well, the father's asked for an order, so he's going to comply, isn't he? So, the father's compliance is a given. We draft our orders in England and Wales in this sort of way: "The mother do produce the child for contact at McDonald's in high street at 11am every third Saturday of the month. And be at McDonald's to collect the child from the father at 6pm." So, we do phrase it in terms of 'the mother must do'.

This was supported by [LPs] who saw this as problematic:

LP: But the fundamental issue here is though that Sheriffs cannot, for example, make an order to say to, for example, a dad, you need to turn up on time. And that sounds like a really trite example, but often when I'm doing child welfare reports where there are issues with contact, it is a two-way street. So mum might be saying, he's not turning up on time. The wee one is getting upset. How can I responsibly obtemper this order? But the Sheriff can really do nothing about that because they can only make prescribed orders. They cannot, and I've tried to get to them make directions about things, they're reluctant to do it. So where we've got a system that basically says, one person seeks an order and that person

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can then enforce it, but there isn't any reciprocity, there is always going to be a power imbalance and there's always going to be a problem.

What this quote outlines are the structural limitations of the law and how it is unable to adequately deal with contact arrangements, which results in an ineffective, blunt, and technical court order:

LP: It's not thought through. You often get quite a naïve decision that says contact is in the interest of the child, contact can take place every Saturday afternoon, or from Friday night to Sunday night, and therefore I'm going to make the order; without thinking through.

The language used in the orders made also created problems:

Lord Wilson: you know, I find it quite difficult to understand some of the Scottish procedures because your language is so alien to me. And when I say that to Lord Hodge and Lord Reed, they say, well English legal language is just as bad for as Scottish law. And I say, it's not, it's much clearer. And they say, no it's equally incomprehensible

LP: Well, it depends, doesn't it? It depends on how the order is framed; and you'll see court orders framed in very different ways. I think that court orders should be clearly framed and in a language that's easy to understand. And sometimes you look at some of them and you think, I beg your pardon, sorry. And then you're looking at the level of understanding of the recipient, and then the level of help that they're getting to understand.

M: No. No, it was very poor language, very complex and there seemed to be the expectation that you would just understand it. It took a lot of pulling apart, well what does this mean...yeah, it was very difficult.

The lack of clarity in the court order and the fact that they are highly technical is further exacerbated by an issue one [LPs] raised in relation to court orders referring to previous contact orders without restating the terms of those orders:

LP: I actually think lawyers could do a much better job when it comes to just putting things in A, B, C language for clients. I mean they don't have a law degree; how can they be expected to understand? But then there's a huge issue around Legal Aid. So, lawyers just don't have the time or the resources to sit down with a client, or put it in writing and say, this is what this order means in real terms, and it refers back to the order that was made six months ago. So, we take what happened six months ago and then we add in the order that was made. That's the kind of thing that I try and do, but you don't always have the time or the money or the resources to do it, and that must be far worse if you're in the legal aid system.....

LP: The clerks often draft the orders or draft the Interlocutors so they will tend to just refer back to the order that was made on X date. I don't know how much drafting of Interlocutors the Sheriffs actually do.

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These quotes once again reveal the implications of limited resources, technical court orders and the expertise of the staff drafting the contact orders. Despite the difficulties with the contact order, the court expects any order it pronounces to be adhered to and any failure to comply with the terms of the order may constitute contempt of court.

As discussed in *chapter four*, in England and Wales, contact orders do contain penal notices, but the penal notice does not state if it applies to both parents:

M: It was so extreme and frightening, a penal notice on a document relating to my child.

M: I just understood it was for my benefit, it wasn't explained, it was just there....

M: The court attached penal notices to the contact orders, so serious consequences for me if I did not comply. No consequences at all if father breached orders which he did regularly

The penal notice appears to act as a tactic to frighten [Mothers] but what is also clear from the interviews is that they didn't understand how the penal notice would result in them losing their liberty. [Mothers] in Scotland reported that the contact order did not specify what would happen if contact did not take place, they just knew that they were equally frightened by the prospect that they could be sent to prison. Similarly, 41% of the respondents in the online survey said that the court order did not explain what would happen if either party failed to follow the court order. The anxiety about prison was intensified as most [Mothers] said that their court order was not immediately available or that they never received it. This was an issue recognized by one Scottish [LP]:

LP: I think that's fair because interlocutors sometimes go astray. They do go astray. Courts aren't...I mean they're very good at sending them out normally, but I mean especially dealing with Glasgow's sheriff court for example, which is the busiest court in Europe, things do go astray. They get sent to solicitors, it's all very old fashioned.

Another issue with the court order was that a few [Mothers] reported the absence of final orders. This is particularly problematic as it is difficult to appeal an interim order:

M: We had interim orders on several occasions over the years and never had a final order.

What this means is that [Mothers] must lodge further documents seeking to change the interim order or push for a hearing on evidence before being able to appeal the erroneous court order. As such, problems with contact arrangements were further exacerbated by additional complex legal procedures.

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Domestic Abuse & The Court Order

Some [mother's [11] referred to the court order as being a weapon which legitimized the continuation of domestic abuse. They reported that domestic abuse escalated after the court order was put in place. This is supported by several research studies which suggest that '*much violence is directly connected to child contact arrangements*' (Harne & Radford, 2008). In this study 54% of the online respondents also said they were concerned about their own safety. One [Mother] said that she was physically assaulted during contact:

M: He jammed my hand in the door and then said, I'm not going on the domestic violence perpetrator programme and by the way, I would do it all again in a heartbeat, and then let go and slammed the door in my face, in front of the children.

Another [Mother] explained how her ex-partner tried to intimidate her with threats of physical violence:

M: Well it sounds really ridiculous, because when I think about it now, this is seven years ago when this started, it was like, he used to run his finger over his throat at me. Which sounds more cartoony now, when I think about it, but at the time, it was really quite horrible when somebody is doing that and looking at you. And with the most evil, contemptuous look that they've got, it's just horrible. He would call me all the horrible words, like, 'cunt,' and just hideous stuff, he was just, he's just hideous.

Hester and Radford (1996) found that contact handovers were particularly difficult for mothers and the potential site for further violence. In addition to threats of physical violence, some [Mothers] reported damage to their property during or post contact and in other cases [5] it was a persistent feature of the continuation of abuse:

M: He was then outside my work, I had to go to my car, and it had been keyed.

M: he tried to kick the door in, that's when the police got more involved. And we did have alarms at that point, but this was the Police Protection Unit, and he was lifted for that, and there were bail conditions....

M: Tyres slashed, windows smashed, deliveries, taxis, you name it.

M: I had...my tyres were stabbed repeatedly over a course of about 15 months. And in the end, I used the same garage, so that there would be evidence of it, I guess. And on one of the occasions, they actually found the knife blade inside the tyre. But again, we don't know it was him.

In this study [Mothers [20]] reported incidents of stalking:

M: I mean, it felt like everything. So, we had, that police action, we had, like I had him everywhere, I went to work, he's there, you know, my phone, social media, going down the street, like, it felt like he was like a

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hologram, because he was everywhere. And it was just like, and it's just, it's crazy. And the amount of people who would say, I think I saw him, and I was like, yeah, you probably did, you know.

This quote and the use of the term 'hologram' reflects a feeling of being trapped, unable to escape their ex-partners presence. Some [Mothers] explained that if they reported the stalking, and the Police failed to successfully charge their ex-partner, the court would view the lack of prosecution as an example of the [Mother] making false allegations. In addition to stalking and harassment, some [Mothers] reported that their ex-partner used social media platforms to discuss personal aspects of the contact action, which they felt was humiliating for them and their child:

M: And there were things all over social media about me, he was saying things to, like, friends, or people, you know, maybe not friends. It was just, so I was getting abuse from quite a lot of different angles at that point. Yeah, it was quite hard going.

M: That there was a child welfare hearing taking place next day and there was a lot of people that like...that it was linked to, like Families Need Fathers and there was a lot of people in response to that had wrote quite...I think they were posting quite a lot of nasty things and obviously with my experience with my ex-partner as well, I felt...I didn't feel safe in my house. But the police said that they couldn't do anything unless an incident happened that they could then relate back to that message.

This quotation is indicative of an abuse tactic used to diminish the [Mothers] reputation in public and to maintain control. The fact that the online harassment also includes links to 'Families Need Fathers' is indicative of a highly gendered campaign of isolation and harassment. In one case the [Mother] reported the public Facebook posts detailing legal proceedings to her [LP] and she was advised that her concerns did not merit judicial intervention, despite the post being part of a wider campaign of harassment and abuse (none of which would or could be put to the judiciary in evidence). Some [Mothers] argued that these tactics not only had a direct impact on their own right to privacy, but also their child(ren)'s:

M: Recently he made a public Facebook post in which [he] shared the court documents that he was lodging. It had my name and address, my son's name and obviously address and it had like...a few separate people actually contacted me and sent me screen shots and on the screen shots it had a police incident number and like the number on this date and stuff, so yeah

M: There's a thing about embarrassment, and the whole thing about being in an abusive relationship is, you don't tell anyone, because you're so embarrassed. You're so embarrassed that you've let yourself, or you feel like you've let yourself be trapped in this situation. That you're so stupid, how could you not get out of this? So, it felt like, when I was in it, I never told anybody, and now, it became, it was like, I had to tell everybody, or people were then allowed to ask me stuff, and it was very personal. So, your whole privacy of who you are, and what you decide to tell people,

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and what you keep to yourself, was suddenly just spilled out. And I had to learn how to just, I just had to learn how to deal with it. And yeah, for a long time, it was really upsetting, really scary. Because you're like, well what's getting said now. Well, if people believe that, they'll believe this, you know. But there was no control.

M: Yes. It said that my son was screwed up...yeah, and all this...yeah, big public post, basically.....But the fact that he done that so publicly about his son and shared his son's address, like his son's home address....^[3]

A further form of harassment all [Mothers] in this thesis experienced was excessive text messages and phone calls:

M: And I just showed them [the police] my phone, I remember showing them [the police] my phone and going, is it from this person, here are all the big, massive, long text messages that I get from him, like, continuously, you know, 40 or 50 a day. And he went, right. And at this point, these police officers were just like, yeah, I think you just need to speak to your solicitor about this, and I'm like, you know, solicitors are involved.

M: He would call, at all hours of the day, it was a constant. I was terrified every time my phone would ring^[4]...

These multidimensional harassment tactics also spread to using third parties in particular professionals. Two [LPs] explained that in some instances, fathers had employed Private Investigators (PI) ^[5] to follow [Mothers] and child(ren). The PIs were asked to prepare reports for the court, with no criticism from the bench, which suggests that recruiting professionals to spy on [Mothers] is acceptable ^[6]. One [LP] said:

LP: I don't, to be blunt, I don't approve of it. I don't think that two wrongs make a right, and I don't think it's ever okay for a parent to be sort of disrespectful of the other that they're squirreling around looking for people to speak out against them.....it just perpetuates the antagonism. No wonder mothers aren't inclined to obtemper orders if they think that they're being followed, they're being recorded. And I don't think it's fair on the child either. I am absolutely against that.

³ Article 8 Respect for Private and Family Life equally applies to children as it does to their parents and arguably the court has jurisdiction to determine if public posts detailing court litigation about a child breaches that said child's right to privacy under Article 8 or if such behaviour accords to the 'best interest' test for the child.

⁴ The Protection from Harassment Act 1997 covers both jurisdictions and include social media, text messages and phone calls.

⁵ In 2013, Teresa May sought to regulate the industry (GOV UK, 2013) but this has not materialised.

⁶ The Scottish Government FOI with regards to Private detectives in child contract actions stated : An individual who is in receipt of civil legal aid may want to instruct enquiry agents (private detectives) to carry out work in connection with their case. In some cases, this work can simply be instructed without the Scottish Legal Aid Board's prior approval.

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In this quote the [LP] refers to the examples of harassment as being 'disrespectful' and perpetuating 'antagonism'. Such terms may be seen as downplaying the abuse and reconfiguring it as hostility. The [LP] appreciated that invading the [Mothers'] privacy, would aggravate the dispute. [Mothers] also believed that misusing public services was another example of harassment and one [Mother] explained that she been harassed by staff from the Benefits Agency and Housing Department as her ex-partner had made false allegations against her:

M: I think at that point, there was somebody from the, like, council, was it like, council tax, because I live on my own, and I'm a single occupant. But they had somebody coming around from the fraud department, saying that I was living with somebody.

Here the mother describes having to answer to professionals, as a result of malicious assertions being made which is another example of harassment [7]. All [Mothers] explained that they were exhausted by the mountain of documents they received from their former partner:

M: Like I get...and I'm not even exaggerating when I say this, I get legal documents from him every couple of months. Sometimes it's just he's sending them himself and it's not necessarily been lodged with the court or asking the court, like them but he's sending them to me.

The paperwork also resulted in excessive litigation, which all [Mothers] found particularly difficult to combat and they shared feelings of helplessness:

M: So he knows that through that process he can get what he wants and there's nothing, there's nothing in place that says he can't raise like a court process. But I was always told that if I was wanting to raise like a minute variation to the court order that not to even bother if it meant that [name] could get him less time. But there's no deterrent the other way around.

M: He can take me back to court anytime, for anything and the court doesn't seem to mind that he keeps changing his mind or isn't complying with the order.

M: I had to keep taking unpaid leave from work at short notice to go to court as he wanted to have an extra hour. He didn't ask me, he just lodged it in court, and I had to attend.

M: If I want to go on holiday with the children, I need to take him to court to ask permission. Anything I ask, he refuses.

M: He is self-employed so he can take time off work, I am using holidays and unpaid leave, which means I have less time with the kids.

⁷ The High Court in England and Wales in *Plavelil v Director of Public Prosecutions* [2014] held that making false and malicious allegations could be prosecuted under the *Harassment Act 1997*. However, the harassment would have to be proven to have been "targeted, calculated to cause alarm and distress and was unreasonable".

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Exposing the inequality and power imbalance in the litigation reinforces the argument that power is with the pursuer who can enrol motions or request hearings at short notice. These quotes also reveal the restrictions placed on the children's and [Mothers'] lives; having to take time off work, the inability to go on holiday without the permission of the father, always subject to the father changing his mind about arrangements. All [Mothers] explained that they no longer felt free, nor could they make decisions about their own lives or those of their children. They also felt that they were being held captive by an invisible legal process that subjected them to threats of change of residency of the child, if they did not agree with their child's father. Many mothers felt that their ex-partner used this power to trap [Mothers] and intensify the litigation with threats of change of residency to prevent [Mothers] from rejecting their requests:

M: He just kept on saying that he would take the kids away from me, if I didn't give him what he wanted.

As such the contact litigation provides fathers with the opportunity to control and manipulate [Mothers]. Indeed some [Mothers] suggested that they were able to manage the abuse and harassment prior to the court order, but it became impossible once the court order was in place:

M: I almost wish that I had not stopped contact, even though I know it was bad for the children, I know I was completely right in stopping contact with the children, but he was actually... My ex-partner was more manageable in the scale of what he was doing back then [...] That was far less harmful to the children than the things he has done since, that he's been able to do whilst there's been a court order in place.

The [Mothers] therefore expressed feelings of being controlled and constrained by the court order which was initiated by their ex-partner and framed by [his] wishes. The abuse that some [Mothers] outlined in their interviews indicates how they felt controlled through fear, shame, embarrassment, and physical violence. Most [Mothers] argued that the escalation of abuse after the court had made an order for contact had a significant impact on them emotionally, psychologically, and physically.

Concerns Relating To The Child

Most [Mothers] in the online survey said that they had concerns for their child(ren)'s safety and as such complying with the contact order was difficult. Notably, some [Mothers] were concerned that children were being sexually abused:

M: And when they were at contact, they were saying things that were happening that were wildly inappropriate. There was...well we suspect he was a paedophile. I say 'we,' the police and...generally speaking we suspect he was a paedophile.

M: The children would come home and the things they would say, was alarming, it was adult-like and inappropriate for their age.

When there are concerns about inappropriate language and content, the court may still believe contact is still appropriate, however. In a Scottish Case B v D [2016] the

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court awarded contact where there had been a finding that the father had been in possession of a DVD “*containing inter alia child pornography was insufficient to necessitate and justify termination of future contact, having regard to the value of his relationship with his children*”. This once again suggests that criminal conduct is not always disregarded when the court is considering contact. Other [Mothers] referred to threats to their children’s physical safety:

M: He drove the car at my daughter. And that was after she spoke to the police, so I felt that was a direct...it was done deliberately to frighten her, frighten me.

M: The children didn’t want to go. The children were afraid. It didn’t seem to matter at all that they were afraid. And at the time we didn’t know why they were afraid. I didn’t know why. I just...later you look back and you think with hindsight, don’t you, you’re like, there’s plenty of clues.

M: My son had said...I had pictures of marks that my son had come back with [...]and when I tried to raise this at that time the solicitor was having none of it. He basically said, if you don’t reinstate contact you could go to prison and there’s a very high chance that you will go to prison, and do you really want your son going to live with the person that you are saying is doing this stuff? And it was like, it was basically...it was a lose/lose situation, you know, it was...horrendous.

M: It’s...it’s horrendous. But these are the things that you basically can’t raise in court or if you do like I’ve been told to speak to him about the boy who cried wolf when I informed the court of like the disclosures that he was making.

These extracts express feelings of guilt, anger, and helplessness. Again, threats of prison are used to silence [Mothers] and control their behaviour. These quotes also point to the dilemmas facing [Mothers] to comply with the court order, or to protect their child. [LPs] are aware of the dilemmas facing mothers, and they also appear to be in a catch-22 situation as they are duty bound to advise their clients to follow the court order to prevent them from going to prison. [LPs] must also consider the implications for the child if their client is sent to prison and the child’s residency is changed to the father who their client believes is harming the child.

M: Court say, well, if this was a serious allegation, the police would have convicted. And it’s like it’s such a Catch 22, it’s almost like everybody wants to shirk their responsibility, and at that bottom of it, there’s a child who’s still being forced to go to contact, like physically forced out of the door, because if I don’t comply, I’ve got the threat of the children being taken off me

Denigrating and overpowering [Mothers] in the court system, and preventing their concerns being heard in court, led to a precarious situation for the affected child. In many instances, the child would refuse to go to contact and [Mothers] were faced with forcing the child to go to contact, against their will, with someone the [Mother] had concerns about:

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M: I am faced with a young boy saying no I am not going. What am I supposed to do; I can't forcibly put him in a car?

M: I would have a child distraught kicking off. Then the police would be called.

M: I had to push my son out of the door.

These quotes reveal once again the helplessness that [Mothers] feel in these situations and the fear of criminal justice processes being used, in particular the police, to deal with a distraught child. [LP's] accepted that it can be difficult for [mothers] and children to fulfil the terms of the contact order, but insist that the order must be obeyed at all costs:

LP: I always do say you have to obey this order and you have to make it as positive for the child as possible. The child doesn't want to go, well, there are various reasons why a child may not want to go. But the older the child is I think more weight should be given to that child's views.

