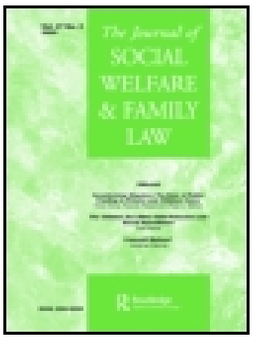

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Reimagining communication and elicitation strategies in private family proceedings

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ABSTRACT

The article focusses on communication and discursive practices in private family proceedings with the aim of exploring procedural barriers obstructing court users from sharing their stories and having their voice heard. Drawing on survey and interview data in combination with the linguistically driven empirical method – ethnography of communication, the discussion illustrates the discrepancy between communicative aims of court users and communicative aims of individual procedural stages. The article expands on how information and narratives are currently elicited from court users and proposes how procedural changes could accommodate more effective elicitation strategies and enhance procedural justice tenets.

KEYWORDS

family court; legal discourse; elicitation strategies; narrativisation; procedural justice

Introduction

The family justice landscape in England and Wales is at a crossroads, with a prospect that long standing and ever-growing challenges could be addressed by pursuing a reform programme which is currently in the trial stage.[1] One of the growing concerns is that family courts do not deliver an effective response to allegations of domestic abuse due to the immense pressure on resources, overarching institutional pro-contact narrative, lack of communication and coordination among the supporting services, and, notably, the adverse impact of the adversarial approach to family proceedings (Hunter *et al.* 2020, p. 4). What is crucial to note is that the root cause (and thus the solution) for some of these issues is linked to how we use language and establish communication in legal settings: practices of eliciting and sharing court users' stories are dependent on the institutional culture of legal settings, which is often alienating for lay people (Grieshofer 2022a). By building on applied linguistics methods and ethnographical court research, the article investigates the role communication plays in procedural justice (Grieshofer 2022 forthcoming) and proposes strategies for aligning court processes to effective communication and elicitation practices. Since one of the solutions considered for family courts in England and Wales is a shift away from the adversarial approach and the adoption of the investigative approach (Hunter *et al.* 2020, p. 4), the article examines the differences

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between the two approaches and discusses linguistic strategies for ensuring court users' voices are heard, including as part of an investigative approach. The discussion thus speaks to the literature on lay participation in legal proceedings (McKeever *et al.* 2018, Jacobson and Cooper 2020) and access to procedural justice for court users more broadly (Tyler 2000, Trinder *et al.* 2014, Sela 2018, Byrom 2019).

Drawing on court observations, genre analysis and interview data, the article provides an overview of disparities between lay narrativisation strategies and communicative aims of court procedures that court users need to follow. This allows the analysis to highlight the communicative practices which are in discrepancy with the principles of procedural justice and to suggest how the current elicitation strategies and communicative processes can be enhanced for the investigative model. The originality of the article lies in highlighting (1) the impact of different elicitation strategies on evidence provision; (2) the limitations of communicative genres (e.g. witness statement, cross-examination) currently used throughout different stages of the proceedings; (3) the importance of aligning communicative aims and elicitation strategies to the investigative objectives within pre-court or in-court phases. The study thus contributes a linguistic insight into establishing communicative practices for the shift towards an investigative approach to family proceedings. Since the investigative approach is currently in the piloting stage, the findings gain on urgency: efficient communicative practices need to be at the core of the changes to enable court users to share their stories in a trauma-aware and safe environment. Beyond family proceedings, the linguistic scrutiny of communicative practices embedded in court processes and procedures will resonate with different types of civil and tribunal proceedings in England and Wales and, in fact, other common law jurisdictions across the world.

Communication challenges of the adversarial legal system and the potential for change

The adversarial legal system is based on the premise of the battle of two narratives. The criticism of the adversarial approach is long standing in legal theory (Menkel-Meadow 1996, Lande 2003, Freiberg 2011, King *et al.* 2014) and forensic linguistic literature (Cotterill 2003, Gibbons 2003, Coulthard and Johnson 2007). In the family context, adversarialism can appear particularly misplaced for two reasons. First, despite the fact that the paramount principle of child-related proceedings is the welfare of the subject children, the narratives presented in court revolve around parents' wishes (as parties need to contest each other's narratives) instead of making children's rights and needs more central to the proceedings (Firestone and Weinstein 2004, McIntosh *et al.* 2008). The challenge is that the voices of children are often not sufficiently represented: their input does not constitute a substantial part of the court process due to the limited time allocated to social services for talking with children, difficulties related to eliciting their views, and the limited weight put on their stories (Hunter *et al.* 2020, ch. 6). Furthermore, the current adversarial system design lacks a problem-solving focus which would address the needs of children and accommodate safeguarding concerns (ibid, 9).

Secondly, the number of parties without legal representation is particularly high in family settings. As legal costs can be unaffordable for many, court users often have no other choice but to act in person to resolve their disputes. In the context of England and

