

# Have the Legal and Social Concepts of Domestic Abuse Been Profoundly Revolutionised, or Is Further Reform Required?

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## **Abstract**

Domestic abuse is an important aspect of family law that is governed by everyday attitudes, personal beliefs, legislation, and legal precedents. These are important to consider when assessing how society has reacted, and still reacts, to ‘controversial’ issues that challenge the norm. This article analyses to what extent domestic abuse law may be reforming and how these changes will influence future decisions. It is suggested that although the definition of domestic abuse has broadened to include coercive control and recognise women, men, and children as potential victims. There is a need for more to be done to eliminate patriarchal views and attitudes that shape society’s understanding of domestic abuse and legal responses.

**Keywords:** Domestic Violence; Coercive Control; Gender; Patriarchy; Law Reform; Children

## **1. Introduction**

A revolution is an important change in an area of human activity.<sup>1</sup> It is argued that profound revolutions have occurred in many areas of family law. This article will focus on domestic violence, as the law seeks to abolish traditional ways of thinking through the creation of modernised concepts. However, the new approaches are not free of criticism and limitation. This paper will assess this area of law by analysing the changes in the law that constitute a “revolution”, the impacts of these changes, and the limitations created by a patriarchal society. It is argued that there is a broader understanding of domestic abuse through a significant progress within the law covering coercive control of women, men, and children. However, a true revolution in domestic abuse law can only occur if patriarchal views and attitudes

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<sup>1</sup> The Collins Dictionary, ‘Revolution’ <<https://www.collinsdictionary.com/dictionary/english/revolution>> accessed 5 December 2021.

that consider women to be problematic and inferior to men change. This argument will be supported by drawing on leading scholars such as Reece<sup>2</sup>, Choudhry<sup>3</sup> and Tracy<sup>4</sup>. They reflect the viewpoint that until a patriarchal way of thinking has been eradicated from society, there cannot be a revolution.<sup>5</sup>

## 2. Victims and perpetrators of domestic abuse

The law on domestic abuse has developed from a traditional way of conceptualising it as “battered wives” syndrome towards acknowledging it as a wider problem.<sup>6</sup> A new definition describes the act as “behaviour of a person that is physical, controlling, or coercive, economically abusing, or psychological... and it doesn’t matter whether the behaviour consists of a single incident or a course of conduct.”<sup>7</sup> This highlights that domestic abuse is not one isolated incident, but rather a “pattern” of incidents that may occur over a period of time between associated persons rather than just in conjugal relationships. This is an important change in the law as it is no longer overtly gendered. Such a change is evidenced in the definition being the “behaviour of a person” rather than the behaviour of a man against a woman.<sup>8</sup> This is important to keep up with the ever-changing ideas of a 21<sup>st</sup> century legal system.

Academic commentary supports a wider definition of domestic abuse. For example, according to Currie, violence is more easily recorded as an episode or event, believing it to be an “extreme expression of one moment in on-going processes through which heterosexual relationships are negotiated”.<sup>9</sup> Although Currie’s intention may have been to provide further guidance on legislative changes, her language choice limits the effectiveness of her statement. The use of “heterosexual relationships” downplays the changes created by the “associated persons” category in the Family Law Act (FLA) 1996. This provision acknowledged that domestic abuse

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<sup>2</sup> Helen Reece, ‘The End of Domestic Violence?’ (2006) 69 *Modern Law Review* 770.

<sup>3</sup> Shazia Choudhry, ‘Towards a Transformative Conceptualization of Violence Against Women’ [2016] 79 *Modern Law Review* 406.

<sup>4</sup> Steven Tracy, ‘Patriarchy and Domestic Violence: Challenging Common Misconceptions’ (2007) 50 *Evangelical Theological Society* 573.

<sup>5</sup> Reece (n2) 771.

<sup>6</sup> Jonathan Herring, *Family Law* (9<sup>th</sup> edn. Pearson 2019) 303.

<sup>7</sup> Domestic Abuse Act 2021, s 1.

<sup>8</sup> *Ibid*, s 1(2).

