Controlling and coercive behaviour is gender and colour blind but how are courts meeting the challenge to protect victims

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Both the family and criminal courts have over the last few years seen a proliferation of complaints of domestic abuse that not only takes the traditional form of 'hitting' but that encompasses behaviours designed to strip the other party of their sense of self, and ability to self-protect.

Family lawyers have long understood the fact of coercive and controlling behaviour as a key part of domestic abuse.

Family courts have always looked at the welfare of the child particularly in the context of allegations of such abuse. However concern has been raised that divorce and child arrangement orders were failing to deal with such controlling behaviour by one party.

The law developed and the President of the Family Division gave new directions in October 2017 (via Practice Direction 12J) to judges deciding cases where allegations of domestic abuse and harm were made.

Practice Direction 12J applies when it is alleged or admitted or there is other reason to believe -that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse.

Domestic abuse includes any incident or pattern of incidents of controlling, coercive, or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members.

Coercive behaviour is defined as:

> '. . . an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse which is used to harm, punish or frighten the victim.'

Controlling behaviour is defined as:

> '. . . an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.'

The PD is intended to be the core framework by which the family courts test whether such behaviour exists and its influence on the parties.

Similarly a number of years ago concerns were raised that forms of abuse that did not squarely fall into the recognised definition of physical assaults were not be adequately dealt with by police.

This December will be the 5th anniversary of the criminal law through the Serious Crimes Act recognising the need for a separate offence : s 76 controlling and coercive behaviour in an intimate or familial relationship; carrying a maximum of 5 years imprisonment. The Sentencing Guidelines Council then developed offence guidelines in force since the 1 October 2018.

The new law has identified the crime of emotional, physical, economic, social

isolation and control. It is defined not just as a victim who has 'been in fear of violence on at least two occasions' but legislating for the first time for 'behaviour that causes a victim serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities'.

The difference between the family and criminal definition of what amounts to controlling and coercive behaviour ('CCB') is interesting.

This welcome acknowledgment of this form of mental and physical course of conduct, which often will escalate depriving a victim of their true autonomy and ability to seek help, has long been framed as assisting only female victims.

As we know from reports globally there has been a marked rise in cases of domestic abuse due to the pandemic and lockdown and the forcing of a person to live often without any break with their abuser. In the UK alone by July this year 26 women and girls have been killed as a result of domestic violence and the government has been challenged on its response.

An important distinction is the difference in how the criminal and family law define what the court can redress. In crime the intimate or familial relationship must be operative at the time of the coercion and control and the evidence must be proved so that any court or jury is sure of guilt.

In family law the notion of still living or being with the abusive partner before you can cite this type of abuse is gone and obviously it requires the lower civil standard of proof on a balance of probabilities.

But who are the victims? Is such abuse only the trauma of one group of people?

Of course not, and efforts are being made to identify and challenge unconscious bias so that access to help is afforded to all. Such control and coercion can exist in any dynamic, but cultural and religious differences must be protected and recognised. A bride who relocates after marriage to her husband's home can be more readily isolated and controlled. CCB is often seen in the criminal courts in tandem with honour based violence and forced marriage. Language barriers can hinder attempts to seek help although this is being redressed.

But the issue is not just one which can raise cultural questions it cuts across gender too.

The last few years have taught us that men are increasingly prepared to come forward and report not only to police the domestic abuse they are suffering but raise it in the family courts as often it is used as a tool to deny their paternal rights and access to their children, and as a form of control.

Men often have not wanted to report any domestic abuse seen as a social taboo, or due to entrenched attitudes of masculinity even now can feel too ashamed or embarrassed to say anything, worried they may not be believed or failing themselves to recognise they are indeed victims.

Men have thus often come late to the table having the control exerted over them recognised, with marked disparity in provision of support and refuge if they and their children are in need of protection.

That is something that traverses all of society the ability to know to say this is not normal, and no one has the right to control or force me.

The implications are different dependent upon whether you take the criminal or family court route. The reporting of CCB to police will invariably cause an arrest, then either a remand in custody or bail conditions of no contact and although a complainant will always be at the heart of decision making, the Crown Prosecution Service and police can maintain a case even if the witness becomes reluctant due to considerations of public policy and safety.

