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Women and children first? Potential gender bias in a legal text in the UK

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Abstract

This paper explores a perceived social problem in the UK from a critical discourse analysis perspective. The problem is that of divorced fathers' lack of access to a family relationship with their children. To explore it, I examine one of the legal forms used to determine child residence after divorce. I first analyse the ways in which this text represents mothers' and fathers' relationships with their children. I then go on to analyse the form as part of a legal exchange between individuals and official bureaucracy. I conclude not only that the form fails to facilitate equal legal rights for all parties concerned, but also that it fails to serve children's best interests due to its perpetration of gender stereotypes.

Keywords: gender, legal language, critical discourse analysis.

Please note that quotes from data are indicated by italics in the main body of the text.

Introduction

The issue of separated fathers' apparent discontent with access to relationships with their children has been much highlighted in the UK media in the middle 2000s, and has also been discussed by more academic commentators (e.g. Kanagas & Day Sclater 2004, Collier 2005). Critique seems to have coalesced around the construct of the family law system. This construct is of a social-semiotic system which gives rise to, and is to an extent structured by, specific forms of language (Chouliaraki & Fairclough 1999, Fairclough & Wodak 1997). The text investigated here is, then, both an example and an instantiation of the family law system. Specifically, it is an official form used in the early stages of divorce proceedings to help decide child residence issues.

Like many people I have personal experience of the matters discussed in the analysed texts. I am a divorced [parent] ¹ whose children live with me and see their [other parent] frequently.

The text

For every divorce in England and Wales involving children, the divorcing spouses must fill in form D8A, Statement of Arrangements for Children, and present it to the court.² Form D8A can thus be seen as one of the first lines of the family court system. On the basis of it, courts may decide whether divorcing parents' planned arrangements for their children are satisfactory, or whether court intervention is

¹ I do not mention my gender in this draft of the paper in order to comply with requirements of blind review.

² This form is available from the UK court service website, <http://www.hmcourts-service.gov.uk>

required. The form applies only to married families and is itself part of divorce proceedings – it is sent to court at the same time as the divorce petition itself.

Form D8A contains detailed questions on several aspects of children's and parents' lives. The content of the questions falls into six broad categories: Number and identity of children, current living and education arrangements, day to day childcare arrangements, financial maintenance, health issues, and any court proceedings involving the children.

The form runs to 8 pages of A4 including white space. There are 30 numbered questions on the form and the majority of them are on matters of fact, e.g. *4b Give details of the number of living rooms, bedrooms etc at the address [where the children live]*. Most of the questions can be answered yes or no or with single word answers. Some questions ask for further details in the case of a particular answer, e.g. *9a Are the children generally in good health? (Please give details of any serious disability or chronic illness)*.

The form is an obligatory element of divorce proceedings for families with young children. In Sarangi & Slembrouck's (1996) terms, it is a bureaucratic text, a power-oriented communication between an institution and an individual, in two main senses. First, it has a concrete function in a wider social context; the consequences of filling it in are potentially of major significance in the life of the individual. Second, it is a mechanism through which the institution imposes a framework for interaction upon the individual; the individual is obliged to communicate within the language framework imposed by the institution..

Approach to analysis of the form

My approach to analysis is broadly systemic-functional, focusing first on language as representation and second on language as exchange. It has been argued that the tools of systemic functional linguistics are particularly suited to critical discourse purposes, since they allow for the integration of a micro-analysis of a particular text with an examination of a broader social picture (see eg Barker & Galasinski 2001, Fairclough 1999, Young & Harrison 2004). Both systemic-functional linguistics and critical discourse analysis understand language as dialectically structured and structuring. SFL sees language choices as encoding socially significant world views, and CDA sees many social problems as discourse- and language-related.

Language as representation in form D8A

In this section, I will argue that form D8A encodes some problematic assumptions about mothers' and fathers' relationships with their children. However, the first point to make is that the terminology of the form is apparently gender neutral. Both parents are referred to by the following terms: *petitioner*; *respondent*; *parent*; *your spouse/ civil partner*³; *him/her*; *the parties*; *the family*. Parents filling in and countersigning the form are addressed as *you*. There is no gender-exclusive content, e.g. no reference to activities that would be biologically impossible for one parent.

Representations of current child residence on form D8A

³ In 2006 some of the terminology on the form was changed to account for the UK Civil Partnership laws. Previous to 2006, the phrase *your husband/ wife* was used instead of the phrase *your spouse/ civil partner*.