<sup>9</sup> Dawn H Currie, ‘Violent Men or Violent Women? Whose Definition Counts?’ in Raquel Kennedy Bergen (ed), *Issues in Intimate Violence* (Sage 1998) 97.

does not only occur in heterosexual relationships, as those in a homosexual civil partnership were now classed as associated persons as well.<sup>10</sup>

However, according to Reece, the law on domestic abuse “rightly” designed to protect women.<sup>11</sup> Using “rightly”, Reece suggests that the law is *only* designed to protect women, following the Roman Law approach that men are superior, and women are the victims of that superiority. However, this article does not seek to argue that only women can be victims. A recent government statistic has shown that 23% of domestic abuse victims are male.<sup>12</sup> Whilst this figure may seem relatively small, the importance is not downplayed and it proves the need for gender neutral terms in legislation, which thankfully we have in the Domestic Abuse Act 2021.

Despite this, the argument still paves the way for the influence of the patriarchy that poses the biggest limitation to a revolution in the law on domestic abuse, for it is a society where men have all or most of the power.<sup>13</sup> The presence of patriarchal attitudes will continue to be a barrier to the developments of domestic abuse law as they weigh heavily on the traditional attitudes, rather than modernised concepts.

### **3. The effects of Domestic Abuse on the welfare of children**

Dobash and Dobash recognise that domestic abuse occurs in different forms of close relationships and that men can be victims as well as women. They also concluded that almost half of the incidents of domestic abuse took place in the presence of children.<sup>14</sup> Therefore, not only is the primary victim of the abuse affected, but also children as witnesses as it threatens their welfare. Whilst the Children Act 1989 does not specifically refer to instances of domestic abuse, it maintains that the welfare of children should be the paramount consideration.<sup>15</sup> This

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<sup>10</sup> Family Law Act 1996, s 62(3).

<sup>11</sup> Reece (n2) 770, 780.

<sup>12</sup> Office for National Statistics, ‘Domestic Abuse Victim Characteristics, England and Wales: Year Ending March 2019’ (ONS, 25 November 2019)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019>> accessed 7 December 2021.

<sup>13</sup> The Collins Dictionary, ‘Patriarchy’ <<https://www.collinsdictionary.com/dictionary/english/patriarchy>> accessed 5 December 2021.

<sup>14</sup> R Emerson Dobash and Russell P Dobash, ‘The Nature and Antecedents of Violent Events’ (1984) 23 British Journal of Criminology 269.

<sup>15</sup> Children Act 1989, s 1(3).

does not mean to say that the welfare of the victim does not matter, but the welfare of the child requires the court to have regard to their risk. However according to Kaye, research suggests that courts do not consider the child witnessing the violence, only being the subject of it.<sup>16</sup> However, the Domestic Abuse Act 2021 has sought to revolutionise this idea, as it includes a specific provision to children “seeing, hearing or experiencing, the effects of the abuse”.<sup>17</sup> In addition to a change in the law related to domestic abuse, this recognition could signify a revolution in the rights of children as domestic abuse law is no longer solely adult-focused. Changes like this are brought about with the support and advocacy of influential figures such as Dame Vera Baird QC who acknowledged the void in children’s voices being heard and welcomed the recommendations that are now solidified in the 2021 Act.<sup>18</sup>

When children come into question, a lot of the case law surrounding domestic abuse suggests that giving the mother custody is not the best option due to their perceived inferiority. In *Re O [1995]*, Fox J described the mother’s attitude as “irrational repugnance” in comparison with his “favourable impression” of the father, even though the father had breached the non-molestation order that was issued.<sup>19</sup> Kaye believes that, following this case, the Children Act 1989 should be amended to ensure that violence against the mother is considered in all decisions concerning the child. The fact that the court sometimes focuses on the mother’s implacable hostility rather than the father’s violence supports Smart’s assessment that some interpretations of the Children Act 1989 “construct the mother as the potential problem or obstacle to the desired outcome of the welfare of the child”.<sup>20</sup> It could therefore be construed that the patriarchal view of women as inferior or problematic undermines any potential “revolution” that has taken place in this area of law, as abolishing a mindset is not so easily done. Further, Kaye seems to suggest that the future can be bright if we make the necessary steps to try and reduce the impact of the patriarchy through her statement “any change to the law must take into account the issue of litigation and ensure that battered women are not further

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<sup>16</sup> Miranda Kaye, ‘Domestic Violence, Residence and Contact’ (1996) 8 Child & Fam L Q 293.

<sup>17</sup> Domestic Abuse Act (n7), s 3(2).

<sup>18</sup> Ministry of Justice, ‘Major Overhaul of Family Courts to Protect Domestic Abuse Victims’ (Gov.uk, 25 June 2020) <<https://www.gov.uk/government/news/major-overhaul-of-family-courts-to-protect-domestic-abuse-victims>> accessed 15 January 2022.