From the [Mothers] perspectives, it was a no-win situation. If the [mother] did not force the child to go contact or ensure handover took place, threats of punishment from the father and the judiciary would follow.

Interventions By Other Professionals

Alleged non-compliance, abuse and threats of punishment, in this thesis resulted in multiple professionals becoming involved in the contact dispute. All [Mothers] argued that the involvement of professionals was a particularly stressful stage in the litigation and a further source of confusion. Some [Mothers] reflected on the involvement of police which they believed was particularly fraught with problems. Some [Mothers] explained that the police were contacted because of missed contact despite contact being a civil matter:

M: Never grown up with police involvement in my life, or anything like that. So, it was the first time my children had seen the police being involved in our lives.

M: I think he knows that the police can't actually do anything. I think it's more like an intimidation thing in the hopes that [name] will see the police and go. Or I don't, I don't know, I honestly, I look at this so many times and I try and think, you know, what is it that he's thinking?

These quotes reveal [Mothers] feelings of intimidation, and their dismay at police involvement. One [LP] also appear to be bewildered by Police involvement:

LP: I mean the police in particular; I mean I don't think the police have got any locus there. I don't think they do at all if there's not a criminal issue. And it's happened on a few occasions in case that I'm aware of, not necessarily ones that I've acted in, where the police have been brought round. You're like are you not busy enough for other things? Rather than

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enforcing a civil court order. I'm always surprised when the police do get involved, I have to say.

These quotes once again highlight the use of the criminal justice system, in a civil family matter. In one instance reported, a police officer over-reached professional boundaries to try to persuade a son to go to contact:

M: One of the officers said he didn't see his kids and he wanted to see if he could get X to go see his dad. I said he was terrified, but he spoke to X and tried to get him to go. I felt it was bang out of order. X didn't go and the officers weren't happy at all.

The police have no jurisdiction to get involved in a civil matter, and yet in this case the contact order appears to more important than the child's fear. Police presence at a child's home would also be a scary experience for children, and they may feel that they have done something wrong, when their refusal to attend contact results in police officers visiting the family home:

M: And he gets the police to come round, which terrifies my little boy because he is being told week after week after week after week if you don't go mummy is going to jail and you won't be able to live with mummy anymore.

M: He hides under the bed and won't come down as he is scared the police will take him to his father. The police have to come into the house, and it's so stressful and exhausting.

M: My daughter thought the police were bad and doesn't trust them anymore.

These quotes suggest that the police are used as a tactic to scare and intimidate the [Mother] and child into complying with the wishes of the father. However, using this method also has an impact on how the child views the police, and in these quotes the police become something the child is to fear and are not to be trusted. such experiences further add to the feeling that the [Mother] and child have nowhere to turn. They also illustrate how using criminal justice tactics can create an impression of criminality even when there is no criminality. Furthermore, some [Mothers] in this study also believed that involving the police was a legal strategy to gain evidence that contact had not taken place or that there were issues with contact in a bid to support an enforcement action and position the [Mother] as the problem:

M: Yeah his lawyer wrote a letter quoting the incident number, and saying the police did a welfare check and my children were fine. The court said I was making it up that my children were distressed.

The police visit to the child's home, is used in this context as a way in which to claim to the court that the [Mother] is being dishonest and that she is flouting the order of the court. The police are used to add substance to fathers' claims that the [Mother] is being contemptuous which results in the court using the same tactic also to create fear and as a means of punishment:

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M: The Judge said I had been irresponsible, and I had wasted professionals' time by refusing to take my son to contact. I tried to explain that my son refused to go. The judge said he didn't believe me and the next time the police would be called to take my son to contact.

This suggests that in this case not only are fathers recruiting support from the Police when contact doesn't take place, but also that the Judiciary believe the Police have a role in facilitating contact. It is difficult to comprehend how and why police resources would be diverted to taking a child to contact, and the impact this would have on the child. This approach may also result in further anxiety for the child, intensifying their fear of the police and creating the impression that if the child speaks up about abuse the child or [Mother] will be punished. These extracts support the views of Neilson (2017) who argues that "*the child learns there is no one he or she can turn to be free from the violator's control and that police cannot be trusted to help*".

Involving the police was riskier for mothers. In some cases [Mothers] contacted the police in relation to disclosures the child(ren) had made or as a result of physical injuries. However, the police pushed the responsibility back onto the Family Courts, and did not appear to want to register a crime when contact was the issue:

M: My son had been hit [...]by his dad. So, I asked for an emergency order and there was a police investigation. After the police investigation ended and they said, just deal with it in Family Court. The Family Court said, well, the police haven't done anything about it, so it obviously didn't happen. It's really important that contact goes ahead. At that point in time, the court didn't know what to do, so they handed it over to social services.

M: So, for example, going to the police is seen as being hostile, when the children report something has happened. So, on the one hand, I'm sort of persecuted by the court if I don't report these things to the police, and on the other hand, if I do report them, then I'm being hostile. So, I've just learnt that there is no way I can be seen positively by the court and I've just accepted that.

These quotes uncover another catch 22 for [Mothers] who report concerns about their children. If [Mothers] do not report concerns, they are seen as supporting the abuse, and if they do and there is insufficient evidence they are viewed as being dishonest and manipulative. The lack of prosecution or formal police action appears to be used to support the fathers' position that the child is okay and the [Mother] is the problem.

CAFCASS & Social Work

Another professional group which featured significantly in this thesis were CAFCASS & Social Work. The [Mothers] in England and Wales, all raised substantial concerns about the quality of advice and assistance from CAFCASS. One reoccurring criticisms of CAFCASS was the organisational understanding of domestic abuse:

M: And I don't know whether it's a funding issue or whatever, but CAFCASS do not seem to be trained in domestic abuse. They do not understand how children will present, and that children may not always be

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able to verbally talk about their experiences of abuse because they don't understand [...] it will probably take them most of their life to try and figure out what happened to them.

M: We had a really bonkers CAFCASS lady, and my oldest son, he actually taped the conversation on his phone. He shouldn't have done it, but he did. And she was really aggressive to the kids. She was very aggressive when she spoke to me as well.

What these quotes suggest is that CAFCASS may in this case also be pushing contact, may not be paying attention to [Mothers'] concerns and may also be sceptical about allegations of domestic abuse in contact disputes. However, if CAFCASS professionals *do* have concerns about the child and recognise abuse, the situation can become even more challenging for [Mothers]. According to some [Mothers] they felt threatened by CAFCASS and or social work, if they allowed contact with the abusive father:

M: So the police bailed him and bail conditions [were] put in place, which meant I was not allowed to have contact...I was not allowed for the children to go to contact. Social services made me sign a form saying I...that they would consider me not a protective enough mother if I allowed contact. And then he took me to court for denying a court order.

This is yet another example of a catch 22 for mothers, who are on the one hand told they must comply with the contact order and yet if they follow the order, other professionals may claim mothers are knowingly putting the child at risk. Some [Mothers] indicated that the impact of complying with social work or CAFCASS, only made the situation more complicated and fraught:

M: So of course, I was denying the contact order. I was denying it. And then obviously I was still hauled into court, and I was...I thought I was quite safe. I waved my bit of paper, you know, it was a little bit of paper that I'd been made to sign, and the police had signed, and the social worker had signed. And I was like, no I cannot allow to hand these children over. And they basically slated the police, slated social services, slated me. And said, well we're higher than them, how dare they? And ranted for about...which I couldn't quite get my head round, because actually it wasn't my fault, and it wasn't even my ex's fault.

M: I just kept thinking, why am I here listening...this isn't even my problem. This is an issue with the system. And the systems not working together. So, you're having one system telling you to deny contact and then the other system telling you you're in contempt of court cause you are continually denying contact. So, it's really hard.

Such quotations reveal the disorientating, absurd and nightmarish situation mothers and children experienced, a Kafkaesque world. Yet such disorienting experiences were further exacerbated by multiple concurrent investigations by several professional groups. Scottish [LPs and Mothers] all agreed that the Scottish system gave rise to a maze of complicated investigations which often ran concurrently:

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LP: What will happen is somebody refers the child to the children's hearing on the basis that what the mother is doing is emotional abuse of the child, a social worker comes in and decides, yes, it is, or no, it isn't. Then we get what I do think is objectionable is the multiplicity of fora, so if you get into that situation you get a referral into the children's hearing, and then you've got part children's hearing, part court, and there's a restriction on who can get into the children's hearing; and I think that is where we are perhaps letting the kids down, I think we need to rethink our arrangements for children and what is the link or the overlap between the court system and the children's hearing system.

LP: And of course, if the children's hearing makes a determination on contact, the court order flies off and cannot be enforced [8].

What Scottish [LPs] are describing is a maze of competing and co-current professional investigations into the 'best interests of the child,' investigations that can have a real bearing on the legal action and that may in some cases trump the court order. The multiplicity of investigations also does not appear to take into consideration the impact on the 'child'. The impact of concurrent investigations was that some [Mothers] felt:

M: I was being measured, assessed, and interrogated from all angles and I ended up being so nervous, I had to second guess what was right and what was wrong for that particular professional.

M: There were all these processes and demands and they just became a massive blur. I had no idea what was going on and I felt that everything I did was open to criticism from one group or the other.

The experiences of the [Mothers] in this thesis are supported by Neilson (2013) who argued that mothers "*are not only confronted with inconsistencies among legal systems, but they must also grapple with a complex array of appointments with different sets of assessors, different sets of experts, and different sets of lawyers attached to the separate legal systems. Moreover, those various officials often have little understanding of how various parts of the legal system affect each other.*"

Court Experts

In addition to publicly funded professionals (Police, Social Work, CAFCASS), court experts were also used in many cases[9]. Some [Mothers] were ordered by the court

⁸ In Scotland the Children's Hearings (Scotland) Act 2011, allows for parallel procedures to take place concurrently on the same issues. While the Children's Hearing can make a determination in relation to contact and that determination takes precedence over the civil court order. This can result on significant changes to the contact arrangements and parents and the child do not have to be legally represented and legal aid is not always available. Appealing a children's hearing decision in Scotland, takes the issues back into the civil court system. In England and Wales the section 31(1) of the Children Act 1989 allows for parallel process also used child protection legislation and imputes the issues into the public law field, and discharges a s8 order.

⁹ In England and Wales the Family Practice Directions Relating to Family Proceedings in Force before 6th April 2011 which Support the Family Procedure Rules 2010, at Part 25 A makes provision for expert evidence in support of their application to the court.

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to comply with their ex-partner's request for a psychiatric and or psychological assessment. This was also an issue reported in previous studies (Coy et al, 2012, Humphreys & Harrison, 2003; Saunders & Barron, 2003). These assessments were described as particularly invasive and inappropriate:

M: Ripped to shreds as a person and a parent and have my entire medical history and life thrown before me in the most disgusting way. But I have to go through that and accept that, just for the sake of keeping my children safe and not in his care.

M: They're forcing me to have a psychological assessment for the sake of my children, but in the meantime, providing him with all of my medical records and more things to go through to try and prove...searching, scratching at evidence to try and prove that I'm not fit as a mother.

[Mothers] lives are therefore put under a microscope and are invaded by court processes in a quest to find evidence to present [Mothers] as being unfit mothers. [Mothers] who had experienced mental ill-health felt that this was used against them, a tactic similar to those used by criminal lawyers in Rape cases:

M: So these court proceedings, he has done what he said he would do and he's used my mental health. The court asked if they could have access to my mental health records, because I'd been very open with social services and said that, yes, I do have issues with my mental health but I manage them really well and I'm very proactive about seeking help. And they put that as a strength in the end of the child protection register.

This quote also shows how seeking help for mental ill-health can be viewed as a strength in one investigation and a weakness or cause for concern in the Family Court. Another [Mother] explained:

M: So, I've been very open about it. However, they decided to look into that, so they asked to see all my records and I said yes. And then they went through all of my records, and then they came back saying, we're very concerned because she's mentioned being very depressed, occasionally feeling like she might be a little bit more snappy with the children, you know. And this is like on such a small scale, when I mentioned that, because at the same time, I'm stopping the children from seeing any of this, but I'm noticing that I'm a little bit more irritable with the children. Like that's such a tiny thing but they've blown it out of proportion, which has all culminated in me having to have a psychological assessment. Because his barrister is having access to all of my mental health records and medical records and came back saying that they decided I have a personality disorder, which they completely made up. So, the psychologist who did my report was specifically asked whether I have PTSD, which I do have a diagnosis of, or borderline personality disorder. So, I've also spent the last year thinking, do I have a personality disorder? And what if I do and I just don't know? And just panicking about what that is and what it means. It turns out I don't have a personality disorder and it's now been cleared. But the question that my solicitor keeps asking is, even if you did have a personality disorder, how would

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that affect your parenting? And it's discriminatory, anyway, to suggest [this].

What this quote does not reflect is the impact of the accumulation of Family Court processes and other professional investigation in addition to the meetings with court experts on [Mothers] and children mental health. Some [Mothers] also suggested that experts employed by their ex-partners presented information inaccurately:

M: The expert, a psychiatrist gave a report to my ex-husband before me and he was able to see it, and in it I had said to the psychiatrist that I would go to my grave knowing that I'd tried my best to support X with contact with her father and that I've always told the truth. I was never suicidal, I never said I was going to kill myself, I just meant, I was trying to suggest that I've done everything, I've done my best. He wrote to the judge, said that I was suicidal, that I was going to probably murder X kidnap her and that I was a flight risk, and that X should be removed from me.

It was also suggested that the judiciary do not always read expert reports which often contain buzz words and that courts relies upon the reputation of the expert rather than their assessment:

M: I don't know, well I think there were a lot of buzz words that are used, there's certainly a pattern. I think that the expert witness that was called and expert, Dr he goes by reputation now rather than what he actually says, and so people respect him and believe him, regardless of what he actually says. I think there is an awful lot of power involved, there's a pattern between chambers that are being used and barristers that are used, and connections between barristers and psychiatrists that are appointed.

M: I've done a lot of work and I've spoken to other people and barristers as well and there's certainly a connection between certain judges, certain chambers, certain experts, that are repeatedly used again and again. Particularly with very high net worth individuals, ones who use their power and money and take children away or discredit women, especially when there's domestic violence involved as well. And I think that's what happened with me, but at the time you don't know what's happening and you're frightened.

The suggestion here is that [LPs] will appoint experts that they can rely upon and that there is money in it for both professionals to create and develop a strong narrative to support their client. In any case, such experts can have huge influence. One [Mother] explained that it can be difficult to challenge an expert report and to do so can in some cases result in another legal process:

M: It's like a seed of doubt that's planted in the judge's mind and it becomes truth within seconds, and if you're listening in person it's really hard to stand up and say well that's not true, and so it becomes the truth. And then that becomes on record, and then unless you appeal that, it becomes the truth, and it's just a nasty cycle that never goes away.

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And it is at this stage that the polarised battle lines are formed. The maze of parallel investigations and litigation becomes self-sustaining, paving the way for the court to stop contact, change the contact order, change a child's residency, and pursue a contempt of court action. Ultimately this leaves the [Mother] and child in a precarious position.

Chapter Discussion

Drawing upon Unger's five points of indeterminacy, and the work of feminist jurisprudence scholars these findings will now be discussed in the five chronological stages.

FAMILY RELATIONS

In this chapter [Mother's] explained that they had attempted to reach an informal parenting arrangement with the child(ren) father, at the point of separating but they claimed it was hugely problematic. The [Mother's] narrated problems with the informal parenting arrangements and explained that it was the source for further abuse, and they said they had concerns for the child(ren)s welfare. All [Mothers] in this chapter claimed that when the parental relationship broke down, they felt the burden of '*social expectation*' on maintaining contact and to do so with protective measures in place, (Arnold,2015). However, as a result of the continued parental difficulties, domestic abuse and concerns for the welfare of the child, parents resorted to legal action.

LEGAL ISSUE(S)

The interviews with [Mothers] in this chapter revealed that at the pre-court stage of the contact dispute, their [LPs] advised them of the unwavering judicial position of the '*presumption in favour of contact*' and suggested that [Mothers] should not want to be viewed as "*that kind of mother*", *the one who prioritises her needs ahead of her children* (Arnold,2015;Kaganas & Day Sclater,2004; Wellbank,1998).This suggests that the stereotype of the '*implacably hostile*' or '*bad mother*' (Ashe, 1992, Chesler,1986) had a real impact on the advice [LPs] gave [Mothers].

[LPs] also removed allegations of domestic abuse as a result of what they believed were prejudicial and uncaring judicial attitudes. [LPs] further reflected on their professional experiences of raising domestic abuse concerns and being publicly lambasted from the bench. This advice was in stark contrast to the legislative intent contained in section 11 A-E of the Children (Scotland) Act 1995, amended by the *Family (Scotland) Act 2006*, and section 12J of the practice directions *Children Act (1989)*, amended 2014.These findings to some degree support Condlin's (1986, p100) argument that lawyers "*amend, abrogate, and enforce the law, and in the process, determine much of law's meaning for persons who come in contact with it*". In addition to not providing advice in line with statute, [Mothers] legal advice appeared to be influenced by judicial prejudice and scepticism.

[LPs] were also sceptical of [Mothers] claiming domestic abuse and believed that the judiciary would not be convinced. Hence [Mothers] felt pressure to remove allegations of abuse. This supports the findings in *chapter five* of this thesis in regard to judicial attitudes towards allegations of abuse and the difficulties [Mothers] face

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making raising such allegations. [Mother's] explained that they felt powerless from the outset to argue their case (Smart, 1989) and it appears that much of the legal advice was "[t]aken at face value" (Unger, 1976, p56) without legal explanations and documentation. [Mother's] appeared to feel powerless to the "law" (Hasnas, 1995, p85) and there certainly was an overwhelming lack of understanding of their legal rights. This once again supports Unger (1976, p56) claim that the "*legal system, prevents non judicial understanding as to how the law operates and prevails*" which maintains its power which also supports the findings made in *chapter five* of this thesis.

In summary this pre-court stage illustrates the precarious nature of court litigation for mothers bound by invisible powers of judicial prejudice and discrimination. Furthermore, each aspect of the initial pre-court advice reveals the power gender has to disqualify [Mothers'] experiences and to construct them as '*insignificant*' and or '*legally irrelevant*' (Smart, 1989, pg162).

COURT PROCESSES

Once the contact dispute was in the court system [Mothers] recounted the difficulties they faced trying to navigate judicial prejudice and biases. Some [Mothers] argued that they felt there was a stigma to being unable to resolve contact issues without the court's intervention, and that the judiciary treated parents like criminals. This supports the findings in *chapter five* of this thesis that courts tend to use criminal language in civil disputes involving children which was supported by [LPs].