The form's ostensible function is to ask divorcing parents about plans for child residence and contact. However, analysis reveals that it already encodes a number of assumptions about these arrangements. For example, it does not appear to acknowledge the possibility of a current shared living arrangement. Question 6a is an apparently open question: *Which parent looks after the children from day to day? If responsibility is shared, please give details.* And yet questions 8a and 8b absolutely assume that the children are living with one of their parents only: *8a Do the children see your spouse/civil partner? 8b Do the children ever stay with your spouse/civil partner?* There is no parallel question such as 'Do the children see you'. The assumption is therefore that they live with the spouse filling in the form, and the situation represented is one of residence and contact, rather than one of shared living.

These assumptions bring to mind Talbot et al.'s (2003) notion of the implied client. There may be important discrepancies between the implied client of a form, projected as universal, and the particular circumstances of some of the real people filling it in. Where such a discrepancy exists, a bureaucratic text is a site of bias and injustice, because it fails to recognise diversity and by so failing can suppress particular social groups (Fairclough 2003). The extent to which such suppression is part of a gender bias here depends on whether fathers or mothers are systematically more likely to be the parent who is apart from the children at the point when childcare plans go to law, and thus be positioned as 'absent' by the language of the form. Statistical data suggests that indeed, children living with one parent only are most likely to be with their mother: in 2004, almost 9 out of 10 lone parents were lone mothers (UK Office of national statistics).

Representation of parents as petitioner and respondent

It was argued above that form D8A assumes that the parent who completes it is resident with the children. It is important to note, then, that parents do not have a choice about who fills in the form: the form is addressed specifically to the petitioner of the divorce.

The term ‘petitioner’ requires some discussion. It refers not to parenting roles, but to roles in the divorce process itself. The legal system of England and Wales allows divorce only where irretrievable breakdown of the marriage has been proved. The legal system accepts five facts as proof of such irretrievable breakdown, and these are: a) adultery and intolerability; b) unreasonable behaviour; c) desertion; d) separation of 2 years and the respondent consents to a divorce; e) separation of 5 years. (Court Service leaflets D183 & D184). However, whatever the fact on which a divorce is based, the law requires that one spouse (called the petitioner) instigate proceedings against the other (called the respondent).

Form D8A, then, represents the petitioner of the divorce as resident with the children. In principle of course either a husband or a wife can petition for divorce. But in practice, most divorces are petitioned by women: currently 69% of divorces in England and Wales are granted to the wife (UK Office of National Statistics). The form, because it represents children as living with the petitioner, again tends to represent children as living with their mothers. As we shall see below, it also positions petitioners – probably mothers - as experts regarding the circumstances of their children.

Representation of the petitioner as nurturer

Sections 4, 5 and 6 of form D8A appear to be concerned with a knowledge exchange (Fairclough 2003). The petitioner is asked very detailed questions about children's living arrangements, day to day routines, and state of health. The form of these questions is an unmodalised interrogative: *9a Are the children generally in good health?* There is no subjective marking, e.g. 'Do you think that the children are in good health'. The form of question used here admits no doubt about the petitioner's ability to answer.

It is of course perfectly possible that a petitioner not living with the children would not know the answers to all of the questions. The fact that the discourse positions the petitioner as a nurturer has at least two implications. Most obviously, it is part of the assumption discussed above that the petitioner is living with the children. Secondly, there is a value implication: a suggestion that a petitioner who does not know the answer to these questions is somehow inadequate. In Fairclough's (2003) terms, an apparent knowledge exchange can also be seen as an activity exchange: the institution positions the individual as required to know these things, and demands that they display their knowledge.

The representation of the petitioner as a nurturer again fails to acknowledge diversity in the circumstances of actual divorces. A petitioner not living with the children, but seeking to do so, is particularly poorly catered for by this text.

Language as social action in form D8A

Form D8A, before it is filled in, represents one side of the interaction in which the family law system establishes or begins to establish child residence in divorce cases. Its function is to provide bureaucratic authority with intimate information about families' lives, and it can ultimately be used as a basis for decisions about their future. In this section I will look at the opportunities, in terms of interacting with the legal system, that the form affords to the divorcing spouses.

This form has many of the characteristics that Sarangi & Slembrouck (1996) attribute to official forms. The high power asymmetry between the institution that authors it and the individuals who must do their social business through it is encoded in several ways. For example, the questions are very detailed and intimate. There is no explanation in the text to legitimate the asking of such questions; the legitimation comes from the status of the form as a court document. This point relates to Fairclough's (2001) suggestion that bureaucratic control is based on an institutional intrusion into personal lives. On form D8A institutional power as a participant in the interaction is most frequently referred to as *The Court* or as the hidden agent of a passive form: ... *you are advised to see a solicitor*. In van Leeuwen's (1996) terms it is impersonalised: either spatialised or suppressed.