<sup>19</sup> *Re O [1995]* 2 FLR 124.

<sup>20</sup> Carol Smart, ‘Losing the Struggle for Another Voice: The Case of Family Law’ (1995) 18 Dalhousie Law Journal 173.

disempowered”.<sup>21</sup> There may not be a ‘profound revolution’ right now, but there is the possibility.

#### 4. Forms of domestic abuse

An important progress in the abuse law is moving away from an understanding of domestic abuse as only committed by men against women. Similarly, the law has also developed from a traditional way of conceptualising abuse as physical violence to an understanding that abuse can also be of a sexual, emotional, and financial nature.<sup>22</sup> While the legal changes are welcome, it has also invited criticism. Much opposition comes from O’Neill and Reece, who suggest that giving domestic violence such a wide definition downplays the physical violence that still occurs.<sup>23</sup>

This issue was discussed in the Supreme Court in the key case of *Yemshaw v London Borough of Hounslow* [2011].<sup>24</sup> Lady Hale provides a strong argument towards the development of the law stating that physical violence is a rather than *the* natural meaning of the word “violence”.<sup>25</sup> Whilst he did not dissent, Lord Brown still placed weight on legislative history which indicated that only physical violence would amount to domestic abuse.<sup>26</sup> Lady Hale’s statement invited criticism from academics. For example, Knight suggests that two wrongs do not make a right, paying close attention to traditional legislation.<sup>27</sup> Therefore, it may be interpreted that Knight suggests it is “wrong” for Lady Hale to give domestic abuse such a broad definition when traditionally, legislation proves otherwise. Regardless of the interpretation of Knight’s article, the judgement was one of the many things that contributed towards a change in law. Thus, the law now respects all victims of domestic abuse, not just those who experienced physical violence.

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<sup>21</sup> Kaye (n16) 288.

<sup>22</sup> Domestic Abuse Act (n7), s.1(3).

<sup>23</sup> O’Neill has described the new definition as an ‘overhaul’ and that it only promotes a partner feeling bad about him or herself. Reece on the other hand, is the figure who describes the new definition as a ‘remarkable downplaying of the physical’.

<sup>24</sup> *Yemshaw v London Borough of Housing* [2011] UKSC 3 [19].

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* [48].

<sup>27</sup> Christopher Knight, ‘Doing (Linguistic) Violence to Prevent (Domestic) Violence – *Yemshaw v Hounslow LBC* in the Supreme Court’ (2012) 24 *Child & Fam L Q* 95, 96.

## 5. The emphasis on coercive behaviour

This was further advanced with the inclusion of 'coercive behaviour' in the definition of domestic abuse. The Domestic Abuse Act 2021 has sought to develop the 2012 Act as it now states that behaviour is abusive if it consists of any of the following: "physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse and psychological or other abuse."<sup>28</sup> A definition of coercive control has notably been provided by Women's Aid as "a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim."<sup>29</sup> Whilst the new legislative provision confirms that coercive control does not require assault, merely "behaviour", it is still too early to predict how effective the law will be in adapting to these changes. Nonetheless, it is an important change to be made as there were 17,616 offences of coercive control recorded by the police in the year ending March 2019.<sup>30</sup> On these statistics alone, it is a relevant issue to consider and one that is becoming increasingly concerning.

Rachmilovitz supports a wide' definition of domestic abuse. She emphasises that the aim of the abuser is to 'diminish the self-worth of the victim' and that physical violence is but 'one tool' used in the relationship.<sup>31</sup> Her recognition of the intention of the abuser supports the inclusion of coercive control in the definition of domestic abuse as the very reason behind coercive control is to make the victim feel worthless. This was evidenced by the Crown Prosecution Service (CPS) in their exploration of the issue as it was stated that "controlling behaviour is a range of acts designed to make a person subordinate or dependant by isolating them."<sup>32</sup>

Similarly, Adrienne Barnett wrote that the form of conduct used in domestic abuse is one that women find most devastating and believes that abusers may "degrade, humiliate and shame women to establish moral superiority".<sup>33</sup> Barnett uses coercive

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<sup>28</sup> Domestic Abuse Act (n7), s. (3).

<sup>29</sup> Women's Aid, 'What is Coercive Control?' (2019) <<https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>> accessed 8 January 2022.