Furthermore some [Mothers] explained that because of the removal of Legal Aid in England and Wales, they could not afford legal assistance and had to become LIPs. One [Mother] described her experiences as entering the 'Lion's Den'. All [Mothers] who were LIPs said that they all felt vulnerable in court without the support of trained [LPs]. And all [Mothers] believed that both their roles - representing their child and themselves- were silenced. This perspective is supported by a number of other studies (Arnold, 2015; Callaghan 2015; Mackay, 2013; Morrison, 2015, Morrison et al, 2021).

Similarly, to the findings to *chapter five*, the court order was a source of contention. All [Mothers] said that they disagreed with the terms of the contact order and believed that it was made for the fathers' benefit, while making them responsible for maintaining contact and open to criticism and punishment. [LPs and Mothers] believed that court orders were ineffective, erroneous, blunt, and technical but had to be complied with. And to ensure compliance in England and Wales, penal notices were attached to a contact order, which most [Mothers] claimed created anxiety, fear, and confusion. A penal notice also has strong connotations of criminality.

Although [Mothers] experiences and viewpoints were nuanced, they all in some way talked about a wide array of domestic abuse tactics including physical violence (Hester and Radford, 1996; Morrison, 2015; Arnold, 2015), damage to their property, stalking (Coye et al, 2012; Procter, 2019, Hester and Radford, 1996, Bendline and Sheridan, 2019, Mocking-smith et al, 2017; Nikupeteri and Laitinen, 2015) the use of social media, text messages, phone calls, paper abuse (Miller and Smolter, 2011) excessive litigation (Elizabeth, 2017; Mocking-smith, 2017) and threats of changing the child's residency(Arnold, 2015).

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As the abuse intensified, concerns about the welfare of the child and abuse directed at the children escalated, but [Mothers] claimed their [LPs] regarded the abuse towards her as irrelevant or operating on a different planet (domestic abuse) (Hester, 2011). Rose (2019, p15) noted in her research, when she claimed, “*mothers suffering is position in such a way that it appears socially acceptable*”. Children were also not regarded equal victims of domestic abuse (Callaghan et al, 2017, Callaghan, 2015, Callaghan, 2017, 2020, Nikupeteri and Laitinen, 2015, Arnold, 2016, Katz et al., 2020). Some [Mothers] expressed feelings of guilt, anger, and helplessness as they believed they were in a ‘no-win’ situation.

PUNISHMENT (THREATS OF)

Throughout the chapter [Mothers] repeatedly talked about enforcement in loose terms, such as ‘*prison and change of residency*’; but these did not appear to be grounded in a concrete understanding of the different legal issues, which were prescribed with sufficient precision and guidance to be predictable or foreseeable, (Article 6). Enforcement appeared to be used to coerce [Mothers] to comply with court orders they didn’t understand, which suggests that they were not clear about their legal rights.

IMPACT

Allegations of non-compliance with the court order were pursued with zeal and vigour, including through police involvement, which once again is suggestive of criminality. Although the police have no remit in child contact enforcement, it appears similar to the dispatches TV programme whereby courts were using criminal processes in civil disputes to enforce their terms, such as removing sleeping children during the night and taking them to their father’s home. It is unclear how this could ever be considered or positioned as being in the child’s best interests. In fact, as scholars noted it is most likely to result in adverse feelings towards professionals (Hester, 2011; Neilson, 2013). The extent to which the police were involved in contact disputes, in many instances was perplexing and in one instance at least, police officers overreached their professional boundaries. The expansion of professional involvement and multiplicity of concurrent professional investigations put all [Mothers] under an overly critical microscope and supports previous findings by Hester (2011). Overall, the combination of *legal proceeding, social, police, health* investigations all operating from different professional perspectives (Hester, 2011). Along with judicial prejudice, abuse, and daily life, left [Mothers] feeling powerless, exhausted, and isolated.

Throughout this chapter, the welfare of the child was brushed aside, with children being treated as ‘*collateral damage*,’ as the legal system denigrated [Mothers] who sought the courts intervention to help protect them and their children from abuse. The child was also largely missing in legal considerations of contact, and instead the parental relationship and deficiencies (Bairnham, 2001) are given precedence over the voice, wishes and experience of the child.

Chapter Summary

The interviews in this chapter case illustrates how [Mothers] were silenced and their social circumstances were not taken seriously, they experience a difference in the

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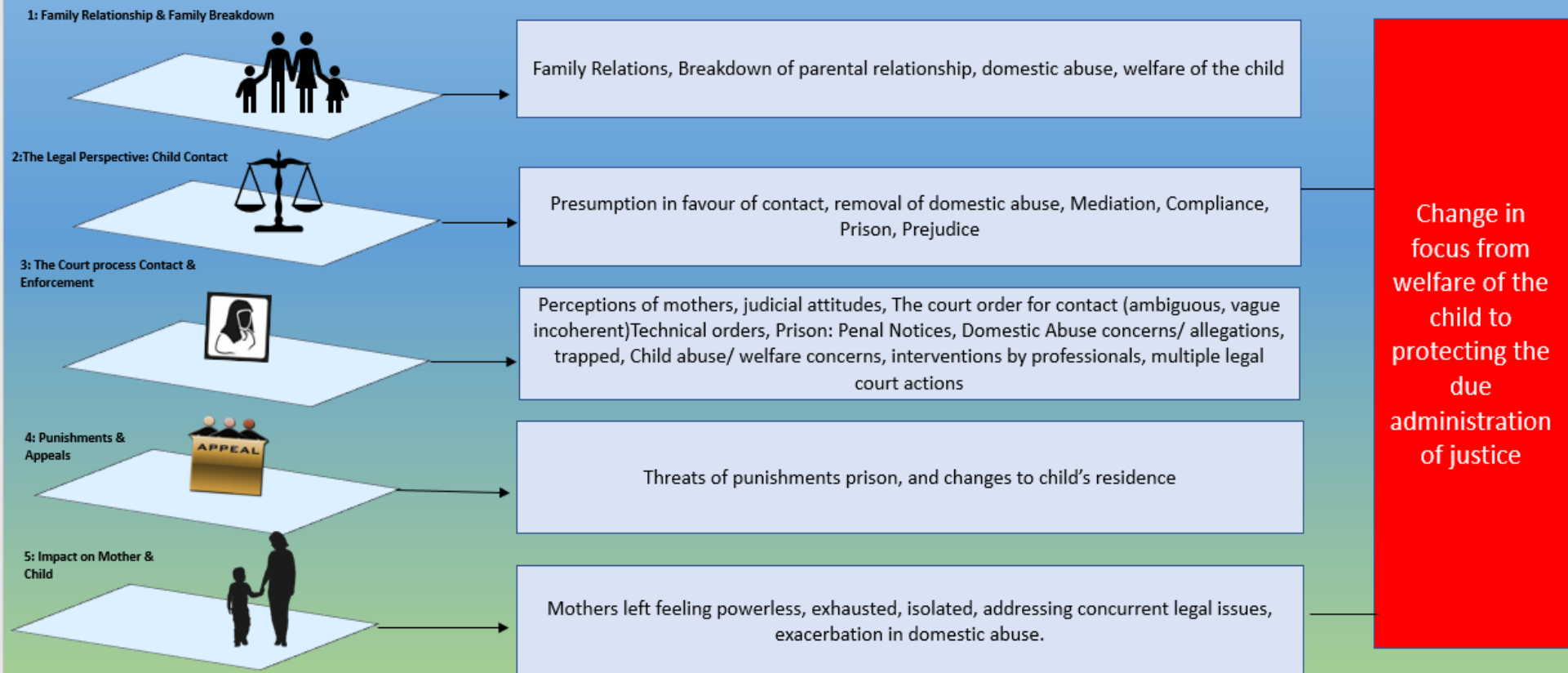
law in the books and the law in action. [Mothers] experiences were also translated into legal relevance, which also resulted in the removal of domestic abuse at the outset. Throughout the chapter the [Mothers] and [LPs] talked of inequality, gender, prejudice, and domestic abuse. This chapter has revealed how domestic abuse is driven underground and operates as a troublesome sub-structure beneath the contact dispute. Opposite is a visual representation of the research chronological map and themes. Chapter six will now turn to focus on how these issues impact on enforcement

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CHRONOLOGICAL MAP (SOCIAL-LEGAL)

5 CHRONOLOGICAL STAGES

CRITICAL FEMINIST INDETERMINIST PERSPECTIVE



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CHAPTER SEVEN

PUNISHING MOTHERHOOD

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CHAPTER SEVEN

Punishing Motherhood

This is the final findings chapter and the second to map [Mothers'] experiences of child contact proceedings, interspersed with opinions from [LPs] and Lord Wilson, Supreme Court Justice. This chapter follows on from previous discussions in which [Mothers] felt that they were constantly battling against a legal narrative which positioned [Mothers] as, 'manipulative, vengeful, dishonest and deceitful' women. As a result, [Mothers] felt that their allegations of abuse were rejected as being 'fictitious, insignificant or legally irrelevant'. The consequences of the accumulation of prejudice, sanitation of the issues in dispute and the silencing of [Mothers] gave rise to problematic court orders and allegations of non-compliance. [Mothers] described being held to account for contact difficulties and subjected to multiple concurring investigations. This chapter will focus on how allegations of non-compliance with a contact order result in enforcement and will conclude by highlighting how the combination of all these elements results in injustice.

The Recalcitrant Father

This thesis so far has shown that [Mothers] in child contact disputes are predominately accused by fathers of non-compliance and are made to take responsibility for contact by members of the judiciary for contact difficulties. However, [Mothers and LPs] claim that there is an alternative possible narrative which goes unrecognized, expressing frustration and bafflement at suggestions that fathers don't breach contact orders. One [LP] said:

LP: I can't recall a situation which someone whose been allowed contact and fails to turn up

However, another [LP] recognized that fathers do breach contact orders but as most contact orders are in the father's favor, they appear to be able to make a choice whether they comply with the contact order or not:

LP: It feels to me that that's actually the flipside of it. And I think that's actually probably more likely, that contact for the non-resident father in particular, especially if he's got a new family or something, is more likely to just fall away. Like I say, I've never ever experienced a situation where a father who has not exercised contact as per the order has been considered in contempt of court. It's almost like that choice is okay to make

This LP therefore suggests, as Arnold (2015) found that a father can unilaterally and unequivocally disregard the courts order for contact made in the 'best interests' of the child. As Coy at al. (2012) noted this deliberate disruption can undermine a child's sense of routine, security, and stability. It also suggests that a father can do something that neither a [Mother] or child can do as the court is making the [Mother] the responsible parent [1]:

¹ Contemptuous means showing contempt

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LP: To me it feels that it's women who are punished for this and not reluctant dads who've got the order and then for whatever reason choose not to exercise it, because that is wilful as well.

LP: I mean the thing is, [...] there does seem to be...from my perspective the focus seems to be on making the woman do things and not the man.

These quotes reveal the inequality in the family court, whereby the [Mother] is punished for breaching the order, while fathers appear to be immune. The mens rea test for contempt should be the same and would not be gender specific. One [Mother] explained that she complied with two court orders for contact simultaneously with her children's respective fathers. However, when the children were due back as per the terms of the court order, they did not come:

M: None of the children came back, they didn't bring them back.

The [Mother] said that the police and social work did not help her and that she had to wait until Monday to speak to a lawyer. As there were two court orders in place, the [Mother] was told she would have to raise two actions and pay in excess of £7,000. Unable to afford this and on the advice of her lawyer she raised one action for her youngest child. The child was returned to her three weeks later and at that time the court put in place a contact arrangement for the child to see her father. He was not threatened with contempt or prison, and he was able to recommence contact immediately. The [Mother] was unable to raise the funds to have her other children returned to her and her ex-partner later alleged that she abandoned the children, as she did not pursue him through the courts. She is now fighting to have the children returned to her after losing her job as she is now eligible for legal aid. Even though neither father in this case had followed the order, their actions were not criticised by the court. In these cases, fathers are not threatened with contempt of court, nor are they reprimanded. Furthermore all [Mothers] pointed out that it was extremely difficult to enforce the terms of the court order. In the online survey 90% also believed that there was no route to enforce an order against a father:

SR [2]: He can do whatever he wants. Breaches court orders to make it look like me, cancels contact at contact centre and pretends it's me, abuses me, mentally on face time so I hang up and it's me who gets blamed [interfering with the contact]. He can do anything, not stick to the undertaking etc. Yet I'm bullied.

SR: He manipulates the order to suit his own needs. I'm currently on my 3rd round of court proceedings and it's costing me thousands and thousands of pounds.

These quotes reveal [Mothers'] frustration and sense of powerlessness about the father's actions and his ability to pick and choose whether to comply with the order or not. [LPs] believed that it would be extremely difficult to understand what the court could do if a father failed to comply with the court order:

² Online Survey Respondent (SR)

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LP: If a father is not exercising contact, I've personally never heard of...I mean, maybe it's happened, I don't know, it probably has, but I've never heard of a non-custodial parent coming to court insisting the contact should take place and if they did I struggle to see how the court could be persuaded that it is in the best interest of a child to have contact with a parent who doesn't want to see them.

LP: I have never heard of anyone being forced to attend for contact against their wishes and indeed it's slightly difficult to see how that could conceivably be in the interest of the child.

These quotes suggest that it would not be in the child's '*best interests*' to force a father to attend contact against his will, yet [Mothers] and children have repeatedly highlighted how they *are* forced to attend contact against their will. Indeed, in *chapter six*, [Mothers] highlighted the distress some children were in when being forced to attend contact. This is another example of gendered inequality in the family court. Relatedly, [LPs] claimed that inequality and gender result in different reasoning being applied to [Mothers] and fathers:

LP: I suppose, if the court were to take the view that notwithstanding this guy's behaviour it was still in the best interest of the child to have contact, but then, as I say, in the real world, I just do not really see that happening because if the court were to take the view, notwithstanding what this guy was doing, there should still be contact, then it...in that situation, putting the guy in the jail would be inimical to the child's best interest, don't really...I just don't particularly see that arising in the real world.

When a father breaches the court order, it is positioned as not being in the '*child's best interests*' to force contact, and the court does not view non-compliance as challenging the courts authority. A [Mother] who does not comply with a court order is viewed as posing a direct challenge to the authority of the court, illustrating how the court constructs the problem of enforcement in relation to itself rather than the child.

An alternative option to pursuing enforcement action and/ or contempt of court is to stop contact. [Lord Wilson] explains that if there are instances whereby the non-resident parent does not comply with the contact order then the court can intervene:

Lord Wilson: Well, as I'm saying, in England and Wales, contempt of court is regarded as a most unsatisfactory way of dealing with this. And it may be there's a different attitude in Scotland from which we could learn. You are quite...I mean, basically a father who's asking for contact is going to turn up. The...But you've hit upon one thing that he may do, which is not return the child to McDonald's at 6:00. He may turn...return the child to McDonald's at 8:00 and the child...the mother will have been kept waiting for two hours and she may have other children to look after. It may be hugely inconvenient. And if a father consistently returns the child late, you have to say to the father: "well I'm terribly sorry, unless you keep to these times, I don't think we can continue with this contact. So I'd go down...I...you know, unless you...Unless there's better timekeeping, I'm going to stop this order for contact, or stop this order for direct contact, or

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reduce this order for contact in some way, because we can't have you mucking her around. You...know this is now the fourth time you've turned up substantially late, in breach of this order, and I...we're am simply not having it. And we'll have to scrap the order or vary it in some way if this goes on. But we don't wave the possibility of imprisonment around. We don't think it's clever. We don't think it's in the interests of the child, Sharon.

All [LPs] in this thesis, agreed that the court could stop contact if the non-residential father did not comply with the terms of the contact order, but again there was some scepticism about this given that the court had already determined that it was in the child's '*best interests*' to have contact with their father. However, from [Mothers] perspective it seemed that the courts attitude to fathers was completely different to its attitude towards [Mothers]:

M: So, I was sitting there listening to all of that and I'm thinking, the court is completely complicit in his abuse here because they're not making him take responsibility for his actions

As such most [Mothers] believed that that the judiciary could no longer be considered as independent arbitrators as they did not hold the father to account, and they applied different reasoning to the actions of [Mothers] and children. One [LP] agreed with [Mothers'] perceptions and highlighted that:

LP: the person who's on the wrong side of that order is then going to find it logically very hard to think that the court is just an impartial adjudicator if they've made an order against them.

Allegations of Non-Compliance

Chapters four and five discussed the issues with the court order for contact and indicated that simply because contact did not take place cannot simply be surmised to have been contempt of court (see *Bramblevale Ltd [1970]*). However, several [LPs] highlighted that even when [Mothers] had complied with the letter of the order, their ex-partner and the court could argue that her conduct, or the behaviour of the child, did not accord with the spirit of the order:

LP: well, 'if the mum had been more supportive the child would have crossed the doorstep'. So, what are we asking of these people? And I think that at the moment is an issue for...I actually have a case where it's up for discussion....And where I can see that the parent in that case, she's complied with what she's been asked to do, but she's now being criticised because she wasn't 'supportive'..... I can't say to them, give my lady a personality transplant, can I? There she is, on the court's view she's wilfully defiant, she knows what she's doing, and we'll have to see if she's criticised. I don't know. As far as I'm concerned, I'm representing somebody who I identify as hugely anxious, has her own personal issues; and I can't say to her, be somebody different, be some big bold lady who can say yes, it'll be all right.

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This quote illustrates a further 'no win' situation for [Mothers] who comply with the order, but criticism still follows. As the [LP] above highlighted, the client was being accused of contempt of court because the court perceived her as having an attitude problem. This further highlights the extent to which [Mothers] are criticised and condemned in contact disputes and exposes the way in which contempt of court is used to perpetrate injustice. Furthermore, these issues are further complicated as mothers explained that they were being punished for their child's refusal to comply with the contact order:

LP: That contempt action went on for at least two and a half years. And eventually what happened was that the Sheriff, quite rightly, decided to involve a psychologist who just said, 'call off the dogs'. But up until that point, the court just were not listening when we were saying, the existence of this contempt action is making things a whole lot worse. Because what was happening was that dad's lawyer was saying, oh you're just hiding behind this. You're just saying that this kid's upset. She wouldn't be upset if you weren't wound up. But of course, the mother was going to be wound up. And she didn't get Legal Aid either. So, there was a horrible imbalance there because dad was very wealthy. He could afford to pursue this privately. She couldn't afford to defend it.

Another [Mother] also highlighted that:

M: the judge doesn't understand what goes on in the background and, only sees a small percentage of the information or what really happened. And there's so much that they don't get told or seen, or solicitors are told telling survivors particularly, to minimise or reduce or ignore or delete their domestic violence.

What can be drawn from these quotes is first that there is no clarity around what is considered as contempt of court in the contact disputes. Furthermore, it seems that fathers who have a contact order in their favour have a unique legal standing in contact disputes which prevents them from being threatened with contempt of court and prison. Furthermore, irrespective of how appalling fathers' behaviour linked to contact may be, the court appears to be undisturbed by such concerns leading fathers to believe they are untouchable and beyond reproach. The focus remains unambiguously on [Mothers].