But unlike in civil courts where you can apply for a non- molestation order of its

own motion- in criminal courts there must be proceedings which have concluded and either the court issues restraining orders upon conviction and sentence or even if acquitted can impose the same if a real risk is demonstrated.

The criminal case will inevitably affect the family situation, can a divorce occur in tandem, that must be based on fault? What interim contact arrangements for the children? Very few admit the crime of CCB as the courts have shown they are prepared to impose sentences of several years.

What about family courts? How have they grappled with these complex issues?

In *SD v AFH and another* [2019] EWHC 1513 (Fam) decided on the 13 June 2019 – the father sought permission to appeal against the findings made against him in the court below, in the context of child arrangements order applications which involved allegations of CCB. The need for a fact finding had been identified.

The judge noted that there were three central issues regarding whether the father had perpetrated coercive and/or controlling behaviour of the mother on two specific occasions and during the time in between, and whether the father had been violent to the mother on a further occasion. The appeal court made plain:

> 'Those would appear to be appropriate and well-focused allegations of facts, which were plainly relevant to the determination of the nature of the relationship that it would be appropriate for the child to have with the father. If the agreement was truly consensual and reached as a result of the parents free will, that would be a weighty factor for the court to consider in determining where the child's best interests lay.
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> Not because an agreement or a contract is binding but because competent parents are generally best placed to determine what is in their children's interests.
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> However if the agreement was reached as a result of pressure or coercion being exerted by one parent upon the other the agreement would be of little if any value to the court in determining what was in the child's best interests.
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> Secondly, the existence of coercive or controlling behaviour would not only inform the court as to whether to place any weight on the agreement but would also inform the court as to the impact on the alleged victim and the child of future child arrangements and whether spending time with arrangements were appropriate and if so how they would need to be formulated in order to ensure that the alleged victim and child were not exposed to the emotional abuse that might accompany further coercion or control.'

The appeal was dismissed after an analysis of the strength of the father's arguments, of note was that one such argument was founded on the father using the *Oxford English Dictionary* definition of control and coercion rather than PD 12J.

The judge said:

> 'The dividing line between behaviour which can properly be characterised as coercive or controlling and within PD 12J and behaviour which does not cross that threshold is not a bright line. The PD 12J definition by its own terms makes clear that to amount to coercive or controlling behaviour the behaviour will be well outside that which is acceptable within a relationship. The evidence in this case plainly demonstrated that the father's behaviour was outside those fairly broad parameters of acceptable relationship based behaviour. In respect of the behaviour surrounding the reaching of the agreement in June it may have been towards the lower end of the spectrum of behaviour within PD 12J but within it, it plainly was. By September it had progressed along the spectrum. There is no merit in the father's contention that his behaviour could not properly be characterised as controlling or coercive behaviour within the statutory definition'

Agreements at family court have and should continue to be properly dissected as above to accurately determine if they are freely given without an inequality of position.

As a Crown Court judge I instruct a jury they may not speculate as guesswork has no place in a criminal trial but they make draw inferences which are simply common sense conclusions based on evidence they do accept and are sure about. The family courts are seized of the same issues.

Prosecutions should be brought whoever the complainant is, wherever they come from, whatever their background and home tongue and whatever the sex of the perpetrator.

I have recently prosecuted a number of cases in the criminal courts where there have been male and female victims of such abuse – one leading to the BBC1 documentary *Abused By My Girlfriend* aired last year.

Last December the national press reported another of my cases where a very young teenage victim gave evidence of the assaults and threats and 'brainwashing' that had caused her to jump from a 3rd floor window to escape the father of her child. Although he was only 20 years old his pattern of controlling behaviour had not been limited to her and he was found to be legally dangerous and given an extended 5 year sentence.

Thus a key feature is often that CCB is about power and patterns.

This has been recognised again very recently in both the criminal and family courts.