Wales, the recent decades saw a gradual deterioration of publicly funded legal aid as part of long-term austerity measures, which impacted the legal profession landscape and pathways to justice (Moore and Newbury 2017: 21–31, Maclean and Eekelaar 2019, pp. 6–13). The legal aid cuts eventually culminated in 2013 with the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which essentially removed most private family disputes from the scope of publicly funded legal advice and representation (Mclean and Eekelaar 2019). As a result, the number of self-represented litigants, or litigants in person (LIPs), has drastically increased in family proceedings: in all private law cases, the proportion of parties with legal representation was 28% for the latest quarter (April to June 2022) compared to 58% in 2012 (the last full pre-LASPO year) (*Family Court Statistics Quarterly: April to June 2022*: Table 11).[2] Yet the court procedures still presuppose that lawyers will manage the proceedings; this creates procedural and practical barriers when LIPs, for instance, need to instruct an expert witness, challenge an expert report or, until recently, cross-examine the other party who may be an alleged perpetrator/victim of domestic abuse (Trinder *et al.* 2014). The last issue has been removed by the Domestic Abuse Act 2022, which bars the parties in domestic violence cases from cross-examining each other and enables family courts to appoint a publicly funded advocate for conducting cross-examination in such cases.[3] Adopting more victim friendly and trauma aware practices, alongside changing obsolete and complex procedure rules, moving away from adversarialism and initiating a more active involvement of the judiciary, would further support LIPs in managing the proceedings more efficiently (McIntosh *et al.* 2008). The active approach of legal professionals, whether the judge or the opposing lawyer or even the legal representative of a child, can be particularly beneficial for moving LIPs' cases forward (Trinder *et al.* 2014).

Many adversarial jurisdictions across the world experience cognate challenges in family proceedings due to the combination of similar factors: the high number of self-represented litigants (given by the common law right to self-represent); the passive role expected from the judiciary (Leitch 2017); and the inherent procedural and legal complexity of adversarial litigation (Kessler 2004: sec 1). As a rule, self-represented litigants are offered some form of support through self-help centres (Hough 2010) or community-based centres run by law schools, professional organisations or charities (MacFarlane 2013, Maclean and Eekelaar 2019), but such support can be limited in its availability or the scope of help it can offer (Maclean and Eekelaar 2019). In some countries, a more dedicated support is offered by lay advisers specialising on family law (e.g. limited licence legal technicians are authorised to help self-represented litigants in Washington, USA – see Jean - Louis 2021). The more substantial solutions, however, combine the provision of support with reforming the judicial style and/or adapting the adversarial approach of the proceedings to pursue the best interests of children (Firestone and Weinstein 2004, McIntosh *et al.* 2008, Hunter *et al.* 2020). In the context of England and Wales, the current reforms are directed towards an investigative approach or an active model of adjudication (Thomas 2012, Hunter *et al.* 2020). In family justice, the premise of the investigative approach is linked to an opportunity to refocus the institutional culture towards protection from harm, and develop a problem-solving model with a more aligned approach across the justice services. The redesign of the system thus aims to help address victims' needs, enhance the role of children's voices and facilitate the process for lay court users, irrespective of whether they are represented or not. To achieve this, it is crucial to support court users in sharing

their stories, experiences and views and establish appropriate methods for eliciting their arguments and spoken/written evidence. Elicitation methods should thus be part of the redesigned court procedures and communication practices (Grieshofer *et al.* 2021, Grieshofer 2022 forthcoming).

Legal-lay communication

Legal-lay communication has been explored from several aspects across the diverse scholarly traditions within law, psychology and linguistics. The existing research has predominantly focussed on the following areas: issues with comprehension of spoken or written legal texts (Solan 2004, 2012, Tiersma 1999, 2010, Stygall 2002, Johnson 1990, Dumas 1990, Ainsworth 2010, Rock 2007, Greene *et al.* 2012), limitations of relying on plain language principles (Adler 2012, Masson and Waldorn 1994, Mindlin 2005, Assy 2011), differences in legal and lay narrativisation strategies (O'Barr 1982, O'Barr and Conley 1991), unequal power relations among lay and legal participants (Cotterill 2003, Gibbons 2003, Heffer 2005), and lack of discursive competence among lay court users (Bhatia 2004: 144; Tkacukova 2016). As a result, there has been a strong emphasis on why lay people (witnesses, victims, defendants, jurors or self-represented litigants) experience difficulties when faced with legal texts or court proceedings. The research on self-representation has, in particular, explored LIPs' vulnerabilities or challenges with court procedure, law or legal discourse (Trinder *et al.* 2014, Lee and Tkacukova 2017, Tkacukova 2016, Grieshofer 2022a, MacFarlane 2013, McKeever *et al.* 2018) and shown that LIPs lack capabilities to operate in the system which was created by lawyers for lawyers and is thus full of inherent complexities (Tkacukova 2016).

What is largely missing in the literature is the focus on how court processes and procedures impede LIPs' options to frame and share their stories and access procedural justice (Grieshofer 2022 forthcoming). In many legal-lay contexts, the interaction is shaped by a legal practitioner or an expert (e.g. police officer, CAFCASS officer) and lay people are limited to the role of the interviewee, but there can be stark differences in how communication is managed. The comparison between police interviews and witness examination in criminal cases can illustrate how distinct communicative settings impact lay people's narratives: the differences in elicitation strategies affect the development of the narrative and the extent to which the narrative is controlled by the questioner.

As part of pre-court criminal investigations, police interviews play a crucial role in gathering initial information and testing the evidence collected. The UK-wide model of police interviewing has been recognised as the ethical model for eliciting information and adopting a search-for-the-truth approach (Grant 2010), drawing on the conceptualisation of the interviewing process as a complex communicative event with several interlocutors (Milne and Bull 1999, Dando *et al.* 2016). The model provides a structured approach to communication management using the PEACE framework, a mnemonic acronym for the five stages of the interview process: (1) Planning and preparation; (2) Engage and explain; (3) Account, clarify, and challenge; (4) Closure; and (5) Evaluation. While the first and the last stages are part of the preparatory and reflective steps, the three interactive stages in between (numbers 2–4) proceed from an open narrative through a phase for challenging the account to

the consolidation of the narrative. As a result, the account is elicited first chronologically though open topic-initiation questions (e.g. 'Describe what happened', 'Tell me what you saw'). The next stage is reserved for testing the story by challenging its feasibility and presenting conflicting evidence. The closing stage provides an opportunity for the interviewer to summarise all the information elicited and check if there is anything else the interviewee would like to add. Overall, the communicative environment is designed to be friendly and police officers tend to build rapport and show empathy with the interviewee because the supportive environment helps elicit more reliable evidence (Holmberg 2009, Oxburgh *et al.* 2016).