Allegations of Non-Compliance As A Tool of Domestic Abuse

Both [Mothers and LPs] assert that abusive fathers use contempt of court as a domestic abuse tool. Fathers do this by making allegations of non-compliance. One [LP] suggested that the reason that non-residential fathers seek enforcement is:

LP: And I do think as well that contempt of court minutes are used, I would say, abusively by non-resident fathers, to punish the mother for not bringing the child for contact or for getting something wrong. And I do believe that. I mean that might not be a popular opinion but it's something that I have very much got the feeling that that is what's happening.

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This view accords with the views of Neilson (2012) that abusive fathers manipulate child contact litigation. One [LP] also highlighted that in some instances fathers had used official enforcement documents to vent their bitterness and to attack the [Mother's] character:

LP: I got a request in from one of these fathers' organisations where somebody had had their minute bounced, and I looked at it and thought, well, no wonder, he actually hasn't worked out...he'd just laid down a diatribe, he hadn't actually identified what it was that he wanted the court to do and why he wanted to do it.

As this [LP] noted, in addition as using enforcement as a tool to attack [Mothers] characters, some [Mothers] in England and Wales also claimed that fathers were filling out the C79 form without specifying what they wanted the court to do:

M: he hadn't asked for anything, and that's, yeah, nobody had said what he wanted. I know that, from hearing other people's stories, they'd heard that they wanted change of residency, or they want you to do community service, or...but no, he hadn't asked for anything. So yeah, it was a bit strange, really.

M: So, then the judge asked him, what do you want, you know, you haven't said what you want, what do you want out of this? He said, I could send the mother to prison if I wanted to, is that what you want, you know, he kind of pursued him like that. Which just made him look very silly. So, he still had no answers as to what he wanted out of it, but the judge was very clear, that he wasn't, like, happy with the fact that my ex didn't actually know what he was being here for.

M: But yeah, no, it didn't say anything specific because he hadn't requested it. I don't know if it would have been different, but he hadn't, at that point, asked for any specific punishment. I think that's because he didn't know what he was actually doing.

These quotes illustrate how [Mothers] and children must tolerate additional stress and experience complicated and costly legal procedures, brought by abusive fathers in a quest to be in control. Another [Mother] believed that the threat of enforcement was to pressurise her into submission in court:

M: I agreed to contact sort of starting it again with him at that hearing at that time. If I hadn't, I thought I would literally be leaving and going to a prison cell if that's what the sheriff had decided.

Using contempt as a means through which to invoke negotiations was an issue identified in the case of *Sports Direct International v Rangers Football v Dave King* [2016]. This has been a long-standing issue in the case law of contempt of court.

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Indeterminacy in Contempt of Court Actions

In addition to [LPs and Mothers] believing enforcement actions were sought by abusive fathers, there was also significant concerns about court processes. One [LP] believed that the complexity of enforcement exacerbated difficulties:

LP: And of course, if you're looking at contempt, you're looking at something much more complicated than something that's happened in court, because you're looking at something that's out of court, and the sheriff didn't directly see it; and it may have happened on a number of occasions.

As this quote highlights, allegations of non-compliance with a contact order arise from issues '*out with the court*' and as established in *chapter five*, contempt of court is a separate process from the contact action. One Scottish [LP] explained that this presents a number of difficulties:

LP: It's a completely separate process which I think makes it difficult because you've got two parallel processes going on. So, you've got your Child Welfare Hearing system which is where the contact order is made in the first place, and then it would be reviewed in the Child Welfare Hearing system, but contempt of court is a whole other remedy. So, it doesn't arise from child or family legislation. And it's punitive, it's designed to find somebody guilty of an offence, effectively.

This quote also highlights how it is tricky to unravel the two parallel processes, each with a separate focus. Another [LP] explained that this results in additional court procedures:

LP: So, you need to lodge a completely separate minute for contempt of court. So you would need to enrol a Motion to find the defender say, in contempt of court, but then there needs to be a Minute as well that details what it is they've done, the order that they've breached, and then there's a whole other process that unfolds around whether or not they are in fact in contempt of court. So, there has been a huge misunderstanding within the family law community that that process is separate, but also that process can take ages. So, I think there are two big problems....

This [LP] stresses that there should be two distinct processes, and there should be separate documentation, but that this has been 'misunderstood' by [LPs] and the Judiciary. What this quote once again highlights are the implications of the indeterminacy in contempt of court's jurisdiction. Another Scottish [LP] raised further concerns about the procedure for enforcement:

LP: Well, if you look at to start the social work contempt case the Lord President went out of his way to say you don't deal with these sorts of procedures on the hoof, because in that case the contempt hearing had gone on for days and it was very badly focused, and it was because the sheriff herself had initiated the proceedings feeling that her authority had been wilfully defied. What the Inner House said there was you actually need to have a proper civil process where you specify what has gone

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wrong and what you say is the wilful refusal, i.e. what it is that didn't happen and this is why you think it was wilful; there's a physical and a mental element to this...And then you could properly litigate in a civil process what you say the contempt of court is. So, looking at the case law there has to be pleadings, a minute and answers in a civil process.

LP: different Sheriffs have different understandings of what the process is, they really do.

These quotes reveal the indeterminacy of contempt in terms of in terms of the legal processes and procedures. In addition to the concerns about the judiciary, mothers in both jurisdictions lacked knowledge of enforcement, and when questioned they could not answer what the enforcement procedure was in their jurisdiction. One [Mother] said:

M: Well, at the time, I thought what would happen is that my ex-partner would just call the police and the police would just come and arrest me, but three proceedings in, now what I understand is that he would have had to take me back to court. And if the court had deemed that I had broken the order, I could potentially face prosecution, including, potentially, jail time, or a fine, or community service. But at the time, I just had this fear that the police were going to turn up on the doorstep and take me away from my kids, and it traumatised them. It's not made very clear that at that point in time, when they use jargon like, we're putting a power of arrest at the end of this court order.

This [Mother] describes the traumatic effects of the lack of information and uncertainty if the legal processes linked to contempt of court. To some degree, similar points were made by [Lord Wilson] in so far as he had concerns about Scottish procedure:

Lord Wilson: I have found it difficult to understand aspects of Scottish law and in particular Scottish procedure. And I do think, if you don't mind my saying so, that Scotland makes an enormous meal of some of these cases. They go on for...you know, like, a contact case can go on for a long, long time...Endless applications and proofs and this, that and the other. And technical objections and...I don't know. But I hope you don't mind my saying. I think that in England and Wales now we, sort of, get on with it more and deal with it. And so maybe things are changing. I think Lord Reed and Lord Hodge said that they hope things would change but I do find the...do...believe that in the Sheriff Court in particular these things wind on wearily for a long, long time and it's not good for the children, Sharon.

The procedural difficulties described by [Lord Wilson] were further raised by some [Mothers] in both jurisdictions who believed:

M: Family Court, it doesn't seem, like, structured well enough, the rules don't seem to be grounded. Like, there's no, you did this, so this happened. And I know it's different, because it's family and children. But it just all feels so up in the air, like, if that makes sense.

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M: I've been to a few different courts, and had different judges, and it's all been very different experiences. And, you know, even one experience, having representation, and then not, can completely change your opinion. Because like I said, it's so varying

Once again, the uncertainty and confusion in relation to the processes and the differing interpretations experienced by the [Mothers] may also reveal indeterminacy in judicial decision making. Another [Mother] explained that [LPs] take part in courtroom theatre to create a sense of authority and to conjure up fear in [Mothers] who are accused of challenging the court authority:

M: And she [ex partner's LP] literally started putting on the black bib with the white bits that's a very formal style of dress. And I don't know if that's what you do when you prosecute for contempt of court, as opposed to in a family court. The magistrates who were hearing the case absolutely tore her apart. And so, did the clerk of the court. Because I understand that the structure of hearing a contempt of court is very different to a family court in terms of who has to be present. So, it would've been the governance of that that was completely out of the window.

This [Mother] was fortunate as far as the magistrate recognised that the [LP's] actions were inappropriate.

A further issue which both [LPs and Mothers] raised was that allegations of non-compliance and contempt of court can be lodged with the court, without further action, a further source of uncertainty:

LP: I mean if there's been a minute that's been put in for contempt and nothing's been done with it, because sometimes they sit in abeyance for ages with nothing being done

Punishment for Contempt of Court

Despite the challenges with contempt of court, some [Mothers 5] who took part in this thesis had been found to have been in contempt of court. One [LP] explained that once a finding of contempt of court is made, the problems continue:

LP: And another thing about that is that that's because there's an alternative in crime, that you can do a community pay-back order. And I've also seen that in these civil cases, where these sheriffs are asking for criminal justice social reports, with a view to a community...community service, so unpaid work, on the basis they could be looking at unpaid work. You can't look at unpaid work for contempt of court.

As contempt of court is a civil issue, a criminal justice social work report is completely inappropriate as noted in preface of this thesis. Furthermore, seeking a criminal justice report once again suggests that the criminal justice system is being used improperly, extending out into the community, and potentially resulting in further

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procedures for the [Mother] and child possibly via social work involvement. The Contempt of Court Act [1981] clearly states the punishments permitted are no sanction, fine or prison and they do not include, community service, or unpaid work. The quote reaffirms the specific sanctions for contempt and highlights the lack of alternative sanctions for contempt of court.

All of those [Mothers] who were found to be in contempt of court believed that the punishment element of contempt of court was prolonged by multiple deferrals. One [Mother] said that each time she went into court:

M: I was absolutely mortified walking into that place, the woman was lovely and said that she did not agree with me going to jail nor community service.

Another [Mother] said that the members of the judiciary were inconsistent during the periods of deferral:

M:.... because of my medical position and that time [my LP] said that community service would not be an option nor going to jail. The only option would be a fine. But the Sheriff kept saying you will not be getting a fine you will be going to jail.

M: I think I was back about 5 or 6 times.....And each time they were lodging further documents

These quotes support Lord Glennie claim in *SM v CM* [2017] that courts misuse contempt of court findings holding the threat of punishment like a '*Sword of Damocles*' over the [Mother]. One Scottish [LP] explained this had been an issue in previous cases:

LP:...the way things went wrong in a number of the cases I've dealt with is because there's been a deferral of punishment, and then when the punishment has taken place it hasn't been for the contempt for which the finding was made, but it's been for subsequent failures, which are not part of the finding and therefore they shouldn't have been wrapped up in the punishment

These delays and errors can have serious consequences for the [Mothers] such as harsher punishments. [LPs] in this thesis explained that the ultimate punishment of civil incarceration for contempt of court was anachronous and challenging. One [LP] explained:

LP: Well, I think it's a hangover, it's the inherent power of the court to regulate its own procedures.....And if somebody is in defiance of the court then you can impose some sort of penalty. And then that's been limited by the Contempt of Court Act.

The courts' power to punish has been curtailed by the *Contempt of Court Act [1981]* to some degree, but as Lord Wilson explained, the court must have powers to punish:

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Lord Wilson: we would say that's part of the common law [civil imprisonment]. I mean every legal system has to deal with breaches of order. You don't need..... we don't need an act of parliament to say, we can imprison someone for breaching our orders. If we can't enforce our orders, we mightn't as well not bother to turn up and be judges at all. So its inherent. So we would say the common law

One of the challenges of the reference to the inherent powers of the court, is that it is not immediately clear, when the act would be used and what would instead lead to the court using its common law powers. One [LP] raised concerns about how these powers are used:

LP: But I know it's used to frighten people, it's used to... And it's almost like the nuclear deterrent, isn't it? What's the point in having Trident if you're never going to press the button? It's that kind of thing, isn't it? And that's how it feels to me really with this. I suppose you have this power; it has to be used as appropriate. But I'm just worried about the effect on families by using such a power.

This quote suggest that the court needs to have a way to ensure that society respects its authority, and to be able to punish if its power is undermined. The analogy of the nuclear deterrent suggests that the court would use contempt of court as a weapon to scare people into complying with their orders. In contrast, Lord Wilson believes that sending a [Mother] to prison for noncompliance with a child contract is a "*wholly ridiculous idea.*"

Civil Imprisonment Processes

All [LP's] were asked if they could clarify the process for civil imprisonment. One [LP] said:

LP: Just this kind of default. Anything's okay if it's in the common law.

Not only were [LPs] vague on civil imprisonment, none of the [Mothers] in England & Wales had ever heard of civil imprisonment and thought that if they were sent to prison, it would be a criminal sanction, with a criminal record, which highlights how some of the uncertainty associated with contempt of court leads to extra stress for [Mothers]:

M: I guess, if it was to happen, I guess the judge would have said that that was what he wanted to happen. Yeah, I don't know. No, to be honest, I don't know. I guess the judge would have ordered it, and then I would have heard how it would have happened, yeah.

The lack of awareness as to what might happen may suggest that [Mothers] are not aware of their rights. One [LP] highlighted that there can be problems with the process used to send a [Mother] to prison:

LP: the interesting thing was the whole process that had led her to being imprisoned was flawed, and so it wasn't properly checked out; and she

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also hadn't shown wilful contempt, contact hadn't...there was a failure to distinguish between contact not having occurred and somebody failing to do what the court had required of them, so these children would be presented but they weren't actually going into contact. The other one that I was involved on the side of was also an open door; and what had happened in both those cases was the court had got confused between civil process – and contempt is a civil process – and criminal process, and they'd somehow switched between recording what they were doing in the context of civil proceedings and dealt with it as if it was a summary criminal matter; so they'd put it through as a summary criminal minute, and these poor women had been locked up with the convicted prisoners, whereas the contempt women should be with the remand prisoners. So, they were in a much more difficult portion of the prison than they actually should have been..... And in that second one the sheriff was quite severely confused about what she was doing

This quote amplifies the implications arising from the inconsistencies of contempt of court and points to the inappropriate use of prison. This injustice may be exacerbated by further procedural flaws. In trying to resolve the errors as one [LP] explained:

LP: when you're appealing on factual stuff to the sheriff appeal court it's very hard to disturb those decisions, because a sheriff has a very wide discretion.

This quote suggests that the discretion of the sheriff is not necessarily constrained by the facts of the case and relates to the indeterminacy in the law. One Scottish [LP] who is also a part-time member of the judiciary in Scotland also raised anxiety about how the changes in Scotland may have a detrimental impact on [Mothers] and families:

LP: But because they have now said that it is an ordinary form of appeal, with the reorganisation of the court structure it's going to the Sheriff Appeal Court, not to the Inner House; and I don't know how quickly the Sheriff Appeal Court is going to react, but the Inner House reacted very quickly and we were able to spring the couple of women who they were in Cornton Vale, I think, within a week or so. Still a horrible week for them....But I wonder whether the Sheriff Appeal Court is going to have the same approach; and it's the Sheriff Appeal Court is much more supportive of its sheriffs than the Inner House that stands back from this. I have an anxiety about how if we go on with these contempt actions how they're going to work, how the appeal is going to work, and whether the Sheriff Appeal Court will be as sympathetic as the Inner House to having women out and allowing the appeal to take place.

This [LP] reveals professional concerns about protecting institutional power over the due administration of justice. Another aspect of a contempt finding which [LP] believe is erroneous is the belief that a finding of contempt of court can be purged. As one [LP] argued:

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LP: You can't purge a contempt that's already taken place, can you? You can say, I'm very sorry, I won't do it again, you know, I'm sorry I defied the authority of the court and I'll be good from now on...

However, this does not bring the issue to a robust conclusion, which perpetuates the fear, anxiety, stress, and paves the way for further litigation.

The Never-Ending Litigation: Another Form of Indeterminacy

All [LP's] raised concerns relating to the never-ending litigation and the influence of allegations and or previous findings of contempt have on the cycle of litigation. [LPs] believed that if a [Mother] was found to have been in contempt of court it would be hard for her to have a fair hearing in the future:

LP: But isn't that inevitable? If somebody has been in breach of the court order and was found to be in contempt, then why shouldn't the court take that into consideration when deciding whether or not to pronounce any further order?

LP: What's the court supposed to do, just ignore it, or just hear it and just somehow shouldn't be brought to the court's attention at all. It's confidential or something, I mean...

LP: I think once there's been a finding of contempt, I think whether anyone likes it or not, I think that poisons everything. If there's been a finding. I mean if there's been a minute that's been put in for contempt and nothing's been done with it, because sometimes they sit in abeyance for ages with nothing being done.

LP: Yeah. It's like give a dog a bad name, isn't it?

These quotes once again highlight the impossibility of keeping these two actions separate and supports the views of the court in *Hadkinson v Hadkinson* [1952], raising significant issues in terms of a [Mothers] Article 6 rights to 'a fair hearing' as discussed in *chapter five*. Another [LP] also highlighted the unwillingness of the judiciary to admit mistakes:

LP: I think in our society generally there's a bit of a reluctance just to put your hands up and say, actually I got, I misjudged that. How are we going to fix it? But the legal profession is bad for it.

When the legal profession makes errors, they are unlikely to put their hands up, and fix these issues. Instead, they form part of the doctrinal heritage in which legal decisions are based, and the errors become are woven into the law.

The Impact of Contact Enforcement on Children and Mothers

The courts' function in contact disputes is to determine the '*child's best interests*'. However, as the court pursues enforcement of its orders, the 'best interests of the child' is relegated into the abyss with life changing implications. As one [LP] noted,

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when the court sends a [Mother] to prison for contempt of court, the public nature of decision-making can be difficult for children:

LP: I would prefer to see things in relation to children kept as private as possible. You don't want to walk into school in Monday morning and have somebody laughing because your mum is in prison because she's failed to send you for contact the previous Friday.

LP: Try and move forward and that's going to be even harder if you've then got a child at home who is saying, my pals now know about this and I'm mortified.

These quotes suggest that in a bid to coerce and punish the [Mother], the child become collateral damage, and, furthermore, that the actions of the court in upholding its authority conflict starkly with its function of acting in the child's '*best interests*'. All [Mother's and LP's] in this thesis were asked if they believed threats of contempt of court and enforcement had an impact on the child's welfare:

These quotes also reveal the strain of the litigation and how it can overshadow childhood, resulting in negative impacts on young children. Three [Mothers] highlighted the impact that the contact and enforcement litigation had on their children's health and wellbeing:

M: his mental health was the thing that... It was quite scary. At one time, for half an hour, he told me that he wanted to kill himself, when he was eight years old. And it took a whole year for him to be seen by CAMHS because they're so overloaded. And because he hadn't actually done anything to himself, to harm himself, he'd just talked about it. But again, now he's had the support, things are so much better.

M: She's been saying that she's self-harming, she's sending messages for help, she's calling NSPCC, there's so many things that it's so difficult.

These quotes reveal serious mental ill-health in young people who have been involved in the family court system which may also be exacerbated by public knowledge of contempt of court or civil imprisonment and perceptions that the child's mother has a criminal record and has committed a crime. The impact on children was also a significant concern for two [LPs] who said:

LP: And this child, as I said, has been subject to court action since she was two. So, I think, yeah, the damage in the case, and contact in residence cases I think cannot be overstated. It just cannot be.