<sup>30</sup> Office for National Statistics (n16).

<sup>31</sup> Orly Rachmilovitz, 'Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse' (2008) 14 William and Mary Journal of Women & Law 495.

<sup>32</sup> Crown Prosecution Service, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship' (30 June 2017) <<https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship/>> accessed 8 January 2022.

<sup>33</sup> Adrienne Barnett, 'Greater Than the Mere Sum of its Parts: Coercive Control and the Question of Proof' (2017) 379 Child and Family Law Quarterly 1, 6.

control as the epitome of domestic violence. However, Barnett focuses on coercive men and neglects coercive women.

Whilst the change in the definition of domestic abuse is a step in the right direction to protect victims, O'Neill has described it as an "overhaul" and believes that it forces the "emotional ups and downs of living together" to be considered abuse.<sup>34</sup> A viewpoint like this brings us back to the element of the patriarchy as it could be regarded as normalising the coercion that occur between partners in the familial home.

## 6. Domestic Abuse and the impact of patriarchal views

Tracy takes issue with the feminist argument that patriarchy was, and still is, the ultimate cause of all abuse against women.<sup>35</sup> He highlights limitations of the feminist explanation for domestic abuse, arguing that it does not give a complete explanation, that it does not take into account the social climate, and that not all men abuse women.<sup>36</sup> Rightly so, domestic violence is not a "one size fits all" and just because it is *mostly* men that abuse women, does not mean that *all* men do, and they can also be victims.

However, given patriarchy's persistence and pervasiveness, the question arises if there can ever be a revolution in the law around domestic abuse, and if so, how. Choudhry considers the potential of human rights here.<sup>37</sup> She believes that the positive obligations under the European Convention on Human Rights (ECHR) helps this change. Article 3 of the ECHR states: "no one shall be subjected to torture or inhumane treatment".<sup>38</sup> This can be interpreted to include domestic abuse. In *Ireland v United Kingdom [1978]* the Court stated that torture consists of "deliberate inhumane treatment causing very serious and cruel suffering".<sup>39</sup> *Tunikova and Others v Russia [2021]* considered this idea, as the Court stated that for ill-treatment

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<sup>34</sup> Brendan O'Neill, 'A Liberal Critique of Gay Marriage' in De Waal (ed), *The Meaning of Matrimony* (Civitas 2013), 41.

<sup>35</sup> Tracy (n4) 573, 576.

<sup>36</sup> *Ibid* 579.

<sup>37</sup> Choudhry (n3) 407, 416.

<sup>38</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 3.

<sup>39</sup> *Ireland v United Kingdom* App no 5310/71 (ECHR, 18 January 1978).

to fall within the scope of Article 3, it must attain a “minimum level of severity”.<sup>40</sup> The Court confirmed that “actual bodily injury or intense physical or mental suffering” is “usually involved”, suggesting that domestic abuse *is* torture. However, this issue was developed further in their stance that “treatment which humiliates or debases an individual...or which arouses feelings of fear or inferiority... may also fall within Article 3.”<sup>41</sup> This shows an acknowledgement of the developments domestic abuse law has witnessed as particular attention is paid to the effects of coercive control and how this constitutes inhumane or degrading treatment. Further, given the attention to detail on gender-neutral language in *Tunikova’s* judgement, there is a clear correlation with Choudhry’s viewpoint that domestic abuse poses as a threat to *all* human rights. With this analysis in mind, it is easy to argue that there has been a legal revolution in domestic abuse law, but perhaps there is still some way to go before this is reflected in social attitudes.

## **7. Conclusion**

This article sought to analyse domestic abuse to see whether changes in the law that have been made constitute a profound revolution that has impacted the way different disputes are dealt with. The article demonstrated that the law around domestic abuse has been reformed in recent years to recognise coercive control as a form or aspect of domestic abuse, and women, men, and children as potential victims. Whilst the changes made to domestic violence law are significant and indicate considerable progress, work still needs to be done before these changes will have a revolutionary impact on disputes that Herring believes already occurs. Until we attempt to eradicate the patriarchal views that have been embedded in society, and broaden understandings to those who can be victims, the impact of changes will always be limited. Perhaps we need to follow the recommendations of leading scholars such as Kay to be able to succeed in this.

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<sup>40</sup> *Tunikova and Others v Russia* App no 55974/16 (ECHR, 14 December 2021).

<sup>41</sup> *Tunikova* (n40).

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