In contrast, the witness examination relies on a different communicative dynamic to test the feasibility of the presented evidence, drawing on the stages of examination-in-chief and cross-examination (with potentially follow-up re-examinations). While the aim of the examination-in-chief is to allow the person at the witness stand to tell their story in response to open-ended questions (e.g. 'What did you see?'), the aim of the cross-examination is to discredit the credibility of the witness/victim/defendant and/or their presentation of events (Gibbons 2003, p. 112). During cross-examination, the purpose of asking questions is not to find out the answers but to coerce the cross-examiner's interpretation of events onto the addressee. Cross-examiners thus ask close-ended questions (e.g. yes/no questions 'Did you really see it?'; declarative questions 'You saw it?', tag questions 'You saw it, didn't you?') in order to elicit minimal responses. In practice, coercive leading questions narrow down opportunities for the addressee to present their version of events or disagree with the linguistic framing of the questions and, as a result, cast doubt on the narrative presented during the examination-in-chief (Cotterill 2003, Gibbons 2003, Heffer 2005, Tkacukova 2010). Predictably, lay people leave court feeling that they were not given an opportunity to present their story; even expert witnesses struggle to present their arguments in their entirety (Hobbs 2002). Although testing evidence during cross-examination is crucial for the delivery of justice, the actual discursive practices embedded in cross-examination have been under justified criticism (Riding 1999): coercive questioning does not guarantee the elicitation of reliable evidence as the responses depend on the extent to which the witness/victim/defendant is confident in opposing the linguistic framing of propositions they do not agree with, can foresee where the questions are leading and can ensure the presentation of events is accurately reframed in responses.

In terms of elicitation differences, the context of investigative interviews allows more space for the interviewee to provide a free narrative, guided by open questions before the challenge phase is initiated, and to consolidate the final version of the legally relevant narrative details. In private family proceedings, the pre-court evidentiary stages are often restrictive and not interactive (e.g. court forms restrict the space given to provide a narrative, witness statements are monologue-like and static – see Tkacukova 2016, Grieshofer *et al.* 2021); self-represented court users thus do not have a chance to test the legal relevance of their narrative during pre-court stages, which impacts the relevance of their narratives in court. Establishing clear elicitation strategies during pre-court stages is thus equally important as ensuring supportive elicitation during court proceedings (Grieshofer *et al.* 2021, Grieshofer 2022 forthcoming).

From elicitation to narrativisation and procedural justice

In family proceedings, key evidence is elicited before court hearings, i.e. when court users fill in court forms, prepare documents and witness statements or undergo interviews with CAFCASS (Children and Family Court Advisory and Support Service) officers or other professionals. Yet we know very little about communication and elicitation during pre-court stages, apart from scattered research on communicative challenges with court forms which prevent LIPs from using them efficiently (Grieshofer *et al.* 2021, Grieshofer submitted) or the limited consideration given to children's perspectives and wishes as part of welfare reports and CAFCASS investigations (McDonald 2017). Irrespective of whether the parties are represented or not, many of the pre-court stages are managed on their own (e.g. sharing experiences and presenting narratives during CAFCASS interviews; collecting evidence) or with limited support from an advocate (e.g. lawyers explain the purpose of witness statements to their clients and check their witness statements, but it is the parties who write them). This creates the conditions in which lay people carry substantial responsibility for contributing to procedural steps and fulfilling procedural requirements, often without fully understanding their communicative aims or the legal relevance of their claims (Grieshofer 2022 forthcoming). For LIPs, it is particularly difficult to do so without interactive or tailored support as any online resources are limited to generic principles which are not easily adaptable to the circumstances of individual cases (Grieshofer 2022a).

During court hearings, it is, in theory, easier to provide a legally relevant narrative because the elicitation is interactive and managed by the judiciary (a judge or magistrates with a legal adviser). But in practical terms there are three limitations which restrict lay court users' narratives: adversarialism, procedural focus and unequal power relations. The adversarial design of court proceedings limits the role of the judiciary to considering the evidence presented by the parties and thus making the determinations in relation to the issues defined solely by the parties (Faulks 2010) and limiting the narrative scope. Similarly, the fact that each procedural stage has a clearly defined focus restricts the communicative aims and, subsequently, the depth to which the narratives can develop in initial stages (e.g. an initial hearing does not allow much scope to discuss the case at length – see Grieshofer 2022 forthcoming). The power imbalances in institutional roles further limit possibilities for narrative development: it is the judiciary and opposing lawyers who often choose the topics to cover and specific aspects to focus on or even the stages at which to initiate or finish the discussion of a topic (Tkacukova 2010, 2016). Institutional, procedural and discursive aspects thus impact court users' abilities to share their stories throughout different stages of the proceedings.

The concept of elicitation covers (1) linguistic strategies for questioning, topic-initiation (see comparison of cross-examination and police interviews above) or instructions on what to fill in (e.g. in court forms – see Grieshofer *et al.* 2021) and (2) the format in which the response is required (e.g. a witness statement, oral evidence). Narratives are thus provided by the parties, but narrativisation opportunities and boundaries are defined by court procedures and judicial style.