LP: And the damage that can be caused to children, and the contempt of court situation as well, where mummy is punished and maybe sent to prison for not producing a child for contact. I mean that cannot, just cannot have a positive effect on a child. It just can't.

Aware of the implications for children, all [Mothers] were asked how enforcement had impacted on their lives. One explained:

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M: I mean, it's just mind-blowing, the whole thing, to be honest, and the way it works is just mind-blowing. And I still don't feel safe, in the system.

This [Mother] felt that she could be taken to court and that her freedom could be removed at any point. She highlights the precarious situation, [Mothers] feel they are in when they enter the family court. Another [Mother] highlights her resulting lack of trust:

M: I don't trust anyone anymore; my life just isn't enjoyable any longer. We struggle for everything now, and no one is taking responsibility for their mistakes.

Another [Mother] reflects on the energy and time these actions sap away:

M: it takes so much energy to do all this, and it really has drained me as a person, and to still be afloat today. And I can only say this because it's anonymous, but to still be alive today, the amounts of times I thought I cannot live here anymore, this is too much to take, is incredible. And I think the only reason I'm still here is because I will not let the children be raised by him. So yeah, I know a lot of other people who have been through the same situation.

M: And I've just sold my house, I had to choose between having central heating and double glazing put into my house or a barrister last year, and I chose the barrister, so I've just had to sell my house. And yet I've been fortunate to have a house, but the point was that he is so wealthy that this should never have been the case, but the courts have supported his abuse.

This [Mother] highlights how her financial circumstances have changed as a result of what she believes in abuse through the court system. Similarly, another [Mother] highlighted how her career has been lost to the demands of the family court system:

M: I lost my job; I was off so much with court hearings it was so draining. How do you explain the 5 or 6 years' gap in your employment history? Do you say, yeah well, I was involved in a contact action, and I couldn't work as it was so stressful. What are they going to think?

These quotes reveal the life changing implications and impact of child contact enforcement on [Mothers] and children in Scotland, England, and Wales. Although some [Mothers] had been found in contempt of court at the time of the research, their cases were still on-going. None of the [Mothers] had been sent to Prison and as such they were not able to discuss the impact of incarceration on their children or their lives.

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It's a Human Problem not a Legal Problem

Lord Wilson made some further suggestions and offered further perspectives on the issue of child contact enforcement. He said that there are times when the issue is too difficult for the court:

Lord Wilson: Judges dealing with difficult mothers is very, very problematical, and there has to come a time sometimes when the courts say, can't deal with it, too difficult. Its an emotional problem. So judges have to be bold enough to say, there are some decision which.... there are some issues which cannot be resolved in a court of law.

And I have found.....I found when I was a judge that the most important thing was for the mother to get a boyfriend. I found that when the mother had a boyfriend, perhaps he was a father himself. Perhaps he was a father himself and either he had contact or didn't have contact with his children but wanted it. I found that the boyfriend over time would often persuade the mother, look its quite wrong for you to be preventing contact with your ex. And I mean, this is what's happened to me. Boyfriends are the key to things.

Lord Wilson also said:

Lord Wilson: I do want to end where I began. This idea of imprisoning mums for contempt for not cooperating with a contact order is antediluvian. It's ridiculous. And we've really pretty well abandoned it. It's totally counterproductive and there must be more subtle ways of getting mums to behave properly in respect to contact. And I hope that Scotland agrees.

Finally, Lord Wilson said it was important to remember that:

Lord Wilson: The paramount interests of the child are up there in the sky like the sun. And the paramount interests of the child are shedding light on all the various factors. And so all the various factors have to be weighed in the light shone by the paramount interests of the child in the sky.

And so, the court should not lose sight of the child at the centre of the dispute.

Chapter Discussion

Drawing upon Unger's five points of indeterminacy, and the work of feminist jurisprudence scholars these findings will now be discussed in the five chronological stages.

FAMILY RELATIONS

This chapter has found that fathers can and do breach contact orders, with little or no punishment for doing so, unlike [Mothers] [(see cases of *JDE v SDW* [2014], *T.A.M v M.J.S* [2009], *AG v JB* [2011], *SM v CM* [2017]). The justification for this inequality is explained in terms of the role the party takes in the litigation. It was argued that as

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the father is predominately the 'pursuer', the standard assumption therefore is that he will comply with the contact order as he has brought the dispute to court [Lord Wilson]. However, these double standards create a unique legal position whereby fathers can '*pick and choose*' when to and if to comply with the court ordered contact, which the courts claim have been made in the '*best interest of the child*'. Yet both [Mothers] and children in contact disputes, are powerless to '*pick or choose*' whether to comply or not irrespective of the context of the issue facing them (*domestic abuse, child welfare concerns*).

LEGAL ISSUE(S):

In addition to not having to comply with a court order for contact, a father's non-compliance according to one [LP] would not be viewed as "*disrespecting the authority of the court*". This suggests in addition to having a choice in terms of compliance fathers appear to have certain legal privileges (which mothers and children don't have) which would make them immune from contempt of court actions and sanctions (*including incarceration*). As one [LP] explained "*putting [a] guy in jail would be inimical to the child's best interests*", which suggests that the court applies different reasoning to father's conduct and the impact therefore, which (once again) is suggestive of inequality in family law disputes (Smart, 1989). One [LP] claimed that a father's unique legal position means that courts focus is on "*making women do things and not the man*." Thus, fathers can flout contact orders with no criticism or repercussions.

Both [LPs and some Mothers] highlighted that, [Mothers] were in a '*no win*' situation. Even when [Mothers] complied with the court order, it was claimed by the judiciary that the spirit of the order had not been complied with [LP]. This position does not accord with the Contempt of Court Act (1981), nor the case law discussed in *chapter five*. It also points to how judicial decision making is not constrained by the law, evidence heard in court or precedent, but by inequality and judicial prejudice. One [LP] also explained that in some instances, [Mothers] were being punished for their child's refusal to comply with the contact order. Again, there is no legal provision in the Contempt of Court Act (1981) to punish a parent for the actions of the child. Yet again this demonstrates that judicial decision making is not constrained by the law. It is unclear how the mother could be punished for another person's (*a child*) (*who depending upon their age may not have the Mens Rae or Actus Rae, or the capacity to make decisions which legally could be held to meet the legal test for contempt which is deliberate, wilful and inexcusable disrespect to the authority of the court*) behaviour unless the judiciary do treat mothers and children as a single legal entity (Wright, 2002) in terms of contact and enforcement. But even if this is so, this approach is not articulated in official enforcement documents, nor the legislation (Article 6).

Some [LPs] also claimed that abusive fathers use court documents as a domestic abuse tool to attack [Mothers'] characters, a point also made by [Mothers]. Indeed, one [Mother] expressed her feelings that the court was "*complicit in his abuse*". This complicity points to Smart (1989, p161) argument that "*legal processes create their own harms [and] creates its own order of damage*" for women in the legal system when their lived experiences are discounted, rejected, or treated as insignificant resulting in inequality.

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COURT PROCESSES

In this chapter, concerns were once again raised about the blurring of boundaries (*discussed in chapter five*) and the difficulty of separating the contact action from the contempt action. And as discussed in *chapter five*, it appeared that contempt of court was omnipresent in contact disputes in terms of the reference to prison as a sanction, and yet it was difficult to identify a separate legal process which would trigger such a sanction. The complexity of the court processes, variations in judicial understandings and misunderstanding of contempt of court, and technical legal language (*as discussed in chapter five*) may hide the indeterminacies (*in terms of rational decision making, consistency in contempt doctrine and legal procedures used*) in the contempt of court jurisdiction. This once again raises questions about parents' awareness of enforcement processes and procedures, and their understanding about their legal rights.

PUNISHMENT

In terms of punishment, Lord Glennie claimed in *SM v CM* [2017] that a contempt of court finding had been used as a '*Sword of Damocles*' perilously hanging over the head of the [Mother] for a prolonged period, for subsequent alleged failures for 18 months. [LPs] explained that the issues with using an anachronous and technical law such as contempt of court, is that it can be misused by courts as in *SM v CM* [2017] and the Church of Scotland Ministers case. One [LP] highlighted that misunderstanding about contempt of court had significant and life changing consequences for [Mothers] and their children. As a result of the flawed process (*as discussed in chapter five*) some [Mothers] had not only been sent to prison (for a civil wrong) but had wrongly been placed in a convicted section of the prison rather than being treated as a civil prisoner in the remand area. This in part may be explained by the way in which the courts process a civil finding of contempt using criminal processes and language (*as discussed in the introduction to this thesis*) but the impact on mothers being treated like criminals for a civil wrong in the criminal justice system, once again suggests that if "*extreme consequences cry out for a qualification of this standard this may because they highlight a deficiency*" (Unger, 1976, p29)". And despite procedural errors, appealing a finding of contempt of court is extremely challenging. As one [LP] put it, it can be hard to disturb a finding of the court, which suggests that the court is often reluctant to review previous judgements.

Certainly, the appeal decisions (*reviewed in chapter five*) narrate difficulties which may exacerbate issues for mothers (*prolonged litigation, longer prison sentences*) and again point to inequality. And irrespective of the procedural errors one [LP] claimed that a finding of contempt of court would be influential in the court's decision to award contact, and ultimately it '*poisons everything, weakening the [Mother's] position in the contact dispute further and reinforcing the impossibility of separating contempt of court from the child contact dispute*. This may also put the child at the centre of the dispute at risk. The interviews in this chapter by [LPs] once again point to a lack of transparency and understanding of contempt of court. They also demonstrate how the coercive power of contempt of court is made to look necessary and justifiable.

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IMPACT

Although it may be a *'wholly ridiculous idea'* for [Mothers] to be sent to prison for non-compliance of a contact order, but they are, and the implications for both mothers and children can be traumatic and life changing. Two [LPs] voiced their concerns about children's privacy being impacted, the risks of them being humiliated at school and the unmeasurable damage to the child from prolonged litigation and maternal incarceration being published in newspapers or on social media as discussed in the previous chapter. It is unclear how this is or would be in any child's best interest, given the literature in *chapter three* explained that children whose mother is incarcerated are likely to have a lasting impact on a child's *"ability to trust authority"* (Parliament UK, 2019, p33). And result in the child, having *"sleep and attention problems, depression, anger, fear, blame, flashbacks of the traumatic episode"* (Kampfner, 1995, p19). And as Lord Falmer (2019, p5) also found, *"short prison sentences are [damaging] to [women] their family life and typically their well-being"*.

Three [Mothers] explained that because of the protracted litigation and enforcement pressures their children had experienced mental ill-health and one was self-harming. Five [Mothers] explained that enforcement and contact litigation had affected their own health, career, finances, and their ability to trust anyone. These are life changing implications for [Mothers] and children. And although this thesis was designed not to include children's voices, their [Mothers] have narrated an enduring nightmare, that by any standards possible could never be described or accepted as acting in their best interest. As discussed in the introduction of this thesis, children have endured significant harm, as a result of legal professionals, and the judiciaries refusal to include and seriously and independently assess the claims of domestic abuse. This once again suggests that there are real, plausible alternatives to the courts position that the actions of mothers and children are contemptuous. It also demonstrates in the case of the [mothers] in this study and those of whom [LPs] have represented, that the lack of judicial understanding of domestic abuse, outdated ideals of mothers and the misuse of contempt of court, can and does have life changing consequences for [Mothers] and children. It also raises wider questions as to the legitimacy of enforcement decisions via contempt of court as Kutz (1994, p1001) notes that the *"pretence of legality masks the extent to which systematic bias and prejudice affect decisions by public institutions. [And] citizens are thereby misled about the actual reason for their oppression and are therefore unable to form their resistance and resentment upon the real cause of their suffering"*

Chapter Summary

This chapter has explored how contact issues lead to [Mothers] experiencing threats of enforcement and enforcement actions. While fathers enjoy a unique legal position in the dispute as it was viewed that it would not be in the *best interests* to force a father to have contact with a child against his wishes. Lord Wilson pointed out the default position in contact litigation is that if it brought by the father, then the judiciary will believe he wants contact and thus the problem is one of the [Mothers] making. But once again, problems with legal procedures, prejudice, inequality, and abuse weave their way through the dispute. And what was positioned as acting in the best interests of the child by the judiciary, often resulted in life changing decisions, acting against their best interests. This chapter and *chapter six* also suggest that the

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underlying phenomenon of enforcement is domestic abuse. The next chapter will discuss the key themes from all three findings chapters and the contributions of this thesis before drawing the research to a close.

CHRONOLOGICAL MAP (SOCIAL-LEGAL)

5 CHRONOLOGICAL STAGES

CRITICAL FEMINIST INDETERMINIST PERSPECTIVE

1: Family Relationship & Family Breakdown



Family Relations, Breakdown of parental relationship, domestic abuse, welfare of the child

2: The Legal Perspective: Child Contact



Presumption in favour of contact, removal of domestic abuse, Mediation, Compliance, Prison, Prejudice

3: The Court process Contact & Enforcement



Recalcitrant father, multiple court orders, inequality, no win, catch 22, domestic abuse tool, confusion

4: Punishments & Appeals



Threats of punishments, sanction process problematic, prison, and civil incarceration. Alternatives were threats and actual changes to child's residence, never ending litigation

5: Impact on Mother & Child



Public humiliation and stigma, child collateral damage In the punishment of mother not in the child's best interests. Ill health. Fear of freedom, unsafe, lack of energy, self harm, loss of childhood, financial and career problems, loss of security

Change in focus from welfare of the child to protecting the due administration of justice

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STATUTORY INSTRUMENT

Contempt of Court Act (1981)

CASE LAW

AG v JB [2011]

Bramblevale [1970]

Hadkinson v Hadkinson [1952]

JDE v SDW [2014]

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T.A.M v M.J.S [2009]

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CHAPTER EIGHT

A FAIRER AND JUST SOCIETY FOR CHILDREN AND MOTHERS

CHAPTER EIGHT: A FAIRER AND JUST SOCIETY FOR CHILDREN AND MOTHERS

CHAPTER EIGHT

Mothers and children live under a contemptuous ‘*Sword of Damocles*’ in the family court. Perilously hanging by the slenderest of threats, capable of being cut at any moment by misunderstanding, misapplication, paternal deceit, or judicial hysteria [1]

Introduction: A Fairer and Just Society for Children and Mothers

This concluding chapter will revisit the research questions and explore the original contributions that this thesis makes to knowledge. The limitations of the research will be discussed, followed by recommendations for future areas of research.

What behaviour is considered contemptuous and how is contempt of court used as an enforcement tool in child contact disputes?

The legitimacy of the court system draws on legal precedent, legal processes and the rational basis of the law. In practice however, contempt of court is characterised by indeterminacy (vague and conflicting legal processes, judicial decision making (irrationality) and competing and contradictory doctrines) which aids specific groups (Unger, 1987) and is used to enforce outdated ideologies in the family courts. Contempt is used by [LPs] and the judiciary to strike fear into [Mothers] and to coerce their compliance with a contact order. It contains the ultimate civil sanction of imprisonment. However, it is a law which is often misunderstood and misused by [LPs] and members of the judiciary. [Mothers] in this thesis were aware that they could be sent to prison, for non-compliance, but they had not all heard of contempt of court. Certainly, the documentation reviewed in *chapter five* supports their lack of awareness of contempt of court in the family court.

Contempt was built on exclusivity and confusion as it was up to the King to decide what was lawful or not, in his eyes only. The judiciary do not have this absolute power and their discretion is fettered by the *Contempt of Court Act (1981)*. The limitations of contempt of court appear to be disguised by the law’s incoherence. The use of technical language, which often flirts between criminal and civil ‘legalese’ is particularly confusing in a civil dispute, and it can be difficult to identify and unpick key aspects of contempt court processes. As Unger (2014) argues, the lack of coherent processes and procedures and the blurring of boundaries between one legal action and another prevents critical examination and scrutiny. The interviews with [Mothers and LPs] in *chapters six and seven*, explain how contempt of court is used at the pre-court stage to ensure [Mothers] understand they must comply with the court’s orders. The interviews also provide insight into how contact issues are

¹I have adapted this from an address given by John F Kennedy to the General Assembly of the United Nations, September 25th1961 in relation to the Cold War when he said “*Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us.*”

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then constructed and positioned as a '*challenge to the authority of the court*'. Furthermore, the case law analysed in *chapter five*, reveals that the judiciary do erroneously apply contempt of court in such a way that it disproportionately affects [Mothers] in child contact disputes. The inequality in contempt of court case law, arising from a contact dispute can be understood as being influenced by gendered prejudice. And as Neilson (2017, p 376) notes there are "*few other situations in which a person can be threatened with quasi-criminal or criminal responsibility for the actions of someone else*".

What behaviour is considered contemptuous and how do mothers experience contempt of court in child contact disputes?

The 'Contemptuous [M]other,' is a construction shaped by '*implacably hostile or bad mother*' narratives (Ashe, 1992; Chesler, 1986). Within the case law the 'Contemptuous [M]other', is described as "*defiant, deceitful, manipulative, vengeful, dishonest, disobedient, and hysterical*'. She is positioned as someone who disrespects the authority of law, undermines the rule of law, incites anarchy and she is insubordinate. She is someone other mothers should not want to be 'like' and the judiciary are repelled by her.

Yet as this projects data shows the 'Contemptuous [M]other,' is silenced and marginalised. Her experiences are rejected, relegated or treated as insignificant (Smart, 1989, p163) or are made invisible to fit a specific '*legal mould*'. She is tasked with a dual role in the litigation; that of being her child's advocate and her own, but both are voiceless. She must push through misogyny, inequality, prejudice, bias, power imbalance, coercion and acts of criminality in a system that is incoherent, indeterminate, technical, and processes which are invisible. She is coerced into believing that she may be the '*wrong kind of women / mother*' if she persists in her fight to have her voice, her experiences, the abuse of her and her children considered by the court. She is constrained by intimidation and fear of prison or of losing her child or both.

As the data also show, professionals put her under a critical microscope to find some terminal fault or find some explanation for this 'Contemptuous [M]others' behaviour or why she should no longer be a mother at all. Questions of mental ill-health, Parental Alienation, a lack of respect for authority or simply just notions of '*bad mothers*' frame professional investigation. Professionals and legal professionals hope that fear will be enough to make her want to comply and be their kind of mother.

However, the research findings in this thesis also suggest that the Contemptuous [M]other' is: articulate, determined, forceful, intelligent and driven by maternal responsibility, she is empathetic, and resilient. She is someone who against all the odds seeks to experience the law as it is in the books, with its protections crafted in black in white. She seeks an equality of arms in the contact dispute, she wants her child's best interests to be paramount, not the position of the parties. The 'Contemptuous [M]other' does fundamentally believe in the rule of law, just not the '*law in action*' and she will not put her child in danger, she will strive to do the right thing even if it is unpopular.