The Criminal Court of Appeal emphasised this and the gravity it attaches to CCB in the appeal of *R v Reynolds* [2020] EWCA Crim 1024 (14 July 2020).

The appellant was complaining about a total 9 years extended sentence 4 years for actually bodily harm with 2 years concurrent for CCB and 5 years extension.

The court made plain that most of the violence which [the appellant] perpetuated has been impulsive, angry outbursts, although there had been premeditated assaults.

However they then cited his use of coercive and controlling behaviour demonstrated by his threats of violence as much as his actual violence. He they said had instilled in partners/former partners a fear of violence from him to keep those women under his control.

There was they said no prospect of them disturbing the sentencing judge's conclusion that the appellant was dangerous and that an extended sentence was required to protect the public from serious further harm. That ground was dismissed as totally without merit. Albeit the length of sentence was altered as it exceeded the statutory maximum.

In a decision rendered the following month in *Re R-P (children) (domestic abuse: similar fact evidence)* [2020] EWCA Civ 1088 decided on the 18 August 2020 – the Court of Appeal looked at CCB and asked the unusual question where there are two contact cases, two families, same man. Can evidence in one case be used in the other?

The court viewed the central point as fairly straightforward. The proceedings involved a father's application for contact with his two young children. The mother opposed the application citing CCB by the father towards the mother. The progress of the proceedings was a disaster.

About 3 months after the mother had left the father, the father formed a relationship with another woman. However, about a year later the same man issued contact proceedings in respect of the children of the second woman from whom he had also separated. What was striking was the nature of the allegations made by the second woman about that man, which were similar if not identical in many ways to the allegations made by the first woman.

The question before the court was simple: could the court in the first proceedings use the evidence produced in the second proceedings?

It ruled that CPR PD 12J applied when it was alleged that there was reason to believe that a child or a party had experienced domestic abuse, including coercive or controlling behaviour, perpetrated by another party. The definition of domestic abuse in the PD as consisting of acts or a pattern of acts was an acknowledgement that some forms of abuse did not consist of isolated individual incidents, but of harmful patterns of behaviour.

Lord Jackson had no doubt that relevant evidence from the second set of proceedings could be admissible in the first set and that it was in the interests of justice to do so. The evidence might be capable of establishing propensity that might be of probative value in relation to the core allegations in the first case. Whether propensity was established and whether it would be a probative value would be matters for the trial judge. Similarly, there would now need to be close case management to ensure that the evidence was presented in a way that was fair to both parties.

This form of previous bad character propensity evidence has long been admissible in the criminal courts providing it could be properly and fairly tested and was not used to bolster a weak case.

Equally it has emerged as a factor to be considered if a defendant asserts their actions were the slow build-up of years of abuse and control. The law on murder provocation was changed to recognise domestic abuse but only if the courts determine it is evidentially borne out. We all know of Sally Challen and her release last year but it should be remembered that the court stated it looked at the evidence of her state of mind and made no comment on the impact of CCB.

What is clear is that whichever court you may be in what must occur is due process.

On the 7 September 2020 in *F v G (appeal: direct contact)* [2020] EWHC 2396 (Fam) the court heard an appeal against an order of the judge whereby he ordered that the two children, aged 8 and 7, should live with their mother and have indirect contact only with their father. He also ordered that the father be excluded from making decisions with respect to the children's education and health.

At the FHDRA, the mother applied for there to be a fact finding hearing which was then abandoned. The Cafcass officer then found the mother had been subject to abuse including controlling and coercive behaviour. The court remitted the case back for rehearing as the allegations had simply not been properly tested in fairness to the father.

As we move forward in the courts we must stay vigilant to recognise the true dynamics of family relationships and what freely given capacity exists and not be wrongly influenced by preconceptions of who may be the victim and operate that as such abuse is race and gender blind as ever so should we be.

Maryam Syed is family and criminal practitioner, heavily experienced in dealing with serious complex and high profile cases, with a keen interest in International Human Rights Law. She is a Grade 4 Prosecutor on the Rape and Serious Crime Panels and sits as a judge in the First Tier Tribunal and as a Crown Court Recorder in London and the South East.