The fact that the main narratives are presented in phases, through micro narratives (e.g. court forms, witness statements – see Tkacukova 2016 for more information), presents multiple challenges for self-represented or even represented court users. The macro

narratives are therefore fragmented and constantly reinterpreted (Cotterill 2003; Harris, 2001 and 2005, Heffer 2005), which makes it difficult for court users to retain the coherence thread while also ensuring its legal relevance (Tkacukova 2016). Another challenge for court users is that micro narratives are presented through different genres, i.e. linguistic constructs that define the structure, content and style of argumentation (Grieshofer 2022 forthcoming). For instance, a witness statement is one example of a codified genre that presupposes compliance with linguistic, socio-cultural and institutional requirements expected in legal settings (e.g. numbered paragraphs, factual content clearly evidenced, legal relevance). Prior experience with legal genres and court procedures helps repeat LIPs perform better in court (Trinder *et al.* 2014) because they are more aware of when and how to use their voice and present their story (Grieshofer 2022a).

The linguistic concept of voice[4] (Hymes 1996), alongside elicitation strategies and narrativisation genres, is linked to procedural justice and lay participation in family proceedings. The party can have their voice heard only if they are given an opportunity to speak and manage to express their story in a legally coherent and discursively accepted manner. Drawing on Sela (2018), three out of four principles of the procedural justice model are directly linked to voice projection: process control (having control over presenting evidence), interactional justice (being treated with politeness, dignity and respect) and informational justice (having access to sufficient information about the process and its justification). Receiving an opportunity to participate and have one's voice and story heard is essential for procedural justice (Tyler 2002), but this presupposes support with the elicitation of narratives and provision of contextualised and tailored information and advice. Similarly, the key indicators of legal participation, i.e. enabling strategies from the judiciary, legal-lay engagement andand collaboration (McKeever *et al.* 2018), presuppose clearly defined voice projection opportunities for lay court users to voice their concerns and experiences. It is thus important to link procedural justice and lay participation to elicitation strategies and narrativisation practices.

Methodology and data

The findings presented in this article use the data set comprising the survey of 69 LIPs, interviews with 36 LIPs and eight lawyers, and 21 court observations of fully unrepresented and semi-represented child arrangements hearings. The data is part of the wider data set for the research project on LIPs' communication challenges in civil and family proceedings, drawing on survey and interview data, court observations and analysis of court forms (see Grieshofer *et al.* 2021, Grieshofer 2022 forthcoming). The extraction of the subset of data allowed for a focussed analysis of child proceedings and a detailed exploration of discursive practices embedded in elicitation, narrativisation and voice projection opportunities.

Although the original research focus was related to LIPs, the findings are relevant to represented parties as well because it is court users who are responsible for many of the pre-court steps (see Table 1). Given the high proportion of private family hearings with unrepresented court users (app. 80% source), the data set is representative of the current set-up of private family proceedings.

The combination of the quantitative and qualitative analyses of the interview and survey data provided an overview of the main themes and led to the identification of an

Table 1. Narrativisation in child arrangements cases (according to 'Practice Direction 12b – Child Arrangements Programme').

Pre-hearing stages		Court hearings	
Narrative genres	**Narration**	**Narrative genres**	**Narration**
Communicative goal: initiating proceedings		**First Hearing Dispute Resolution Appointment (FHDRA)**	
		Communicative goal: case management, identifying issues	
Court forms (procedural, adversarial); Risk identification interview with a Children and Family Court Advisory and Support Service (CAFCASS) worker (procedural, adversarial); CAFCASS safeguarding report (procedural, adjudicative)	Direct (parties or lawyer); Expert-led (CAFCASS worker, parties); Expert-framed (CAFCASS)	Out-of-court negotiations; Presenting the case/position (adversarial); Case management and narrowing down issues (procedural, adversarial, adjudicative); Directions, interim court order or consent order (procedural, adjudicative)	Direct (parties) or lawyer-mediated; Direct (parties) or lawyer-framed; Judge-mediated (judge and parties or their lawyers); Directive for narrative scope (judiciary)
Communicative goal: preparing evidence		**Directions/Dispute Resolution Appointment (DRA)**	
		Communicative goal: case management, narrowing down issues	
Interviews for the section 7 CAFCASS report (procedural, adversarial); CAFCASS section 7 report (procedural, adjudicative elements).	Expert-led (CAFCASS worker, parties); Expert-framed (CAFCASS)	Out-of-court negotiations; Presenting the case/position (adversarial); Case management and narrowing down issues (procedural, adversarial, adjudicative); Directions, interim court order or consent order (procedural, adjudicative)	Direct (parties) or lawyer-mediated; Direct (parties) or lawyer-framed; Judge-mediated (judge and parties or their lawyers); Directive for narrative scope (judge)
Communicative goal: preparing further evidence		**Fact finding hearing/Interim hearings (in case of domestic violence allegations)**	
		Communicative goal: consider the evidence around domestic abuse allegations	
Further evidence, statement of facts/issues, witness statements/skeleton arguments (procedural, adversarial); Scott Schedule, i.e. numbered list of allegations and responses to these (adversarial); Court bundle (procedural, adversarial).	Direct, antagonistic (Applicant, then Respondent); Direct, antagonistic (Applicant, then Respondent); All narrations.	Presenting the case/position (adversarial); Case management and narrowing down issues (procedural, adversarial, adjudicative); Witness examination (adversarial); Decision as to allegations (adjudicative, procedural)	Direct (parties) or lawyer-framed; Judge-mediated (judge and parties or their lawyers); Direct and lawyer-framed (parties, lawyers, judiciary); Directive for narrative scope (judge)
Communicative goal: finalising court bundle		**Final hearing**	
		Communicative goal: consider all evidence and make the final decision	

(*Continued*)

Table 1. (Continued).