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What are the implications of using contempt of court in child contact disputes against mothers?

As things stand however, the ‘Contemptuous [M]other, is faced with the incoherence of contempt of court and a dual role of being her child’s and her own advocate, both of which are marginalised. And this is further complicated in England and Wales with the additional avenues for other sanctions. It is a morass of intertwined, complex, and confusing legislation. This confusion not only raises human rights concerns but, as discussed in *chapter seven*, abusive fathers use this complex process as a tool to invoke fear, as a bargaining chip and to continue to control and abuse the [Mother]. The fact that the law sets parents up as unequal adversaries is an important finding in this thesis, the implications of which are explored through *chapter seven*. The position advanced by Lord Wilson that, “*basically a father who asks for contact is going to turn up,*” may mean that there is a judicial assumption that fathers are not part of the problem. But the data in this thesis suggests that fathers may turn up to court but not always contact ordered by the court.

This thesis has shown that the construction of non-compliance is misogynistic and has a real impact on contact. Courts do not seem to be open to the complexity of issues affecting the child. Domestic abuse is concealed or rejected (or viewed as being somehow on the domestic abuse planet, not the child contact planet) (Hester, 2011), and yet domestic abuse is often present and seeps into all areas of contact and contact litigation. Ignoring it only makes matters worse for the child, the parents, and the courts. Smart (1999) highlights that domestic abuse has always been an issue in family law. As discussed in chapter one in the 1980’s Lady Hale noted that “*it was not justified to imprison such a mother or label her as implacably hostile when she was genuinely afraid*” (See *Re D (Contact: Reasons for Refusal)* [1997]) and scholars such as Smart & Neale (1998) recognised that domestic abuse does have an impact on contact arrangements. Legislators have also sought to acknowledge domestic abuse as a factor in disputes by incorporating provision for domestic abuse for example in *The Family Law Act (1996)*, *Children (Scotland) Act 1995*, *Family (Scotland) Act 2006*. But custom and practice in family law is influenced by judicial attitudes (Whitecross, 2016) behaviour, and decisions, and until [LPs] feel brave to include domestic abuse, contact will remain unsafe, contempt of court will be used as a domestic abuse tool by fathers and the litigation will be protracted (another domestic abuse tactic) (Sharp- Jeffs, 2015).

The severe implications for [Mothers] and their children (physical and mental health, privacy, loss of trust) were *discussed in chapter seven*. Cases that start out with the ‘welfare’ and ‘best interests of the child’ as paramount considerations, end up undermining a child’s mental wellbeing, with one child in this study wanting to kill himself. The personal devastation of these negative early experiences may follow these children around for the rest of their lives. In later life, if they fall foul of the law, will society judge and punish them for the impact the failures in the family court had on their early childhood experiences? This is a societal problem. How will society judge the children let down by the family court? The implications for the [Mothers] are just as stark. They emphasised loss of trust, financial difficulties, loss of time, quality of life, loss of career, loss of security. These [Mothers] are psychologically, emotionally, and financially worse off than they were at the start of the court action, and all they wanted was to be heard and be safe.

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Original Contribution

The theoretical contribution this thesis makes is that this is the first thesis to combine the work of Unger and Smart as a theoretical framework. The research drew upon Unger's indeterminacy thesis, which provided the framework for exploring the complexity and contradictions in contempt of court. Exploring and identifying the challenges with using contempt of court also revealed the voices of those affected by this law, which the case law revealed to be [Mothers]. Thus, in a bid to explore and explain [Mothers'] experiences in the family court, I drew upon the work of feminist scholars. Both theoretical perspectives were blended and described in this thesis as a Critical Feminist Indeterminist perspective.

This theoretical blend of Unger (1993) and (Smart 1989) work and their position that legal analysis should seek to map the law, and map experience alongside the law, led to the development of a Chronological Map, which I used to map the legal processes in a chronological order, and then map the (social) experiences of the [Mothers] also in a chronological order. In doing so the themes of inequality, prejudice, misogyny, and the domestic abuse were revealed. A visual representation of the dual chronological map and the five chronological stages, which also developed to provides a summary of the research at the end of each chapter and a final map is included at the end of this chapter.

There are also several empirical contributions this thesis makes to the contribution of knowledge. This thesis has explored how contempt of court is used in the family courts in Scotland, England, and Wales to coerce parents (usually mothers) and to enforce a child contact order. In doing so it builds on the work of other scholars in the field of child contact (Morrison, 2015, MacKay, 2018, Callaghan et al, 2017, Callaghan, 2015, Callaghan, 2017, 2020, Nikupeteri and Laitinen, 2015, Arnold, 201, Katz et al., 2020), child contact child contact and domestic abuse (Morrison, 2015, MacKay 2018, Whitecross, 2019, 2019) and child contact enforcement (Wasoff, 2007, Hunt and Macleod, 2008, Trinder et al., 2013). Also, the collection of qualitative data from the interviews with LPs, Mothers and Lord Wilson and the online survey provide an insight into one of the most complex family law issues.

More specifically child contact enforcement via contempt of court is an under-researched area of family law in Scotland, England and Wales and this study is the first to investigate enforcement from this perspective. Previous studies on enforcement more generally (Wasoff, 2007, Hunt and Macleod, 2008, Trinder et al., 2013) have argued that enforcement affects only a small percentage of all family law cases in Scotland, England and Wales. This research challenges this perspective by demonstrating that enforcement is not a final destination but is thread that runs throughout the lifespan of the contact dispute (pre-legal advice to appeal courts). The interviews with both [LPs and Mothers] claimed that enforcement and prison are mentioned from the outset and has an impact on the advice [LPs] give mothers.

The thesis also builds on the structural concerns raised by members of the judiciary (Gill, 2009; Bach, 2016) in relation to antiquated procedures and rules which appear to prolong disputes (see NJDB v (Appellant) v JEG and another (Respondents) (Scotland) [2012]). This thesis builds on these concerns and suggests that contempt of court procedures add to the complexity of child contact more broadly and also

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builds on concerns around contempt (*lack of clarity as to what contempt of court is, no agreed definition, purpose, and procedures*) raised in the Phillimore report (1977). And in terms of contempt of court more generally, this thesis builds upon the work of (Herd, 2021 and Miller, 2000) but there remains a dearth of scholarly literature on contempt of court in the UK.

Finally, this thesis supports previous studies (Hunt and Macleod, 2008, Trinder et al., 2013) which suggest that domestic abuse is a factor in non-compliance with a child contact order. The findings from this study also build upon the claims made by Whitecross (2017) that judicial attitudes in respect to domestic abuse has an impact on the legal advice given to mothers and how non-compliance is viewed and also the work of Hester's (2011) three planet model, as domestic abuse, contact and child protection appear to be treated differently within the different professional contexts (planets)

Research Limitations

There are several limitations of this thesis as with all research. The relatively small, self-selected experiences of [Mothers] are not universal and, as such, other mothers may experience contempt of court processes differently. Similarly, other senior family law professionals may disagree with some of the perspectives presented in this thesis. However, as noted in *chapter four*, I could not cope with the volume of requests to take part in this research or the online survey within the scope of a PhD and as an individual researcher. Similarly, the [LPs] were all experienced and senior professionals with one being a part-time Sheriff in Scotland.

Developments during the course of the research:

The research was also carried out at specific time and there have been some developments since I first embarked on this thesis in 2017 and conducted my research (interviews, online survey, and documentary analysis) in 2019.

Scotland

In Scotland, the *Children (Scotland) Act 2020* was introduced to hear directly from children. In particular, section 22 states that children have the right to express a view about non-compliance and that their wishes should be the primary consideration for the courts. However, the contempt of court act was retained. In addition, the *Domestic Abuse (Scotland) Act 2018* includes provisions relating to coercive control. The Scottish Government as part of the *Children (Equal Protection from Assault) (Scotland) Act 2019*. According to the Scottish Government this Act does not introduce a new offence. It removes a defence to the existing offence of assault. Courts have also employed remote contact hearings as a result of the Covid-19 pandemic. This is a significant change in how family court issues were managed historically, which in some instances may be helpful.

England

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In England and Wales, the Domestic Abuse Act 2021 was enacted and similarly to Scotland remote hearings took place as a result of the Covid-19 pandemic. There have also been developments since I carried out my research in 2019, including the introduction of the Family Procedure (Amendment NO 2) Rules 2020 which provides guidance on contempt of court in family actions and explains:

These Rules amend the Family Procedure Rules 2010 (SI 2010/2955) by substituting for Part 37 of those Rules (applications and proceedings in relation to contempt of court) a new Part 37 that streamlines and simplifies the process for proceedings for contempt of court. The new Part mirrors Part 81 of the Civil Procedure Rules 1998 (S.I. 1998/3132) which was substituted by the Civil Procedure (Amendment No. 3) Rules 2020 following a consultation by the Civil Procedure Rule Committee (Proposed rule changes relating to contempt of court: redraft of CPR Part 81), which ran from 9 March 2020 to 11 May 2020. These Rules also make amendments in Parts 10 and 11 of the Family Procedure Rules 2010 which are consequential on the streamlining of the new Part 37.

Despite these development, the issues identified in this thesis will continue to be an issue now and in the future. As the new rules and legislations passed in both jurisdictions continue to use language akin to criminality. The technical nature of the rules and the legislation will continue to present accessibility issues for parents, who cannot access legal aid or want to represent themselves. And the concerns raised in this thesis in relation to enforcement and contempt of court will continue as both jurisdictions have retained the use of contempt of court, and the punishment of prison with life changing implications for the child(ren) and mothers

Recommendations

The following recommendations, based on the findings of this thesis, are not beyond the reach of our society, our law makers, or our governments in a '**Fair and Just Society**' (Unger, 1983). For the purpose of 'ownership' these recommendations have been directed at the groups which can invoke change.

Recommendations for Policy

It is time to review the Contempt of Court Act (1981) which is out of date. (It still contains words such as 'tape recorders'). Indeed, such laws should be reviewed regularly. And although 'juries' were formally removed from contempt of court hearings in 1641, it is time to review this position, given that the ultimate punishment of prison has resulted in miscarriages of justice. The 'due administration of justice' in a democratic society should be open to scrutiny and change, and, as such, anyone accused of contempt should be entitled to a hearing with a jury (although it is recognized that juries can also be sexist).

Contempt of court is **not appropriate** as an enforcement tool and particularly not in child contact disputes, as its complexity, ambiguity, and indeterminacy results in excessive and protracted litigation. It moves the focus of the court from the best interests of the child to focusing on one parent, usually the mother. Judicial decision making appears to be based on or motivated by misogynistic and prejudicial attitudes which raise critical questions as to the legitimacy of the use of contempt of

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court, while the application of contempt of court raises questions of Human Rights breaches. And as Martineau (1981, p677) concluded contempt of court is not necessary or essential as “*non common law countries [do] manage without it*”. I recognise that the courts may balk at this recommendation, but I feel it is important. We should seek to find a way to reimagine our laws, to find a way in which we move away from enforcement and determine contact arrangements in a child-friendly way. I am thus recommending the abolition of contempt of court and, indeed, of civil imprisonment in a just and fair society.

If contempt of court is to be retained in the family court, then contempt should be explained to parents from the outset. All processes should be clearly and coherently detailed in official documentation in everyday language, to ensure that parents can distinguish between a child contact action, a contempt action and an enforcement process. There should also be greater awareness of the role and function of civil imprisonment and governments should collect data on how many mothers are sent to prison via contempt of court each year. There needs to be better and more transparent data sets to allow issues in the family court to be scrutinised in a broader and timely way. Finally, there should be more support for civil prisoners. It is wholly inappropriate to place a civil prisoner with convicted prisoners. The one size all approach in relation to imprisonment does not work [2].

Summary of calls to action:

1. Make radical changes in policy and law relating to child contact
2. Make radical changes to how ‘[M]others’ are viewed and positioned in family law and the legal system
3. Remove contempt of court as an enforcement tool in child contact disputes
4. Introduce clearer communication about enforcement, which is accessible and inclusive for parents.
5. Abolish the use of civil imprisonment (or any use prison to enforce a child contact order)
6. Collect data on enforcement to allow for scrutiny

More broadly in relation to Contempt of Court

7. Review the Contempt of Court Act 1981 with a view of removing it from the legal system.
8. The Contempt of Court Act 1981 uses outdated terms and concepts such as ‘*tape recorders*’.
9. Remove civil imprisonment from our legal system.

Recommendations for the Judiciary

² The Corston report (p11) has previously suggested that public awareness is critical to public understanding of the law and the issues around prison “I believe that it is timely to build on indications that the public is not as punitive in outlook as some suppose and wants to know the facts and to have a rational debate. Educating the public and persuading sentencers to have confidence in alternative sanctions must be an integral part of the strategy relating to women who offend and who are at risk of offending. Prison is not the right place for many damaged and disadvantaged women. I recommend that this should become a key consistent message right from the top of government. This may go some way to heighten the awareness of the general public and encourage a reasoned and enlightened debate. The radical proposals that I recommend for women should be treated as a pilot for other groups within the criminal justice system, young men for example”.

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The dated collected indicated that judicial attitudes and prejudices are of serious concern to legal professionals, academics, and mothers. Outdated attitudes and prejudices (the desirability of traditional family life, misogyny, inequality, domestic abuse as a normal part of parental relationships) have a direct impact on how legal professionals present mothers' cases, and the experiences of mothers in the legal system. This means that mothers legal rights are being directly affected by the attitudes of the judiciary, which impacts on how they experience the law. These attitude and prejudices also put mothers and child[ren] at risk of serious and lifelong harm (physical and mental). It cannot be that those who are tasked with administering the law, display such outdated attitudes.

Furthermore, a radical overhaul of the way that child contact orders are drafted and sent to parents is required. This document is central to '*the best interests of the child*' and to 'enforcement,' and it is critical that they are reviewed with urgency. It is also important that the judiciary address allegations of contempt swiftly and clearly explain in writing that this leads to a different court action. The contact dispute is related to the welfare of the child and contempt relates to the due administration of justice, they are not one and the same. And in the case of contempt, legal aid is available.

It is also critical that members of the judiciary, who are legally obligated to take into account the child's rights (Article 8) when considering a sanction of prison in a civil dispute, do so and are held to account if they do not. Standards must be raised, and greater scrutiny of the judiciary is necessary.

The use of civil imprisonment is completely inappropriate -in Lord Wilson's words 'ridiculous' in family proceedings. It is time to end the use of prison linked to family disputes in the UK. It is also time to eradicate civil imprisonment more broadly, in a quest to create a fair and just society. Mothers who allege abuse should not be incarcerated for raising concerns.

The evidence collected throughout this study indicated that criminal language was used almost as a default in civil processes and the family courts. This is unacceptable and wrong. It is my firm belief that the court and prison systems must review the legal process linked to civil imprisonment and remove any links or suggestion of criminality, there is a clear point of difference, and it should be made obvious to all.

Much has been mooted about training the judiciary to recognise the signs of domestic abuse (Whitecross, 2017). However, awareness of domestic abuse does not in itself effect change as can be seen in the raft of legislative changes incorporating domestic abuse since the 1970s. I propose a more radical approach to judicial training, one which includes real life simulations, dilemmas, and an understanding of the impossible choices that mothers are being asked to make and debates as to what court orders ask people to do. I also feel as part of the training to become a member of the judiciary, it is important for Justices to spend time in prison, without any special treatment. If this is the law's ultimate sanction, then those who administer the law should fully understand what it is like to be a

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prisoner [3], especially a civil one. The saying is “*once you have walked in another’s footsteps can you begin to appreciate their journey.*” I also believe it is important that members of the judiciary to apologise when they get it wrong, especially to children. The legal system seeks to lead by example and expects people to admit to their wrongdoing. And yet the system prevents members of the judiciary from doing the same. This should be the highest ambition of a contemporary successful, positive, and humane legal system and a ‘**Just and Fair Society**’.

Summary of calls to action:

1. Court orders should be clearer and should not contain legalese for parents
2. Consider children’s rights when threatening and implementing prison sentences for non-compliance with a civil order for contact.
3. End the use of prison in civil family disputes.
4. Increase awareness of domestic abuse
5. As part of judicial training, members of the Judiciary should experience first-hand the challenges of contact, enforcement, and incarceration (Simulation exercises and spending time in prison)
6. A more inclusive and representative judiciary, which represents the values of society.
7. Greater scrutiny of the judiciary
8. Members of the judiciary should apologise for mistakes and lead by example.

Recommendations for Legal Professionals (LPs)

LPs have a vital role to play in ensuring women and children are treated fairly in the family courts. Part of the difficulty identified in this thesis is that LPs claim that they try to do what is best for their clients and due to judicial attitudes, they believe that this means removing allegations of abuse. They do not want to make things worse for their clients but are also aware that removing domestic abuse from contact negotiations does not remove the problem. LPs need to be brave and be empowered and supported by professional bodies, policy, and laws to make the judiciary listen to the case and to abide by the spirit and letter of the law, which includes hearing allegations of abuse.

It is also critical to simplify court orders to make them easier to follow and that they are reviewed for errors and ambiguity. And any such issues with the court orders should be raised immediately with the court. Clients cannot and should not be threatened and or coerced into a position, which will not help them or their child[ren]. Their case must be presented in a way in which reflects their issues.

Summary of calls to action:

1. Clarify court orders
2. Use plain language (no legalese or jargon) to explain legal processes

³ As mentioned earlier in this thesis civil prisoners should be treated as remand prisoners. Scottish Centre for Crime and Justice Marguerite Schinkel highlighted the issues within the remand population in Scotland by saying “*Remand prisoners are spending more time in their cells and have fewer opportunities than those who have been convicted. They are cut off from their community, they do not receive access to education, counselling services or other support that they may need. The incidence of suicide among remand prisoners is a particular cause for concern. According to the Scottish Prison Service’s deaths in custody statistics between 2016 and 2020 almost half (49%) of deaths of remand prisoners was by suicide compared to 29% of convicted prisoners.*”

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3. Do not remove domestic abuse
4. LPs should not allow clients to be coerced and threatened for raising concerns of abuse in family disputes.
5. LPs should be brave and use family law and human rights provision to make these legal arguments rather than designing the argument to please the member of the judiciary
6. LPs and professional bodies should support LPs who are lambasted by members of the judiciary for raising abuse in the legal system.

Recommendations for Mothers via Women's campaigning groups

Throughout the interviews, women talked about not understanding the legal processes, and being silenced throughout. It is imperative for the women and their children that they are fully aware of their legal rights. Currently, they cannot rely fully on a legal professional to explain the issues, as this research has shown, legal professionals often remove valuable information from the case, due to judicial attitudes and fear of being lambasted from the bench.

Summary of calls to action:

1. More information of contact, enforcement and contempt including processes, procedure, and rights.
2. All information should be in plain language (no legalese, jargon or reference to complex processes and procedure), with diagrams, and videos to ensure everyone can understand what is going on and are aware of their legal rights irrespective if they are being represented by a legal professional.