There is an explicit reference to the power of the court: *The court will only make an order if it considers that an order will be better for the child(ren) than no order*. This is in direct contrast with the powerlessness of the individual who must *ask the court to make any order or be given an opportunity to say [that you do not agree]*. There is no reference to services which individuals have the right to expect from the court, even

though in many institutional discourses such references are becoming more common (Eggins 1994, Fairclough 1996). In Sarangi & Slembrouck's (1996) terms, this form positions parents not as consumer clients, choosing to use a service, but rather as citizen clients without choices, being processed by the family law system.

Within this asymmetrical power relationship there are significant differences in the interactional and discursive opportunities offered to the petitioner and the respondent of the divorce. Firstly, as has already been discussed, the petitioner is the parent who fills in the blank form. Only later is it sent to the respondent. This gives the petitioner privileged access (van Dijk 1996) as instigator of the discourse event. The majority of the questions are about facts, so that the completed form – questions and answers – looks like a statement of facts. So in Gee's (1996) terms, the petitioner is authorised to speak and to represent events. Importantly, there is no opportunity on the form for the respondent to challenge the accuracy of these 'statements of facts'.

Secondly, the petitioner is implicitly informed of his/her legal rights. For example, the form suggests to the petitioner the possibility of making a financial claim against the respondent: *7e Will you be applying for: - a child maintenance order from the court*
- a child support maintenance through the Child Support Agency?

In principle it is equally possible that the respondent should make such an application against the petitioner, if s/he is to be mainly responsible for the children. But form D8A does not mention this possibility. Similarly, the forms mentions to the petitioner the possibility of applying for court orders with the help of a solicitor: *If you wish to apply for any of the orders which may be available to you under Part I or II of the Children Act 1989 you are advised to see a solicitor.* In principle the respondent too

could apply for such orders, but again this possibility is not mentioned. The petitioner is asked for their views on conciliation: *If you and your spouse/ civil partner do not agree about arrangements for the child(ren), would you agree to discuss the matter with a Conciliator and your spouse/ civil partner?*. No similar question is put to the respondent.

The third point to make regarding unequal opportunities for interaction is that the petitioner has the role of making proposals as to future childcare arrangements. S/he does this firstly by describing the current situation and secondly by indicating whether or not s/he intends the status quo to change and if so, how. The respondent does not have the opportunity to make proposals. S/he is instructed to react to the petitioner's proposals: *If you agree with the arrangements and proposals for the children you should sign Part IV of the form. Please use black ink. You should return the form to the petitioner, or his/her solicitor. If you do not agree with all or some of the arrangements or proposals you will be given the opportunity of saying so when the petition for divorce or dissolution is served on you.*

It is essential to note that the respondent has no opportunity of explaining their disagreements, or making their own proposals, on form D8A itself. At this stage of the proceedings, their only options are either to agree, or to withhold their agreement without making counter-proposals. The final part of the form, addressed to the respondent, says: *I agree with the arrangements and proposals contained in Part I and II of this form.* [space for signature]. There is nowhere for the respondent to sign if s/he does *not* agree. It seems that a respondent who does not agree with proposals must simply withhold their signature and await developments.

It seems clear, then, that form D8A gives unequal opportunities to petitioner and respondent for interaction with the family law system. The petitioner fills in the form, makes proposals regarding the children, and is advised regarding their legal rights. The respondent has none of these privileges. It has been argued more generally (Wharton 2006) that bureaucratic forms used in divorce are biased against the respondent. From this analysis, it would appear that the same asymmetry is present in a form allegedly concerned with post-divorce childcare arrangements. As was discussed above, the majority of divorces in England and Wales are petitioned by women. So to the extent that form D8A is biased against the respondent, it can also be argued that it is biased against fathers.

Conclusions: the dangers of competing discourses

Kanagas & Day Sclater (2004: 2-3) argue that ‘Getting divorced ... obliges parents to position themselves in relation to a range of often competing discourses. In form D8A, ostensibly about childcare, the discourse of divorce itself appears to be powerful. The labelling of parents in accordance with their legal roles in the divorce, and the differential privileges accorded to each of these roles, is inappropriate in a legal system which claims to take decisions on child residence in accordance with the best interests of the child, over and above consideration of spouses’ behaviour leading to divorce. It could also be seen as unhelpful in the light of current views on the importance of parental consensus for child welfare.

Form D8A is a pre-court measure, but it may be one factor contributing to the antipathy which fathers’ rights advocates express towards the court system. As a first

line of that system, this form may make a father who is respondent in divorce proceedings feel voiceless, and anxious, right from the beginning of proceedings. At the very least, it seems a missed opportunity to promote a conciliatory attitude between divorcing parents, and to promote a discourse where the needs of mothers, fathers and children in divorced families were constructed as more interdependent. the texts examined here.

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