Pre-hearing stages		Court hearings	
Court bundle (procedural, adversarial)	Direct, expert-framed	Presenting the case/position (adversarial) Case management and narrowing down issues (procedural, adversarial, adjudicative); Witness examination (adversarial) Child Arrangements Order (adjudicative)	Direct (parties) or lawyer-framed; Judge-mediated (judge and parties or their lawyers); Direct and lawyer-framed (parties, lawyers, judge); Directive for post-proceedings stage (judge)

overarching theme: the LIPs' perception that they were limited in how and when they could share their stories (Grieshofer 2022 forthcoming). This was further explored during court observations and thus presents the main focus of the article. The observations were based on the ethnography of communication as the main method, which facilitates an opportunity to combine the description of the linguistic behaviour and interaction among the participants with the reflection on their mutual attitudes and perceptions. As a result, the exploration of the linguistic and socio-cultural patterns observed as part of diverse interactions allows the researcher, on the one hand, to analyse the practical aspects of communicative practices and, on the other hand, draw out theoretical abstractions based on the observable and observed evidence (Hymes 1962, Carbaugh 1989, Sangasubana 2011, Ejimabo 2015). The notes kept during the observations were organised in a spreadsheet with the information on (1) the type of hearing, (2) the role of hearing participants, (3) who presided over the hearing as well as linguistic aspects: (4) interaction issues, (5) a list of the main topics discussed, (6) the framing of the topics by the parties, (7) arguments put forward by the parties, (8) legal/procedural explanations presented by the judiciary. The aspects 1–5 were noted in a scripted manner using codes so that these features could be quantified. To reflect on the linguistic framing of the interactions in relation to aspects 6–8, the notes were either verbatim (i.e. when non-confidential information was discussed, and the speed of speech allowed for a verbatim transcription) or descriptive (e.g. to reflect on topics discussed). The ethnographic data was consequently consolidated through the discursive analysis of narrative genres included in court procedures (Table 1). By aligning communicative aims of procedural stages to the elicitation strategies and genres used during pre-court and in court settings, the findings presented in this article contribute to the debate on procedural justice and the article proposes strategies for implementing the investigative approach in private family settings.

Discourse of child arrangements hearings

The nature of written and spoken communication in court proceedings is pre-defined by court processes and procedures. By linking narrative genres and voice projection opportunities with communicative aims of pre-court and in-court narrative stages, Table 1 (adapted from Grieshofer 2022 forthcoming) provides an overview of the current narrativisation practices that were found in child arrangements hearings. The wide range of narrative genres is categorised according to (1) the type of account (direct, antagonistic, framed or mediated) and (2) the function of the genre in the proceedings (procedural, adversarial or adjudicative – Gibbons 2013, Grieshofer 2022 forthcoming). To expand on the first category:

- a direct account is told by the party themselves;
- an antagonistic account is the direct account presented in response to the other party's direct account (e.g. witness statement of the Respondent);
- an expert-framed account is based on the information elicited from the party and then presented in a different format (e.g. a welfare report prepared by CAFCASS); and

- an expert-mediated genre is, for instance, when the judiciary narrow down issues in the two narratives presented by the parties.

The more alterations the account takes, the further it is from the original version. It can thus be expected that an expert-framed account could include inaccuracies (see the discussion of CAFCASS reports below). A related stylistic feature is linked to the form the narrative is presented in: codified (e.g. a witness statement, Scott Schedule) or free narrative form. Codified genres can be especially challenging: a Scott Schedule, for instance, is meant to show a pattern of behaviour, but victims are often asked to limit the number of their allegations, without being in the position to foresee how the allegations would be evidenced or perceived or to what extent they present a legally coherent pattern. In the recent decision Re H-N and Others (children),[5] the Court of Appeal acknowledged the limitations of Scott Schedules and confirmed the move away from this format of identifying individual instances of alleged domestic violence. The court recognised the importance of focussing on the wider context of abuse and provided specific guidance on considering a pattern of coercive and/or controlling behaviour in a less restrictive manner, which is an important step forward for creating an open enquiry elicitation strategy. Yet other procedural genres still create an artificial environment for narrativisation.

The second category identifies the role of genres:

- procedural genres are required by court processes and procedures;
- adjudicative genres impact case management; and
- adversarial genres enable the parties to present their conflicting views.

So a CAFCASS report is adjudicative as it impacts the judicial decision making but also procedural as it is part of the FPR (Family Procedure Rules), whereas a witness statement is an adversarial genre since it is used by the parties to present their arguments.