Recommendations for Public Awareness (ALL)

There should be greater awareness of the issues in the family court system, and how these issues directly impact on [M]others and children. There needs to be an end to the prejudicial narrative that only [M]others breach contact orders. Fathers need to be held accountable for their role in contact. And should civil imprisonment is not to be eradicated, there needs to be greater clarity and public awareness about what '*civil imprisonment*' is, and that it does not result in a criminal record. Mothers in this study talked about the fear and stigma of prison.

Summary of calls to action:

1. Build alliances with the media to actively raise awareness of enforcement, the gendered nature of enforcement, and make it explicit that civil imprisonment does not lead to a criminal conviction.
2. Awareness raising should also highlight how courts use contempt to coerce and silence women and children in contact disputes drawing upon the lived experiences of mothers and revealing the archaic attitudes of some members of the judiciary.
3. Add information about civil imprisonment official websites, highlight how ridiculous it is to send a mother to prison having never committed a crime.
4. Explain the impact civil imprisonment has on children in family disputes.

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Future Research

As this thesis has focused on the voices of [Mothers] who had been in heterosexual relationships, future study should also include same sex couples. Some future research should also be carried out to investigate why fathers flout contact orders, given that both [Mothers and LPs] claimed that father do breach orders despite instigating applications for contact. It is important to note that there may be some [Mothers] who do make false allegations, and as such researchers could explore reasons why this might be the case.

It may also be appropriate to do a longitudinal study with families to see how contempt influences court decisions and the impact these decisions have on children and mothers over time. It would also be valuable to hear from members of the judiciary to uncover why different reasoning exists for different groups in contempt actions. It would also be worthwhile to identify if the issues raised in this thesis are similar in other jurisdictions. In terms of this thesis, I had people contact me from Australia, New Zealand, Cyprus (military woman), Canada, Ireland, and the US. This suggests that enforcement is an issue in several jurisdictions. Another area to explore is the enforcement of international court orders and the implications via the Hague Convention (see *L (Return Order) [2021]*; *CD v EF [2021]*). Finally, researchers should consider exploring if and how the Covid-19 pandemic affected the enforcement of child contact orders.

Concluding thoughts:

My concluding remarks of this thesis depart from the more academic style, I have adopted throughout this thesis. My appeal is however based on the data produced in this thesis in addition to my personal experience. Childhood and motherhood are too important, we must all strive to make our world a safer, just and fairer world for women and children. And I believe that there comes a moment when change needs to happen, for the benefit of children and women, but also for society as a whole. The harms described and shared in this thesis may appear to you the reader as something that happens to other people. You may observe the cruelty and you may shake your head in disbelief that the legal system closes its eyes to criminality and in some instances endorses it in the family court. You may be left confused and wonder how this is even possible- you may even think that surely someone is making this up, it must be fiction. It is also very likely that you will move on and may not give these issues further consideration.

But before you do, I would like to ask you to not forget the children who have suffered as a result of court ordered contact, to the children living with lifelong trauma, to the undue hardship, stigma, inequality, stress and hurt the children and mothers live with at the hands of a system that systematically rejects their voices and claims of abuse. The damage done by a powerful legal system will always leave scars, but it is also indicative of the gendered type of society we live in.

If we are truly to live in a fair and just society, we should not accept such abhorrent treatment of women and children in the family courts and should demand change. These changes can only be made with the inclusion of children's and mothers' voices. In a Just and Fair society, we would end the overuse of imprisonment and

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eradicate all forms of civil imprisonment. We would instead seek to understand the social world we live in today (not punish for outdated ideals). Our children deserve so much better than the family courts are currently providing them and their mothers.

The real danger for children is not the parental breakdown, but professional, legal and judicial attitudes and the treatment of domestic abuse in the family court system in Scotland, England, and Wales. Using contempt of court to coerce, force and punish mothers who stand up and use their voices to try to end abuse is not justice. These mothers are not *disrespecting the authority of the court*, their actions can be described in one word: **BRAVERY**.

CHRONOLOGICAL MAP (SOCIAL-LEGAL)

5 CHRONOLOGICAL STAGES

CRITICAL FEMINIST INDETERMINIST PERSPECTIVE

1: Family Relationship & Family Breakdown



MAP STRAND 1

MAP STRAND 2

Family Relations, Breakdown of parental relationship, domestic abuse, welfare of the child

Family Relations, Breakdown of parental relationship, domestic abuse, welfare of the child

2: The Legal Perspective: Child Contact



Family Relations, Breakdown of parental relationship, domestic abuse, welfare of the child

Presumption in favour of contact, removal of domestic abuse, Mediation, Compliance, Prison, Prejudice

3: The Court process Contact & Enforcement



Civil/ Criminal blurring of boundaries, what constitutes contempt, court orders problematic (ambiguous, vague) technical, Right to a fair hearing, test for contempt, abuse

Change in focus from welfare of the child to protecting the due administration of justice

CONTACT
Perceptions of mothers, judicial attitudes, The court order for contact (ambiguous, vague incoherent) Technical orders, P

ENFORCEMENT/ CONTEMPT

4: Punishments & Appeals



Sanctions for contempt, contempt sanctions process, domestic abuse, child abuse, incarceration, purging contempt, judicial hysteria, breach of Human Rights Act

Threats of punishments prison, and changes to child's residence

5: Impact on Mother & Child



Fear of and loss of liberty, voiceless mother and child in dispute, structural limitations, increased risk of abuse and abuse, inequality, ongoing relational impact of finding and contact for mother and child. Health issues, financial issues, loss of trust in the law and professionals. Increased cost of litigation and numbers in the family courts system.

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APPENDICES

APPENDICES

APPENDIX 1: INTERVIEW PROCESS

INTERVIEW PROCESS	DESCRIPTION
<p>Develop a Topic guide</p>	<p>The topic guides (appendix) were developed for this research study. As Ritchie, et al., (2014) argue, topic guides provide consistency within the data, but also create space for the researcher to respond with flexibility when in the field. The interview questions were identified from the literature review in <i>chapter one and two</i> and the aim of this particular study and were presented in the topic guide in a chronological order to replicate chronological map for future analysis</p>
<p>Send information sheet of the study to research participants</p>	<p>Research participant information sheets were also developed to provide all participants with important details about the research study (appendix). The information sheet provided a way in which to demonstrate to the participants the research was planned and that it aligned with the professional requirements for academic scholarship.</p>
<p>Send research consent form to participants who had agreed to take part in the research.</p>	<p>At the start of each interview, I explained what the research themes were, and I sought consent to record the interview. I also confirmed that the interview would be transcribed and would be anonymised at the outset. I then sent the transcriptions back to the participants to check for accuracy. The interviews were logged without any identifiable labels for the sake of completeness. Consent to process personal data in this study can be understood as aligning with the Information Commission office (ICO, 2019), which defines ‘Consent’ as:</p> <p style="padding-left: 40px;">“any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by clear affirmative action, signified agreement to the processing of personal data relating to him or her”</p> <p>Issues of confidentiality, disclosure, and anonymity were addressed in advance in respect of the Data Protection Act 2018. Furthermore, as the research is situated within the socio-legal field, the UK Socio-Legal Studies Association (SLSA) Principle 7.1.1 of the ‘Statement of Ethical Research Practice’ (2009) provided a further layer of consideration:</p> <p>“Consent of those studied. This implies a responsibility on the socio-legal researcher to explain as fully as possible and in terms meaningful to participants, what the research is about, who is undertaking and financing it, why it is being undertaken, what risks, if any are involved, what the research methods are and how it is to be disseminated. In the case of large-scale survey research, or other cases where a face-to-face meeting with participants is not feasible, this may be done by a covering letter sent Informed consent was sought in advance and can be understood as “[t]he process of agreeing to take part in a study based on access to all relevant and easily digestible information about what participation means, in particular, in terms of harms and benefits” (Chynoweth, 2008).Beauchamp and Childress (2009) suggest informed consent outlines three stages of informed consent: Adequate information, voluntariness and competence, these stages were incorporated into the research design¹.</p> <p>The consent form stage was also utilised to agree a mutually convenient time for the interview.</p>

APPENDICES

<p>Audio recorded interview conducted</p>	<p>There was an expectation that all proposed interviews were audio recorded for transcription purposes. I discussed this with the participants and explained that the audio would not feature in any output, and I advised all participants that they would be securely and electronically stored as per the University of Stirling's guidelines. I also provided a summary and link to those guidelines for participants to explore further if they wished.</p>
<p>Transcription & anonymised interview data</p>	<p>All interviews were audio recorded with the express agreement from each interviewee at the outset and were anonymised from the outset. Anonymity is defined as "the situation in which someone's name is not given or known" (Cambridge Dictionary , 2019). It is recognised at the outset that potential research participants may be concerned about participating if their identify was known. Therefore, the research interview data was anonymised during transcription. Each interview was coded and from the outset and real names were not documented in plans, notes, written responses or in the final report, to provide a further layer of anonymity. The data was anonymised and only the researcher and the participant are aware of their participation. In order to provide transparency and to ensure the data was accurate, I sent individual anonymised transcription to the participants after the interview to ensure it accurately reflected the interview and to provide participants the opportunity to provide any further comments.</p> <p>Once the transcriptions were returned a further check was carried out to identify any information which could reveal the identity of a research participant. In some instance's professionals referred to cases they had been involved in and as such, these comments and the case references were removed. Others spoke of work they did and again these references were removed.</p>
<p>Anonymised transcriptions were sent to research participant for comments</p>	<p>The transcriptions were returned to each interviewee for approval and for confirmation that the transcription reflected the conversation accurately. The approach adopted was to allow some reflection into the process and to be transparent and open. The transcription process also reinforcement the notion that the interview's contribution to the research was valuable. The interviewees were able to delete comment and modify their answers. In some instances, interviewees provided additional paperwork and information. Once the transcriptions were approved, a two-month period was designed to allow for participants changing their minds and having the opportunity to withdraw from the research.</p>
<p>Receive comments / amendments /approval of research transcription.</p>	<p>This was the final stage in the interview process.</p>

APPENDICES

APPENDIX 2: RESEARCH ACCESS TO COURTS AND JUDICIAL OFFICE HOLDERS

RESEARCH ACCESS TO COURTS AND JUDICIAL OFFICE HOLDERS

From time to time the Scottish Courts and Tribunals Service (SCTS) receives enquiries from people (often, but not always, academic researchers) who want to undertake research involving the courts, judicial office holders and/or court staff. The guidance on these pages about how to seek formal approval for research is mainly for their benefit. Guidance on tribunals research is being developed.

The formal access procedure

Scotland's courts are public buildings, and most court proceedings can be observed by the public, but all research involving access to the courts, judicial office holders and/or court staff has to be approved by the Lord President of the Court of Session, Scotland's most senior judge. If researchers would like access to judicial office holders and/or court staff in the Sheriff Courts, the Stipendiary Magistrates Courts (in the Sheriffdom of Glasgow and Strathkelvin only) and the Justice of the Peace Courts, judicial access request letters need to be sent to one or more of the Sheriffs Principal as well. For a list of courts in each of the six Sheriffdoms in Scotland, please see a map on the SCTS website at <http://www.scotcourts.gov.uk/docs/default-source/artwork-anddiagrams/sheriffdoms-locations-2011-fully-resizeable-size-a4-versionxxx.pdf?sfvrsn=2>.

Research design

The SCTS would ask researchers to think carefully about their research designs. Past experience suggests that it may often be worthwhile discussing research plans informally with someone in the SCTS before making a formal request for access. The Head of Research in the SCTS will be happy to act as a first point of contact with researchers. He may also be able to find out if information sought by researchers is held in court records and, if so, if it is releasable under the terms of the Data Protection Act 1998. If the information sought is not held in court records, or the SCTS deems that it is not releasable, researchers will be encouraged to rethink their research design. Please send draft research proposals and the lead researcher's contact details to SCSresearch@scotcourts.gov.uk.

General principles

There are a few general principles about research involving the courts, judicial office holders and/or court staff that the SCTS would ask researchers to bear in mind.

Judicial discretion and independence must not be impaired by participation, and research must not include any assessment of judicial performance, which is a statutory responsibility of the Lord President.

Judicial office holders should not be drawn into areas of political controversy through research by being asked to comment on the merits or otherwise of Government policies. Researchers can, however, ask judicial office holders to comment on the effectiveness of policy implementation.

The researchers should have the necessary qualifications and experience to conduct the research, although research assistants may be employed under proper supervision.

Participation in research should not impose an undue burden on judicial office holders or court staff such as clerks of court (in the Supreme Courts and Sheriff Courts), legal advisors

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(in the Stipendiary Magistrates and Justice of the Peace Courts) and fines enforcement officers (in the Sheriff Courts).

Judicial office holders and court staff who take part in research should not be identified in any reports arising from research.

Unless the research involves the evaluation of pilots in one or more courts, individual courts should not be identified in reports arising from the research.

Judicial office holders and court staff who take part in research should be sent draft research reports (or relevant parts thereof) before publication so that any errors or misunderstandings on the part of research teams can be identified and raised with the researchers.

Some preliminary questions

Academic research often requires external funding to be put in place and research plans are often developed before funding is in place. It is for researchers to consider when would be the best time to involve the SCTS in their thinking. Although formal judicial access request letters do not need to be submitted and approved before research funding is approved, researchers are encouraged to think about the detail of their access requirements at an early stage, for example:

Is the subject matter of the research specific to only a few courts, judicial office holders and/or court staff (for example, an evaluation of one or more pilots) or does it have a wider application?

If it applies to all courts, the SCTS will need to consider the location of other research in progress in courts so that the burden of research participation in some courts does not become unmanageable.

If the research involves interviews and/or focus groups, where and when could these take place?

Court premises may not always have suitable accommodation, and judicial office holders and court staff may be occupied with their duties during the normal hours the court sits (10.00 am to 4.30 pm, or later for those involved with busy custody courts in some areas). At other times, judicial office holders may be dealing with urgent out of hours work or involved in preparation for the next day's cases, and it is important that researchers when planning research in courts recognise the need to be flexible to accommodate demands on the courts, judicial office holders and court staff.

What kinds of participation in research will judicial office holders and court staff be likely to agree to?

Participation may take the form of face to face or telephone interviews, questionnaires, and focus groups. For smaller projects or for those where the involvement of judicial office holders and/or court staff is limited, it may be acceptable to take the views of participants by an exchange of correspondence. Please remember that there is no obligation upon judicial office holders and court staff to discuss their personal backgrounds.

Are there any restrictions on researchers' activities when observing court proceedings?

Observation of proceedings in open court (at which the public is entitled to be present) is allowed and does not need formal prior approval but it is polite, and good practice, for

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researchers to notify the Sheriff Clerk(s), in advance, of their intention to attend proceedings in Sheriff Courts, the Stipendiary Magistrates' Court or Justice of the Peace Courts. The Sheriff Clerk(s) will, in turn, inform the presiding Sheriff Principal, Sheriff, Stipendiary Magistrate or Justice(s) of the Peace². For observation of proceedings in the High Court, Court of Session or Court of Appeal, researchers should notify the Principal Clerk of Session and Justiciary, who will inform the presiding Judge(s)³. Judicial permission is required under section 9 of the Contempt of Court Act 1981 if researchers wish to use mechanical recording equipment in court, but researchers are otherwise free to take notes during the course of proceedings. If researchers wish to use a laptop to take notes this should be mentioned in the judicial access request letter. Because of the potential for some laptops to be used for visual and audio recording, this may be approved or rejected on a case-by-case basis, following consultation with parties to court proceedings.

Can researchers observe proceedings in chambers or in a closed court?

Approval for observation of proceedings in chambers will be given by the Judge(s), Sheriff Principal, Sheriff, Stipendiary Magistrate or Justice(s) of the Peace concerned only in exceptional circumstances, and then only with the consent of parties to the proceedings. It is unlikely that approval will be given to observe proceedings in a closed court.

Can researchers obtain access to court records?

Access to court records is carefully regulated because they usually contain sensitive or personal information. Court records are exempt from access to information under section 37 of the Freedom of Information (Scotland) Act 2002. The SCTS has a duty not to disclose sensitive or personal information under the terms of the Data Protection Act 1998. Research ethics are also important. As a consequence of the interaction of these regimes it is unlikely that researchers will be allowed to look at, and copy information from, court records. However, it is possible that the SCTS may be able to provide some high-level information that will assist researchers, so long as the efforts to locate, extract and summarise the information are not excessive, and this could usefully be explored in informal discussions with the Head of Research.

Researchers should also consider if they could instead obtain the information, they seek from the originators of documents lodged in the courts, such as the Crown Office and Procurator Fiscal Service or the Association of Directors of Social Work.

Drafting judicial access request letters

When it comes to drafting judicial access request letters, researchers should consider the following:

Judicial access request letters should be no more than two A4 pages long.

These letters should set out clearly the aims and objectives of the research and, in general terms, the extent of the access sought (for example the number and general location of courts to be studied, and the number of judicial office holders and/or court staff the researchers propose to interview).

The letters should not nominate individual judicial office holders and/or court staff for participation in research. If research access is approved this will be negotiated by the Lord

²In some Justice of the Peace Courts, Justices sit as a bench of three. In others they sit alone.

³ Judges generally sit alone when hearing criminal trials, civil proofs and bail appeals but in benches of two when hearing appeals against sentence and at least three when hearing other criminal and all civil appeals.

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President and/or Sheriffs Principal who may invite judicial office holders and/or court staff under their jurisdiction to participate. However, it should be noted that no judicial office holder or member of court staff is obliged to participate in research if he or she does not want to.

Researchers will be encouraged to send judicial access request letters to the Lord President⁴ and relevant Sheriffs Principal. The names and addresses to which these letters should be sent will be given to the lead researcher by the Head of Research.

What happens after judicial access request letters have been submitted?

Researchers should not approach any courts, any judicial office holder or member of court staff until access has been approved by the Lord President and the relevant Sheriff(s) Principal.

If research access is approved, the Lord President and/or Sheriff(s) Principal will reply by letter to the researcher, giving the contact details of a member of court staff with whom they should liaise before making arrangements to conduct their research.

It is possible that the Lord President and/or Sheriff(s) Principal may refuse access requests, approve only part of the access requested, seek clarification on issues pertaining to the research before granting approval, ask the researchers to reconsider aspects of their research design before submitting a revised judicial access request letter, or impose conditions relating to the conduct of the research. If research access is not approved, this is usually because the proposed research is considered by the Lord President and/or Sheriff(s) Principal to be likely to have a disruptive impact on courts, judicial office holders and/or court staff.

Research funded by the Scottish Government involving access to the courts, judicial office holders and court staff is subject to a similar formal procedure. If researchers are funded by the Scottish Government, judicial access requests will be made by government officials with the assistance of the relevant Analytical Services Team and should not be made independently by the lead researcher. If in doubt, the lead researcher should consult the Scottish Government's research project manager.