The overview in Table 1 leads to two crucial conclusions in relation to elicitation strategies and voice projection opportunities. Firstly, pre-court stages elicit fragmented narratives mainly in the form of codified genres or expert-led and expert-framed accounts. While the former are discursively overly-complex and present multiple challenges for lay court users (seethe discussion above), the latter are conducted without lawyers and often without a record of the original interaction. For instance, in six out of 11 observed hearings where a CAFCASS report was discussed, there were factual errors or subjective interpretative comments (Grieshofer 2022 forthcoming). Yet CAFCASS reports are often treated as if they are accurate and it is then difficult to challenge them, especially for unrepresented parties (Masson 2012), as the quote from the interview with a family barrister confirms:

> Extract 1: 'Where a [expert/CAFCASS] report is negative but that person is professionally represented, the professional representative can use all their advocacy skills to uncover vulnerabilities in the report, or illogicalities, and, therefore, discredit it. But an ordinary litigant in person is unlikely to be familiar with that armoury of skills and so they won't be able to challenge it so effectively.' (B8)

It is important to raise the practitioners' awareness of the fact that expert-mediated accounts may inadvertently misrepresent the original narrative. The current practice is that CAFCASS officers interview the parties (and talk to their children) over the phone or in person, but since the conversations are not audio recorded, the only record that exists of the interviews are the CAFCASS officers' notes. The dual role of interviewing and simultaneously creating notes from the interview encompasses complex communicative tasks. The cognitive overload from fulfilling both roles is one of the reasons the social workers or CAFCASS officers can be susceptible to errors (cf Grieshofer 2022ab, Gibb 2019). As part of the future investigative approach to family proceedings, there should therefore be a more considered approach to managing and reporting the information elicited. It is important to note though that irrespective of the trajectory of the family justice reform in England and Wales, the standards of record keeping and management of spoken textual data should ensure careful treatment of court users' narratives across different jurisdictions locally or internationally.

The second conclusion we can draw from the information presented in Table 1 is that in the initial stages, there are limited opportunities for direct narration in the interactive format between the judiciary and court users. Furthermore, many court users do not even receive an opportunity to express their narratives when they are relevant due the long period required to reach the final order (during the last quarter of April to June 2022, the mean case duration was 45.6 weeks and the median case duration 36.6, see *Family Court Statistics Quarterly: April to June 2022*: Table 9) or due to many cases not reaching the final hearing stage (the evidence here is anecdotal as the statistics on the numbers of final hearings is not available). As the quotes from interviews with LIPs indicate, the missing voice projection opportunities create a barrier for procedural justice:

> Extract 2: 'I brought my evidence of the harassment, the stalking and everything, but on the day, when I was ready to produce them, they didn't want to know.' (LIP 11)
>
> Extract 3: '[We] didn't know when they could speak, when [we] couldn't speak, what [we] should say, what [we] shouldn't say. [We] weren't really asked anything. The decisions were kind of made for [us]. It just felt a little bit like it wasn't very inclusive.' (LIP 1)
>
> Extract 4: 'You know what I would like to see? To have the opportunity to express yourself . . . I found that they did not allow you to think, let alone speak. Straightaway, you are shut up in the sense of, "No time, not now."' (LIP 22)

Extract 2 illustrates the situations which were also observed in court as court users wanted to share their stories and show evidence, but were muted and asked to refrain from saying anything because it did not meet the objectives of the hearing. The other two extracts illustrate that, contrary to lay expectations, pre-court stages essentially supplement in-court interaction as the focus of most hearings is on court procedures rather than the family situation. Court users thus leave court feeling that they were not heard, which can negatively impact their engagement with the proceedings (Grieshofer 2022 forthcoming). The family court reform should adapt the procedures for initial stages of the proceedings to ensure that narratives could be elicited earlier and in a more interactive format.

What is often ignored is that each court hearing limits the narrative scope within which court users can operate. For instance, directions or interim orders define the

trajectory of the proceedings and thus limit what needs to be elicited from court users in the following stages. Since individual hearings tend to be heard by different judges or magistrates, the interactional consistency and narrative coherence can be interrupted (Tkacukova 2016). As a result, with each procedural step, court users have to deal with more requirements and barriers placed on their original story. Legal professionals may be apprehensive about eliciting free narratives without procedural constraints as these may lead to overly emotional narratives, but from the communicative point of view it is important to welcome free narratives, even those with more emotive content as disregarding emotions may lead to important information being overlooked (cf Toy-Cronin 2019).

The narrativisation scope is also impacted by the narrative of the justice system, in which the proceedings are conducted. Private law family disputes in the context of England and Wales are viewed as private matters which should be resolved out of court, the push for mediation and out of court negotiation creates the conditions in which reaching an agreement is put before achieving a fair outcome which would prioritise the child welfare principle (Barlow *et al.* 2017).

The procedurally driven delay and fragmentation in eliciting narratives from court users should be recognised by courts as a discursive barrier which can lead to untimely discovery or even lack of discovery of crucial information from lay court users. The centrality of court users' narratives and children's voices can only be acknowledged via a redesign of how and when narratives are elicited. For instance, the New Practice Direction 37Z,[6] which establishes the investigative approach as part of private law reform, introduces the Child Impact Report as the initial information gathering stage and enhances the role the court would play in defining the scope and type of information to be collected as well as deciding on the extent the parties would be involved in information gathering (see sections 13.4 and 13.6). Although the court's oversight over the type of evidence to be gathered is potentially a positive quality assurance measure, there is a risk involved in leaving the parties out from some decisions or collecting evidence indirectly (see sections 13.7, 13.1c), especially in the proceedings where parties and children already feel that their voices are not heard. Furthermore, the actual methods of eliciting evidence seem unaltered (e.g. interviews with parties and children, a Child Impact Report written on the basis of spoken evidence which could be misunderstood or not fully elicited). Overall, the investigative approach provides opportunities for considerable improvements, but only if efficient communicative principles, open-enquiry elicitation strategies and accurate reporting standards are established at the outset. The communicative principles simply need to be at the core of the proposed investigative-driven model or any other user-centred model if the redesigned procedures are to enhance opportunities for exploring the family situation in a more coherent manner, strengthen procedural fairness tenets and bolster lay participation in court proceedings.

Elicitation strategies in court

During court hearings, the procedural focus tends to take priority, especially at the FHDRA and DRA stages. In semi-represented or fully unrepresented hearings, the judiciary or legal advisers (in cases heard by magistrates) thus have to provide explanation of procedures and occasionally relevant legal points (Tkacukova 2015) and such

support is often appreciated by lay court users (Lee and Tkacukova 2017). From the analysed data set, FHDRA hearings related to non-molestation orders tended to require complex procedural explanation, mainly because the recipients of non-molestation orders needed to decide whether they wanted to contest the order. For instance, case 3 exemplifies a typical FHDRA where Parent 1 (represented by a solicitor) applied for a non-molestation order and Parent 2 (LIP) applied for a child arrangements order. The legal advisor presented a rushed summary of the options available in relation to the non-molestation order (accept the allegations and continue with the order, not accept the allegations but continue with the order on the basis of no findings/admissions, contest the order and proceed to the fact-finding hearing) with the aim of eliciting the response. The LIP parent, however, did not explicitly say which option they wanted to choose and instead expressed a wish: 'I've got evidence for (. . .). I'd like to come back and present the evidence'. The reaction from the legal advisor was to schedule the fact-finding hearing, saying that they are 'not in the position to do this [consider evidence] now. Now we just narrow the position'. It is unlikely the parent understood how the options impact the proceedings or could consider the consequences in the time provided, so the elicited response was a result of confusion and a strong wish to be heard. Similarly, in another case, the LIP parent against whom the non-molestation order was made failed to understand the options they had and reacted by saying that they 'totally disagree with statements [alleged in the statement submitted by the other parent]' (case 21). This caused the legal advisor to step out of the more objective role of information provision and suggest that there was evidence that they were 'stalking [the other parent], you were arrested, so something happened', which lead to the LIP defending themselves and saying: 'I want to explain myself in front of court'. The legal adviser interpreted the response in procedural terms: 'You want to contest the order? I will list for a contested hearing'. Such communicative situations are ambiguous by design as both types of speakers have diverse communicative aims and institutional roles.

Overall, the observations of five non-molestation hearings (i.e. first hearings related to the non-molestation order) showed a communicative pattern when legal advisers would present the options in order to elicit the choice. But it is almost impossible to provide explanation in objective terms: the framing speakers choose reveals their preferences. So some legal advisers explicitly expressed the advantages of accepting the order on the basis of no findings, reasoning that 'it would not go against you' (case 25) and that 'by the time you contest the order, it would have expired' (case 25) or even by asking the question 'So are you happy to continue [without findings] with the order?' (case 35), leading to only one option rather than all available options. This illustrates that legal advisers and LIPs are cast in the precarious situation when they have to navigate complex procedures, with LIPs relying on the information which could be provided at a given moment and legal advisers attempting to correct lay misunderstandings of legal processes and concepts but, eventually, not being able to address LIPs' complex needs due to time constraints, procedural restrictions and the gap in the institutional roles of the interlocutors. The crucial aspect is that the explanation provided as part of elicitation impacts the response; further, there are limited opportunities for court users to gain access to affordable and reliable information. Even during the application process, the explanation provided is inadequate because of its fragmentary nature, confusing content and being partially

outsourced to generic external links (Grieshofer *et al.* 2021). LIPs' access to informational justice is thus restricted during pre-court and court stages.

Another type of communicative issue occurs when court users are sent home to compile evidence which could be presented orally. For instance, the LIP parent in case 16 shared their vulnerabilities: they could not afford legal advice or even advice from a McKenzie Friend (unregulated fee-charging lay advisers); they were a carer for their partner with a mental health disorder; they did not receive support from social services when taking care of the child. Despite the fact that the LIP's communicative behaviour was problematic (constantly interrupting everyone, for which they had to be repeatedly reprimanded), they managed to raise several important points (e.g. the other parent moved the child to another town without arranging school attendance; the child stays at home without education; the LIP parent is better at taking care of education needs). However, as the procedure dictates, the LIP was not given the interactional space to develop their arguments and, instead, they were asked to put everything in writing in the form of a witness statement. Although they received some form of support (a template for a witness statement) and explanation on what to include and what to focus on, it is possible that spoken evidence could have been more effective in bringing the LIP's points across, especially if their narrative had been elicited in an interactive format. The procedural over-reliance on written evidence can be unnecessarily challenging for court users, while increasing the number of hearings necessary for the proceedings. It has been noted that the principle of orality is declining as the result of court reforms (cf Lazer 2021); it is thus important to review the applications and functions of the orality principle as enhancing voice projection opportunities within the family justice space is in line with the introduction of the investigative approach (Hunter *et al.* 2020). It is positive to see that the New Practice Direction 36Z provides an opportunity for the evidence to be presented orally or in a written statement (see amendments presented under 5.2 paragraph (n) and sub-paragraph (v)), but the actual application of the mode of evidence collection and elicitation strategies used need to be further explored.