⁴ For research involving civil courts, access request letters could be addressed to the "Lord President". For research involving criminal courts, access request letters should be addressed to the "Lord Justice General" (the Lord President's title when dealing with criminal matters).

APPENDIX 3: RESPONSE FROM THE RT HON LORD CARLOWAY



The Rt Hon Lord Carloway
Lord President

Parliament House
Edinburgh, EH1 1RQ

11 June 2019

Sharon McAllister
PhD Student, Faculty area
University of Stirling
Stirling

McAllister,

Further to your request to interview sheriffs as part of your PhD research into 'An examination of the use of Contempt of Court in enforcing child contact orders in Scotland' it has been drawn to my attention that you were a party in a case in Perth Sheriff Court in 2015. The outcome of that case at first instance (though overturned on appeal) bears directly on the subject matter of your research and I regard this as a potential conflict of interest.

It would assist my consideration of your research access request if the Chair of the University of Stirling Ethics Board was able to confirm to me, in writing, that the Board had been made aware of your involvement in court proceedings before it approved your proposed research. I should also like to know why you did not mention your involvement in prior related court proceedings in your letter to me.

Yours sincerely

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APPENDIX 4: REPLY FROM DR MUNRO



Faculty of Applied Social Sciences
University of Stirling
Stirling FK9 4LA Scotland
Telephone: +44 (0) 1786 467978
www.stir.ac.uk/social-science

The Rt Hon Lord Carloway

Lord President

Parliament House

Edinburgh

EH1 1RQ

18/06/2019

Dear Lord Carloway,

I am writing in response to your letter dated 11th June concerning Ms Sharon McAllister's PhD research into 'An examination of the use of Contempt of Court in enforcing child contact orders in Scotland'. I am Ms McAllister's supervisor as well as deputy chair of the general university ethics committee (although I did not review her ethics proposal, I did advise her on it).

I was aware of the case in [REDACTED] did not advise her to disclose it as it had been overturned on appeal and I therefore felt that there was no necessity in doing so. On reading your letter, and in hindsight, I was wrong about the matter of disclosure, and we should have mentioned the case both as a matter of courtesy to you as well as being relevant background information to the research. This should have been done in her letter to you and in the information sheets to the Sheriffs. For this oversight I apologise, and I can assure you that there was no deception intended and that in no way did Ms McAllister attempt to exploit her role as a researcher for personal or political benefit by neglecting to disclose it. Ms McAllister is interested only in what the Sheriffs' view of contempt are and in how they frame their decision-making processes. As such she considers their views as important and necessary to her research, particularly as a balance to the views of the other respondents in the research. In that respect the views of the Sheriffs will be represented fairly and honestly throughout the research process, and, as she has made clear, those interviewed in the research will have the opportunity to review the transcripts of the interviews before analysis

Although I did not consider disclosure as an ethical issue, I did consider it a significant methodological issue that would be central to the methodological discussion on value within the research process in the PhD itself. In other words, while it was Ms McAllister's experience that led her to explore contempt and to the design of her study, the research itself will be carried out in the context of a social scientific and critical investigation that will adhere to the methodological norms and standards of scientific research that will circumvent any distortions that personal experience might introduce into her work. In that respect, her relation to her work is no different from other studies where personal experience or values

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might influence the design and questions of a research project. The relationship between value and research has a wide and historically rich literature that would support the general approach of Ms McAllister's research. As such, I do not consider there to be a conflict of interest with regards to this research project

I hope that this letter will aid in your consideration of Ms McAllister's research access request. I am happy to provide further information that you might consider relevant.

Yours Sincerely

A handwritten signature in blue ink, appearing to read 'Bill Munro', with a horizontal line extending from the end of the name.

Dr Bill Munro

Lecturer in Criminology

Deputy Chair of the General University Ethics Committee

University of Stirling

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APPENDIX 5: RESPONSE FROM THE RT HON LORD CARLOWAY



The Rt Hon Lord Carloway
Lord President Parliament
House Edinburgh, EHI IRQ

2 July 2019

Ms Sharon McAllister,
PhD Student,
University of Stirling, Faculty or Service Area, Stirling.
FK9 4LA

Dear Ms McAllister

I refer to your email of 18 June 2019 and its enclosed letter from Dr Munro to me. I have taken some time to consider your request to access members of the judiciary in connection with your research into the use of contempt proceedings in family cases.

I have read the case, which is reported as ██████████ in which the Opinion of the Court was delivered by ██████████. From this, it appears that you were involved in protracted litigation concerning contact proceedings from ██████████. On ██████████ the sheriff found that you were in contempt of court on five separate occasions. This resulted in a sentence of 3 months imprisonment, which was only imposed on ██████████. Ultimately, the contempt finding was quashed by the Court of Session on ██████████, on the basis that the sheriff should not have heard the contempt proceedings at the same time as the substantive contact action. The court did not seek to re-evaluate the evidence of contempt, having quashed the ██████████. Following upon the decision, you were reported by the Daily Record as referring to the "system" being "in pieces" or "broken".

I have considered Dr Munro's letter carefully. Nevertheless, I have come to the conclusion that, against the background which I have set out, it is not likely that you would conduct your proposed research in an objective manner. For that reason, I must decline your request.

Yours sincerely

A handwritten signature in blue ink, appearing to be "L. Carloway", is written over a horizontal line.

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APPENDIX 6: ONLINE SURVEY MONKEY

Q1: In the child contact action were you:

The resident parent

The non-resident parents

Other (please use the box below to explain/ add more information)

Q2: Did you feel that you were included in the decision-making of the contact arrangements for your child(ren)

Yes

No

Sometimes

Other (please use the box below to explain/ add more information)

Q3: Did you agree to the terms of the court order for contact?

Yes

No

Sometimes

Other (please use the box below to explain/ add more information)

Q4: Did you have any concerns about child contact related to

Your own safety

Your child(ren) safety

Someone else safety

Other (please use the box below to explain/ add more information)

Q5: Did the court order explain what both parties were to do and what would happen if either party failed to follow the order?

Yes

No

Sometimes

Other (please use the box below to explain/ add more information)

Q6: Did the court order state what the consequences of not following the order would be (for example committal to prison or change of residency)

Yes

No

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Sometimes

Other (please use the box below to explain/ add more information)

Q7: Did you ever feel you were threatened with prison/ removing your child from you care to gain your compliance with a child contact order?

Yes prison by the court

Yes prison by my ex

Yes removal of my child from my care by the court

Yes removal of my child from my care by my ex

Both prison and removal of my child from my care by the court

Both prison and removal of my child from my care by my ex

Other

Q8: Were you ever told that non-compliance with a contact order, could result in a contempt of court minute with the ultimate penalty of prison?

Yes by my own lawyer

Yes by my ex-partner

Yes by my ex-partner's lawyer

Yes by the Sheriff / Judge

Yes by a social worker

Yes by another Professional

Non mentioned it

Other

Q9: Were you advised to raise a contempt of court action against the other party when things went wrong regarding contact?

Yes

No

Sometimes

Other (please use the box below to explain/ add more information)

Q10: Why do you think the courts are using contempt of court in child contact actions? (You can select as many boxes as you feel are relevant. Please use the other box to add any additional comments)

Protect the child's best interests

To protect the child's rights

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To punish the resident parent

To gain compliance from both parents

To prioritise the courts authority

To speed up the courts process

To increase costs

To discredit the mother

To support a change of residency

To have the mother sent to prison

Other (Please use the box below

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APPENDIX 7: ADVERT TO RECRUIT WOMEN ON SOCIAL MEDIA

#childcontactenforcement & #scotland

Research participation sought from women who have experience have been accused of not complying with child contact orders. To find out more (hyperlink to advert)

The same approach would be taken with Facebook using an hyperlink to the advert below.

ADVERT USED:

THE USE OF CONTEMPT OF COURT TO ENFORCE CHILD CONTACT ORDERS IN SCOTLAND

Are you a mother who has been accused of failing to comply with the terms of a child contact order? What processes were used to address the allegations of non-compliance with the order? Was Contempt of Court used as a mechanism to enforce the terms of the order? If so, I would like to hear about your experience for this research project.

The research is designed as part of a PhD study and aims to provide an insight into child contact enforcement in Scotland, England, or Wales. The research is intended to understand the processes used to address any allegations of failures to comply with a child contact order and or address appeals arising from enforcement actions. As a mother who has either been threatened with allegations of non-compliance or has experienced enforcement actions arising from a child contact order, your insight is valuable to the research.

For any mother taking part, confidentiality will be respected, and you will be guaranteed anonymity. The results of the study should be available in the Autumn of 2020 and those taking part, will receive a summary of the results.

If you are interested in this research and would like to find out more please send me an email at: Sharon.mcallister1@stir.ac.uk

Sharon McAllister

PhD Researcher

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APPENDIX 8: PARTICIPANT INFORMATION FORM

Research Project Title: An examination of the law of contempt of court in enforcing child contact orders in Scotland.

Background, aims of project:

My name is Sharon McAllister and I am a PhD student at the University of Stirling. The research is designed as part of a PhD study and aims to provide an insight into child contact enforcement in Scotland. The research is intended to understand the processes used to address any allegations of failures to comply with a child contact order and or address appeals arising from enforcement actions. As a mother who has either been threatened with allegations of non-compliance or has experienced enforcement actions arising from a child contact order, your insight is valuable to the research.

This research is important as mothers have lost their liberty as a result of non-compliance with a contact order and as such this research seeks to find out more about the process and the implications of enforcement from women who have first-hand experience.

Why have I been invited to take part?

I would like to invite you to take part in this research as a mother who has first-hand experience of child contact enforcement. You may have been threatened with enforcement action, or you may have had to defend an enforcement action or you may have had to appeal a decision by the Sherriff relating to allegation of non-compliance with the child contact order. This research is interested to find out more about the processes used, the purpose of enforcement and the impact of enforcement in the child contact action.

Do I have to take part?

No. You do not have to take part in this research it is completely voluntary. If you do decide to take part, you can withdraw your participation at any time without needing to explain and by advising the researcher of this decision. If you go ahead and take part in the research, you will receive a transcription of the interview to approve. You will have a further 2 months from the date of approving the interview transcription to withdraw from the research. You will be given this information sheet to keep and be asked to sign a consent form or to confirm your consent orally/ complete an electronic form

What will happen if I take part?

In agreeing to take part in this research, I would need to complete ONE interview with you which I anticipate should take approximately ONE hour of your time. Please note that in some cases it may take slightly longer, this can be agreed at the outset of the interview.

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The interview can take place in a public space or at the University of Stirling. Agreement of the location of the interview will be reached by the participant and the interviewer. I do not anticipate any follow up interviews thereafter.

As part of the project we will be recording personal data relating to you. This will be processed in accordance with the General Data Protection Regulation (GDPR). Under GDPR the legal basis for processing your personal data will be public interest /the official authority of the University.

What happens to the data I provide?

The research data will be kept anonymous using a coding system from the outset for example 'Women A stated'. Transcribers will NOT have access to personal data such as contact details. Transcribers will only have access to the audio recording of the interview. Transcribers will be asked to sign a confidentiality agreement in advance of any transcription services being procured. The research data which will consist of the interview transcription will be retained for up to 10 years and will then be securely destroyed. The audio recording will be retained until the completion of the PhD research.

Any personal details such as contact details and names will be retained only until the end of this PhD study. Thereafter, any personal detail will be securely destroyed. The researcher will follow the University of Stirling Data Management procedure which is

For further information, the Data Management procedure can be located on the University of Stirling's website. You can also follow this link:

<https://www.stir.ac.uk/about/faculties-and-services/policy-and-planning/legal-compliance/data-protectiongdpr/gdpr-policy-and-guidance/>

Audio Recorded media

There is an expectation that all proposed interviews are audio recorded for transcription purposes. The audio will not feature in any output and will be securely and electronically stored as per the University of Stirling's guidelines which can be accessed by following this link: <https://www.stir.ac.uk/about/faculties-and-services/policy-and-planning/legal-compliance/data-protectiongdpr/gdpr-policy-and-guidance/> The audio will be deleted at the end of the PhD study.

Will the research be published?

The research will be published as part of the PhD programme and may be used for further academic papers. You will not be identified in any reports arising from the research and all comments will be anonymised in any subsequent report, publication, conference presentation or workshops relating to the research findings.

You will be provided with a summary of the research findings at the end of the PhD and you will also be able to access a copy of the published work via the University of Stirling. The University of Stirling is committed to making the outputs of research publicly accessible and supports this commitment through our online open access repository STORRE.

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Who has reviewed this research project?

This project has been ethically approved via The University of Stirling General University Ethics Panel

11. Your rights

You have the right to request to see a copy of the information we hold about you and to request corrections or deletions of the information. You have the right to withdraw from this project at any time without giving reasons and without consequences to you. You also have the right to object to us processing relevant personal data however, please note that after you have approved the transcription of your interview, you will have 2 months to withdraw your consent. Thereafter the data will be in the process of being analysed and/or results published, and it may not be possible to remove your data from the study.

Who do I contact if I have concerns about this study or I wish to complain?

If you would like to discuss the research with someone in the first instance you can contact William Munro by email: w.g.munro@Stir.ac.uk as supervisor of this research or Alison Bowes by email: a.m.bowes@Stir.ac.uk who is Head of Faculty. You have the right to lodge a complaint against the University regarding data protection issues with the Information Commissioner's Office (<https://ico.org.uk/concerns/>). The University's Data Protection Officer is Joanna Morrow, Deputy Secretary. If you have any questions relating to data protection these can be addressed to data.protection@stir.ac.uk in the first instance.

You will be given a copy of this information sheet to keep.

Thank you for your participation.

Sharon McAllister

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APPENDIX 9: TOPIC GUIDE

A: Papers to be completed by the researcher & Interviewee

Date of the Interview:

Time of the Interview:

Location of the Interview:

Recording Code of the Interview:

Consent Form Signed:

Verbal Consent Given:

Information Sheet Provided:

B: Preliminary:

Thank the respondents for agreeing to take part and introduced myself [PhD student at the University of Stirling]

I have a number of questions relating to child contact orders and subsequent enforcement of child contact orders, but please let me know if you would like to discuss any issues in more depth.

The results of the interview will be confidential, and you will not be identified in either the thesis or any papers that are subsequently published. [Expand if required, stating that the MOTHER will be identified as a MOTHER in a global context]

During the interview at any time, you feel you need to stop please simply state that you need to stop. If there is any question you do not wish to answer, please let me know or if you wish me to rephrase a question, I would be happy to do so.

The research question and aims are:

Repeat the Research Question:

An examination of the law of contempt of court in enforcing child contact orders in Scotland.

Repeat the Research Aims:

Examine the contradictory aspects of contempt and its construction within the court system.

Explore how contempt of court is framed when used for alleged non-compliance with child contact orders?

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Examine how contempt of court is experienced by women who have been found in contempt

Then explain how the interview is structured into 10 parts and list the sections

There are 10 parts to this interview.

1. REASONS FOR THE CHILD CONTACT ACTION
2. EXPLAIN THE CHILD CONTACT PROCESSES FOLLOWED OR WHICH YOU EXPERIENCED
3. EXPLAIN THE ENFORCEMENT PROCESS
4. CHILD CONTACT ACTION & ENFORCEMENT THE CHALLENGES
5. LEGAL DECISION MAKING- WERE YOU INCLUDED/ DID YOU UNDERSTAND
6. A PRIVATE FAMILY MATTER/ A PUBLIC ISSUE WITH CRIMINAL CHARACTERISTICS
7. IMPACT ON YOU AS AN INDIVIDUAL
8. APPEALS
9. IMPACT ON YOUR CHILD
10. ANYTHING YOU WOULD LIKE TO ADD

C: Areas to be covered / explored during this interview:

1. REASONS FOR THE CHILD CONTACT ACTION: Explain the reasons for the initial child contact action. How did you understand your role/ position in this action? Were you legally represented? Did you get legal Aid?

2. EXPLAIN THE CHILD CONTACT PROCESSES FOLLOWED OR WHICH YOU EXPERIENCED: What aspects of the contact order was it alleged you had breached? Were the processes outlined at the outset of the action, did you look them up on the internet/ were you given them. Did you understand what was going on before, during or after a court hearing? Were alternatives discussed with you at any time. Did you feel you were in control of the issues? Were you given the child contact order? What types of information did it include? Did you understand the legal language? Did you feel you were included & respected in the processes?

3 EXPLAIN THE ENFORCEMENT PROCESS: What aspect of the child contact action/ order gave rise to enforcement action. Can you explain the enforcement process threatened/ and or used? Did you know at the outset that enforcement action was being suggested? Did the members of the judiciary and your legal representative ensure you understood the process? Did you at any time request enforcement action to be taken against the other party and if so what was your motivation?

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4: CHILD CONTACT ACTION & ENFORCEMENT CHALLENGES: In your opinion does enforcement action detract from the child contact action? Please explain your answer. Do you think enforcement actions are raised to ensure the child's best interests are prioritised or in your own opinion do you feel there was an alternative reason?

5. LEGAL DECISION MAKING- WERE YOU INCLUDED /DID YOU UNDERSTAND THE ENFORCEMENT ELEMENT OF THE CASE? Were you included in each aspect of the child contact action and the enforcement action. What did you understand about the decision making of the Sheriff. Did the Sheriff order any additional processes or order you to do follow certain orders? Can you explain what you understood the purpose of the enforcement action was set to achieve.

6. A PRIVATE FAMILY MATTER/ A PUBLIC ISSUE WITH CRIMINAL CHARACTERISTICS

At any time were you advised that the family issues may become public issues in terms of enforcement actions having differing criteria for court hearings and not being subject to reporting restrictions? How do you feel about these possibilities? Were you advised that enforcement actions although civil matters follow a criminal procedure and that contempt actions may become public issues as they must be heard in an open court and any finding of Contempt should be made public even if this relates to private family matters? Did this have any impact on your case or decision making, How did you view this position?

7: IMPACT ON YOU AS AN INDIVIDUAL: What impact did the contact action and the threats of enforcement have on you as an individual? Were there any significant changes to your life in any way?

8. APPEALS: Did you appeal any aspect of the child contact action and or the enforcement action? How were you involved in these processes and what processes were used. Did you understand what was happening in your case? How long did the appeals take?

9. IMPACT OF THE CHILD: In your opinion do you believe that threats of enforcement action and or enforcement actions detract from the welfare principle of the child? Do you think the court remained focused on the best interests of the child? Do you feel that enforcement and or threats of enforcement prolonged the litigation and did this have any impact on the child?

10. ANYTHING YOU WOULD LIKE TO ADD: Is there anything further that you would like to add to this interview

D: Conclusion:

Thank the MOTHER for her time and explain that the interview will be transcribed, and that the transcription will be sent to the mother for approval and accuracy. Check with the MOTHER as to how he/she would like to receive the transcription by encrypted email or by post

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PARENTAL RELATIONSHIP