The overarching institutional narrative is another factor that impacts on the court users' voice projection. Case 6 illustrates how one parent's voice was muted as part of the pro-contact culture of family courts (Hunter *et al.* 2020). Due to a number of recurring problems with the non-resident parent's conduct, the lived with parent claimed that the child did not want any contact with the other parent any more, which was also confirmed by the CAFCASS officer present in court. This prompted the magistrates, legal adviser and the CAFCASS officer to start a discussion about contact arrangements and making it clear that in future, if the child changes their mind, they should be able to regain contact with the other parent. However, as the discussion continued without any input from parents, the focus shifted towards seeking options the family still had to retain the contact. As a result, the CAFCASS officer suggested trying out the bespoke Positive Co-parenting Programme. This, at first, hesitant suggestion quickly turned into a court-mandated expectation, despite the residing parent's disagreement: 'It feels like it's pressure on [the child]', 'I'm sick it's been so long (. . .) I'll do whatever you tell me, but I don't agree'. Despite the fact that, as explained by the CAFCASS officer, the pre-condition is for both parties to agree to voluntarily participate in the programme, neither of the parents was given an opportunity to say much: the disagreement of the residing

parent was muted or ignored and the non-residing parent was limited to yes/no questions (e.g. 'Would you like to try?').

Overall, court observations illustrate the detrimental impact the existing procedures have on the voice projection opportunities for the parties and the narrow focus legal advisers and the judiciary are required to follow when eliciting information relevant to specific procedural steps. The complexity of procedures is compounded by the complexity of court users' needs. Given that most of the private family hearings include at least one unrepresented party, the proceedings cannot be expected to run in the same way as in fully represented hearings. Explanation becomes necessary before the elicitation is even possible, but neither of the two discursive tasks are straightforward. Ignoring the complexities behind the elicitation processes or even the provision of explanation leads to court users not being given an opportunity to share their story, repeated muting of their voices throughout the different stages of the proceedings, and overburdening them with the tasks and genres required for the purposes of procedures rather than allowing them space to provide evidence in a supported environment.

Conclusion

The adversarial approach in private family law proceedings currently relies on complex procedures, which lead to a phased and fragmented approach to eliciting the disclosure of information and testing relevant evidence. As a result, the court users' stories are elicited via multiple agencies and modes (e.g. interactive mode with children services and other experts; experts' reports presented to court without a follow on input from court users; written testimony in witness statements prepared by court users inexperienced in such genres). The main problem is that direct narratives are not elicited until the final hearing stage, by which point the case agenda and narrativisation scope are already reduced, limiting the court users' stories to several pre-defined aspects. Furthermore, given that many cases are disposed of before they even reach the final stages of the proceedings, many court users do not have a chance to share their stories in court at all, so some aspects of their cases could have a legal relevance but were never explored (especially in cases with LIPs). There are further ways in which court users are muted, particularly in circumstances when the overarching family courts' institutional pro-contact narrative promotes similar outcomes for alleged perpetrators of domestic violence and their victims; for instance, the author observed examples where parents against whom non-molestation orders are issued can proceed with some form of contact on the basis of no findings, while resident parents and children are urged to sustain contact with the other parent even if the previous attempts failed and they wish to stop.

Drawing on applied linguistic research into narrativisation, the article argues that it is crucial to enable court users to share their narratives early on in court proceedings. Introducing this change would raise two questions around procedural feasibility: how to elicit the evidence in an open enquiry format and how to test the evidence elicited in this manner. The discussion of the communication management during police interviews provides some insight into both issues with respect to the following characteristics: the supportive communicative environment helps with the elicitation of evidence led by a trained expert (e.g. police officer), the progression of the elicitation from free narrative to closed questions allows to test the evidence, the summary at the end of the investigative

interview checks understanding and the details of the narrative elicited, the presence of the second interviewer in the supportive role helps with quality assurance of communication management, and finally the audio recordings provide a near-accurate record of the original interaction. There is a justified concern from legal practitioners that LIPs may tend to mainly provide an overly emotional narrative without legal coherence (O'Barr 1982, O'Barr and Conley 1990). In this respect, the pro-active support from legal professionals is instrumental in moving self-represented litigants' cases forward (Trinder *et al.* 2014) and question/answer discourse types are easier for LIPs than written narrative discourse types, such as witness statements (Grieshofer 2022, Grieshofer *et al.* 2021). Importantly, using their voice and expressing their stories in an authentic way reinforces the court users' sense of fairness and procedural justice (Toy-Cronin 2019) while also encouraging them to retain active engagement with the process (Grieshofer 2022a).

The above is in line with the principles of investigative, open-enquiry and collaborative approach presented as a way forward for private family proceedings by Hunter *et al.* (2020). The New Practice Direction 36Z introduces several positive changes (e.g. an opportunity for the evidence to be presented orally, court overseeing CAFCASS investigations), but it is communication, explanation and evidence elicitation practices that define the procedural justice. The implementation of the investigative approach thus requires detailed attention to communicative aims of individual hearings and discursive practices embedded in the proceedings. For instance, the accuracy of CAFCASS reports could be improved by scrutinising social workers' elicitation, recording and reporting strategies. Further support from applied linguists should be instrumental in setting up elicitation practices used throughout the proceedings and ensuring that court users and their children are given an opportunity to project their voice and be heard as active lay participation is part of all aspects of procedural justice, from process control and decision control to interactional justice and informational justice (Sela 2018).

Notes

1. https://www.gov.uk/government/news/pioneering-approach-in-family-courts-to-support-domestic-abuse-victims-better.
2. https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2022.
3. https://www.gov.uk/government/news/domestic-abusers-barred-from-cross-examining-victims-in-family-and-civil-courts.
4. Voice projection denotes an individual's or group's right and freedom to speak and at the same time the discursive style in which the content is delivered (Hymes 1996).
5. [2021] EWCA Civ 448, retrieved from https://www.judiciary.uk/wp-content/uploads/2022/07/H-N-and-Others-children-judgement-1.pdf.
6. https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/new-practice-direction-36z-pilot-scheme-private-law-reform-investigative-approach.

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